THE YALE LAW JOURNAL FORUM

JANUARY 31, 2022

A Counter-History of First Amendment Neutrality

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ABSTRACT. In *The Emergence of Neutrality*, Jud Campbell provocatively argues that courts only recently embraced the importance of content neutrality as an underlying principle of First Amendment law. In this Response, I contest this claim and sketch out an alternative history of First Amendment neutrality. I argue that neutrality has always played an important role in free-speech law in the United States, but that its meaning has shifted over time. Rather than showing—as Campbell argues—that First Amendment law used to be organized around an ideal of toleration and only recently embraced a neutrality ideal, what the historical evidence instead reveals is a shift from a majoritarian to a functionalist and, later, a highly formalist conception of the government's neutrality obligations. This is important to recognize because it suggests that those dissatisfied with the current doctrinal arrangement should not necessarily blame its problems on the judicial embrace of a neutrality ideal. The problem may instead be the kind of neutrality ideal that they have embraced.

INTRODUCTION

The concept of content neutrality plays an important role in contemporary First Amendment law, but it has not always done so. Prior to the 1970s, the term "content neutral" was virtually never used in Free Speech Clause cases and courts did not presume, as they do today, that laws that are not content neutral—that is to say, laws that are "content based"—are presumptively invalid when they regulate speech in the public forum or on private property.[1] When called to

1. The phrase "content neutral" was first used in a First Amendment opinion by the Supreme Court in 1976, but the concept was clearly referenced in previous opinions. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 85-86 (1976) (discussing the cases establishing the principle that "time, place, and manner regulations that affect protected expression [must] be content neutral except in the limited context of a captive or juvenile audience"); *see also* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983) (noting that the distinction between content-based and content-neutral speech regulations is "the Burger Court's foremost contribution to first amendment analysis").

assess the constitutionality of a given speech regulation, the primary question courts asked was not whether the regulation was content based or content neutral. Instead, they asked narrower, more specific questions: did the law constitute a prior restraint?[2] Did it involve the "suppression of dangerous ideas"?[3] Did the government possess a sufficiently substantial justification for its actions?[4] And the like.

The fact that such a central feature of contemporary First Amendment law dates back only to the 1970s illuminates how profoundly the Burger Court altered the doctrinal landscape of free-speech law. Indeed, the development of the distinction between content-based and content-neutral speech regulations was not the only major change that the Burger Court "counterrevolution" wrought in First Amendment doctrine.[5] But it is a particularly significant one.

The recency of courts' embrace of the content-based/content-neutral distinction also raises important questions about the centrality of neutrality to free-speech law. Since it embraced the distinction, the Supreme Court has insisted that the prohibition against content-based lawmaking is and always has been a core component of the right to freedom of speech. As Justice Marshall declared in *Police Department of Chicago v. Mosley* in 1972, "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[6] Assertions of this sort pervade the scholarly literature as well.[7] But if the rule against content-based lawmaking is so fundamental to the meaning of the First Amendment, why was it not articulated earlier?

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2. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.").

3. Cammarano v. United States, 358 U.S. 498, 513 (1959) (quoting Speiser v. Randall, 357 U.S. 513, 519 (1957)).

4. Schneider v. New Jersey, 308 U.S. 147, 161 (1939).

5. David A. Strauss, *Why the Burger Court Mattered*, 116 MICH. L. REV. 1067, 1067-70 (2018) (discussing the changes the Burger Court "conservative counterrevolution" made to the First Amendment commercial and corporate speech doctrines).

6. 408 U.S. 92, 95 (1972).

7. *See, e.g.*, Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 792 (2001) ("[I]f it means anything, the First Amendment means that Congress may not censor or apply seditious libel laws to political dissent—even where such dissent could genuinely lead to violence, as was obviously the case in late eighteenth-century America."); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159, 1165 (1982) ("If the first amendment means anything, it represents a value judgment that the interchange of ideas, information and suggestions is to be kept free and open, at least if the interchange presents no real threat of harm to society.").

In *The Emergence of Neutrality*, Jud Campbell argues that the Court hardly discussed the idea of content neutrality prior to the late 1960s and early 1970s because a demand for government neutrality was not yet a central preoccupation of the First Amendment.[8] According to Campbell, the First Amendment required the government to be *tolerant* of heterodox or disfavored speech, but not *neutral*.[9] Campbell further argues that the Court's embrace of a conception of the First Amendment organized around the ideal of government neutrality was a contingent historical event, one prompted by (among other things) the "individualism[] and social fragmentation" that characterized the 1960s and 1970s.[10] The natural implication of this argument is — as Campbell notes at the end of his article — that a commitment to a neutrality principle is neither an inevitable nor a necessarily permanent feature of First Amendment law.[11]

This is an arresting claim that challenges much of the ahistoricism of the judicial discourse surrounding the First Amendment.[12] If true, it would support arguments that some critics of contemporary free-speech law have made in recent years that courts should reject the idea of neutrality as an organizing principle of free-speech law or constitutional law more broadly.[13] Unfortunately for those critics, however, Campbell's provocative claim that First Amendment doctrine only recently embraced a neutrality principle is simply incorrect.

Neutrality did not first emerge as a central preoccupation of free-speech discourse and practice in the late 1960s and 1970s, as Campbell argues. As I show in this Response, a demand that the government act neutrally with respect to the content of the speech it regulates — that is to say, that it neither favor nor disfavor speech because it dislikes or approves of its communicative content — has been a feature of free-speech law in the United States since the eighteenth century. It is true that the neutrality principle that courts employed in the past tended to look

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8. Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861, 861 (2022).

9. *Id.* at 865.

10. *Id.* at 869.

11. *Id.* at 868 ("Neutrality emerged in a more gradual, more contested, and more contingent manner than we now assume."); *id.* at 947 ("[H]istory can . . . help open our minds to the radical notions that rights are not necessarily trumps and that a system of expressive freedom need not be agnostic about the value of ideas.").

12. For an extended critique of that ahistoricism, see Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015).

13. *See, e.g.*, Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1824 (2020) (calling for a shift from a constitutional jurisprudence organized around the idea of neutrality to one organized around the idea of equality); LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE 12-13 (2016) (criticizing the embrace by the American Civil Liberties Union in the 1930s of a value-neutral ideal of free speech).

very different than the one enunciated by the Court in late twentieth-century cases like *Mosley*. In the nineteenth century, courts understood the equal-treatment requirements imposed by the federal and state free-speech and press guarantees to apply much more narrowly than *Mosley* suggested. In the early and mid-twentieth century, meanwhile, courts articulated at times a conception of neutrality that went *beyond* what *Mosley* laid out. In all cases, however, the insistence that the government act neutrally when it regulates speech was motivated by the belief that one of the rights that freedom of speech entailed, perhaps "above all" others, was the right of democratic subjects to be treated by their government as if they possess what Justice Marshall described in *Mosley* as "equality of status in the field of ideas."[14] In other words, a commitment to neutrality has been woven into U.S. free-speech law from the very beginning.

To say as much is not to suggest that there is no history to how the neutrality principle has been conceptualized and implemented or that Campbell is wrong to criticize the Court and current scholarship for paying insufficient attention to this history. But viewing this history as a story of fundamental change misses important continuities in how the right to freedom of speech has been conceived over time and the importance of neutrality to that conception.

Conversely, it misses how variable judicial understandings of the First Amendment neutrality principle have been — and continue to be. In insisting that the courts did not take the idea of neutrality seriously until they adopted the *Mosley* rule, Campbell appears to assume that neutrality, at least when it comes to First Amendment law, has a fixed doctrinal meaning. But in fact, when we turn to the cases we find multiple, often highly contested views of what precisely the demand for equal treatment requires of the government, and how broadly it should extend.

This is not surprising. As many before me have noted, the liberal idea of neutrality is a fluid and underdetermined concept that can be and has been variably implemented.[15] Because equality can be defined in many different ways, there are, as Andrew Koppelman puts it, "a lush profusion of possible neutralities."[16] Nevertheless, the fact that judicial conceptions of neutrality have shifted so considerably over time when it comes to the First Amendment raises all sorts of interesting questions — questions about what freedom of speech has meant and might mean and about the tensions between the democratic and liberal

14. Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)). In using this phrase, Justice Marshall was of course quoting Alexander Mieklejohn who, it is worth noting, was not a believer in content neutrality by any means.

15. *See* Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. POL. 633, 645-47 (2004).

16. *Id.* at 633.

commitments woven into the First Amendment—that Campbell's account points to but does not address.

In this Response, I sketch out an alternative history of neutrality in First Amendment law. I do so both to demonstrate the problems with the story Campbell tells and the significant virtues of the historicizing project he has undertaken. Campbell is entirely correct that current First Amendment law tends to take the fixity of the doctrine too much for granted.[17] Exploring both the continuities and the discontinuities in how the Court has understood the rights to freedom of speech and press over time does in fact have the potential to remind us of alternatives that we might not otherwise imagine, just as he argues.[18] What Campbell's history does not do, however, is show that neutrality is a contingent feature of the modern free-speech tradition. In fact, it is very difficult to understand what freedom of speech does or could mean without some concept of neutrality, even if that conception of neutrality need not be the one the Court currently holds.

This Response proceeds in three parts. In Part I, I explore the problems with how Campbell frames the history of neutrality in First Amendment law. In Part II, I provide an alternative history that emphasizes both the importance and the variability of the neutrality ideal to free-speech jurisprudence in the United States. And in the Conclusion, I briefly explore the implications of this history for current debates about the role that neutrality does and should play in American constitutional law. I argue that the fact that neutrality is and always has been an important organizing principle of First Amendment law, but a principle whose meaning has never been uncontested or unvarying, suggests that those dissatisfied with the current doctrinal arrangement should not blame its problems on the tendency of courts to embrace a neutrality ideal. The problem is the kind of neutrality ideal they have embraced.

I. THE CRITIQUE

For decades now, scholars have argued that a distinguishing feature of First Amendment doctrine, at least as it has existed since the early twentieth century, has been its insistence on a principle of content neutrality or, phrased more negatively, content nondiscrimination when it comes to the governmental regulation of speech. Paul B. Stephan III argued in 1982, for example, that "[t]he principle that the Constitution forbids government discrimination against the expression of particular messages or ideas . . . emerged in the cases soon after the modern

17. Campbell, *supra* note 8, at 873-74.

18. *Id*.

Court had begun taking the first amendment seriously" in the 1930s.[19] Many other scholars, including myself, have made similar assertions.[20]

In *The Emergence of Neutrality*, Campbell argues that this widely shared view of the modern free-speech tradition is fundamentally wrong.[21] More specifically, Campbell argues that it was only in the late 1960s and 1970s, not the 1930s and 1940s, that courts came to interpret the First Amendment to require content neutrality when the government regulates speech.[22] Campbell does not deny that principles that *resemble* contemporary neutrality principles were articulated in the cases prior to the late 1960s.[23] But he argues that what they reflected was a view of the First Amendment as guaranteeing something called "toleration" on the government's part when it came to heterodox or disfavored speech, not neutrality.[24] "From the Founding through the mid-twentieth century," he writes, "freedom of speech entailed a limited right of toleration, not neutrality."[25]

This claim is provocative not only because it appears to overturn so much conventional wisdom, but also because it suggests a fundamental reframing of First Amendment history. Typically, when scholars narrate the history of First Amendment law, they divide that history into two distinct epochs: the pre-World War I period, in which it was often assumed that courts simply did not take the First Amendment seriously (to paraphrase Paul Stephan),[26] and the post-World War I period, when courts began to interpret the First Amendment right of freedom of speech as a strongly countermajoritarian right.[27] Campbell's

19. Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 203 (1982).

20. Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 622 (1991) ("The development of free speech doctrine is generally traced to the beginning of the twentieth century. The concern with content discrimination by government was a part of that doctrine from very near the beginning and is in no sense a new idea." (footnote omitted)); Lakier, *supra* note 12, at 2168 ("[D]iscriminat[ion] against speech on the basis of its content . . . was something that the new conception of freedom of speech otherwise disavowed [by 1942]."); *see also* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975) (arguing that the principle of equality was implicit in the Supreme Court's decisions before *Mosley* and lies "at the heart of the first amendment's protections against government regulation of the content of speech").

21. Campbell, *supra* note 8, at 861.

22. *Id.* at 866-68.

23. *Id.* at 868.

24. *Id.* at 865.

25. *Id*.

26. Stephan, *supra* note 19, at 203.

27. *See, e.g.*, G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 300 (1996); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 891-93 (1963).

history suggests that there was more continuity between eighteenth-, nineteenth-, and early and mid-twentieth-century free-speech jurisprudence than is commonly assumed, and that, at least when it came to the neutrality ideal, the major break in jurisprudential thinking about the First Amendment occurred in the late 1960s and early 1970s, rather than the post-World War I period.

Efforts to reframe well-trodden narratives and chronologies can be extremely generative, as is the case here. As I suggest in Part II, Campbell's novel rewriting of First Amendment history pushes us to think more deeply about the nineteenth-century cases and highlights the significant but sometimes underappreciated doctrinal changes wrought by the Burger Court in the early 1970s.

On its own terms, however, Campbell's historical argument proves unconvincing for two reasons. First, in order to depict a categorical shift from toleration to neutrality, *The Emergence of Neutrality* understates the important continuities between the mid-twentieth-century cases and the late twentieth-century cases. At the same time, it overemphasizes the continuities between the nineteenth- and early twentieth-century cases. The result is a story of doctrinal evolution that does not do justice to the complexity of the historical material. In this Part, I challenge Campbell's framing of the historical argument before providing an alternative framing in Part II.

A. The Thin Line Between Toleration and Neutrality

The central claim of Campbell's piece is that, for most of U.S. history, although courts and jurists interpreted the state and federal free-speech guarantees to require the government to treat speakers equally when they engaged in certain kinds of privileged expression, courts did not interpret these guarantees to categorically deny the government the power to "favor certain messages over others," or to in other ways "maintain socially defined limits on public discourse."[28] The result, Campbell argues, was a regime of speech regulation that required a "limited right of toleration" on the government's part when it came to heterodox speech, but not "neutrality."[29]

This state of affairs only changed in the late 1960s and 1970s, Campbell asserts, when the Court, in cases such as *Mosley* and *Stanley v. Georgia*,[30] suggested for the first time that the government was constitutionally forbidden from restricting speech because it disliked its message or feared its communicative harms.[31] It was at this point that "neutrality"—a term that Campbell uses to

28. Campbell, *supra* note 8, at 866.

29. *Id.* at 865.

30. 394 U.S. 557, 565 (1969).

31. Campbell, *supra* note 8, at 936-41.

mean a regime of speech regulation in which the government is almost entirely prohibited from favoring certain speech acts over others because of their communicative content—became the First Amendment's "constitutional lodestar."[32]

The first part of Campbell's account is persuasive. He is certainly correct that in the eighteenth and nineteenth centuries, courts interpreted the First Amendment to prohibit the government from favoring or disfavoring different speakers or speech acts. This was, for example, the whole point of the ban on prior restraints. The government was prohibited from imposing ex ante restrictions on who could speak in order to ensure, as Joseph Story put it in 1833, that "[e]very freeman has [the] undoubted right to lay what sentiments he pleases before the public."[33] The purpose of the ban was not, in other words, liberty per se. After all, speakers could be prosecuted after the fact for what they said.[34] The purpose was instead to enable all members of the political community an equal opportunity to participate in public discourse by preventing government censors from acting as "arbitrary and infallible judge[s] of all controverted points in learning, religion, and government."[35] By allowing people to speak, and vesting juries rather than government censors with the power to determine when the messages they chose to utter were sufficiently threatening to public order to warrant punishment, the prohibition against prior restraints ensured that it was the people, rather than the government, that ultimately decided what was a valuable, or valueless, exercise of expressive liberty.[36] Even when it came to juries, courts

32. *Id*. at 941; *see also id.* at 909 n. 245 (equating neutrality with a regime in which "governmental interests that turned on communicative effects" of speech were "categorically reject[ed]" and courts "remove[d] these sorts of interests from the constitutional ledger"); *id.* at 870 (defining "neutrality in its modern sense" to require "treat[ing] speech and press rights as nondiscrimination rules that made content-based restrictions presumptively unconstitutional and that forbade efforts to shape the way that people think").

33. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES; WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION § 1877, at 736 (Cambridge, Brown, Shattuck & Co. 1833).

34. *Id.* ("[I]f [a freeman] publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish any dangerous or offensive writings, which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty.").

35. *Id.*

36. Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 533 (2019) ("When someone criticized the government, the Founders widely thought, it would be downright dangerous to give agents of the government, including prosecutors and judges, the power to punish governmental critics. In this context, giving power to juries was crucial. Commentators during the ratification debates explicitly linked jury rights to concerns about

recognized the limits on their ability to favor or disfavor speech on content-based grounds. As Campbell notes, nineteenth-century courts granted speakers who engaged in well-intentioned and truthful speech on matters of public concern an absolute privilege against criminal and civil liability.[37] In this way, eighteenth- and nineteenth-century speech law denied the government the power to treat speakers favorably or unfavorably depending on what they had to say.

Campbell is also correct that, notwithstanding these nondiscrimination mandates, government actors enjoyed relatively broad discretion in the eighteenth and nineteenth centuries to disfavor speech they disliked or believed to be dangerous.[38] This was because courts were quite willing to define many kinds of speech that we would consider constitutionally valuable today as *not* touching on matters of public concern — or not well-intentioned.[39] To give only one example: in the 1824 case *Updegraph v. Commonwealth*, the Supreme Court of Pennsylvania held that a speaker in a local debate club could be punished for questioning the existence of the deity as part of the debate, notwithstanding the general rule that "every one ha[s] the right of adopting for himself whatever opinion appear[s] to be the most rational, concerning all matters of religious belief" because words that questioned the existence of God could not have been uttered with good intentions.[40] The fact that the defendant chose to say the words he did, the court concluded, demonstrated without a doubt "a malicious intention . . . to vilify the Christian Religion, and the Scriptures."[41] As *Updegraph*

governmental suppression of dissent."); Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 58 (2011) (describing the "jury's democratic function" in the nineteenth century).

37. Campbell, *supra* note 8, at 885 ("[E]very person has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose." (quoting MARTIN L. NEWELL, THE LAW OF SLANDER AND LIBEL IN CIVIL AND CRIMINAL CASES 686-87 (3d ed. 1914))); Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 405 (Pa. 1824) ("[N]o author or printer, who fairly and conscientiously promulgates the opinions with whose truths he is impressed, for the benefit of others, is answerable as a criminal; that a malicious and mischievous intention is, in such a case, the broad boundary between right and wrong . . . ."). As Robert C. Post notes, there were efforts in the late nineteenth century to extend this privilege to well-intentioned but false speech on matters of public concern, but these efforts were largely unsuccessful. Robert C. Post, *Defaming Public Officials: On Doctrine and Legal History*, 12 AM. BAR FOUND. RSCH. J. 539, 544-45 (1987).

38. Campbell, *supra* note 8, at 884-88.

39. *Id.* at 887 ("Speech on matters of public concern was privileged, but such speech could not be aimed at undermining the public good. And the values used to make that assessment were *societal* values, not ones determined by the speaker." (footnote omitted)).

40. *Updegraph*, 11 Serg. & Rawle at 399, 403.

41. *Id.* at 398-99. The court rejected the defendant's argument that the fact that he uttered the words in the course of a debate meant they were not malicious because it found that the existence of a debating society that would encourage such behavior was itself evidence of bad character. *Id.* at 399 (rejecting the argument that it need "take any notice of the allegation,

vividly illustrates, the equality mandates written into free-speech law in the eighteenth and nineteenth centuries remained firmly limited in their application by judicial understandings of what constituted socially acceptable speech. In this respect, Campbell is correct when he claims that, in the nineteenth century, expressive freedom only existed within socially defined limits.[42]

Campbell is also correct in arguing that the same remained true, albeit in different ways, in the first half of the twentieth century.[43] Notwithstanding the profound changes that took place in free-speech law in the post-World War I era — changes that dramatically extended the scope of the government's nondiscrimination obligations when it came to the regulation of speech — government actors retained considerable power throughout the mid-twentieth century to restrict at least certain kinds of speech because they disliked the message it communicated. The decisions in *Cantwell v. Connecticut* and *Chaplinsky v. New Hampshire* made clear, for example, that uncivil speech could still be subject to criminal or civil punishment, at least so long as it was directly addressed at another.[44] Cases like *Giboney v. Empire Storage & Ice Co.* and *Roth v. United States* held that other kinds of socially deviant messages could be punished without constitutional concern.[45] And of course, the clear-and-present-danger standard that the Court embraced as a mechanism of speech protection in the 1930s and 1940s was interpreted, at times, to allow the government to enforce sometimes sweeping content-based regulations, like the now-infamous Smith Act.[46]

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that the words were uttered by the defendant, a member of a debating association . . . and that the expressions were used in the course of argument on a religious question," given that "an[y] association in which so serious a subject is treated with so much levity, indecency, and scurrility . . . would prove a nursery of vice, a school of preparation to qualify young men for the gallows, and young women for the brothel").

42. Campbell, *supra* note 8, at 887 (stating that the privilege to speak on matters of public concern "guaranteed toleration within socially defined bounds, not neutrality").

43. *Id.* at 943 ("Even decades into the twentieth-century rebirth of the First Amendment, the dominant paradigm was still one of socially bounded toleration.").

44. Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) (recognizing that speech can be punished when it involves "intentional discourtesy" or "personal abuse"); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (relying on *Cantwell* to conclude that "fighting words" are beyond First Amendment protection).

45. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (rejecting the idea that "constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute"); Roth v. United States, 354 U.S. 476, 485 (1957) (holding that "obscenity is not within the area of constitutionally protected speech or press").

46. Dennis v. United States, 341 U.S. 494, 516-17 (1951) (upholding the conviction of the leaders of the Communist Party of the United States under § 2(a)(1), (3) and 3 of the Smith Act after finding that their political advocacy created "a 'clear and present danger' of an attempt to overthrow the Government by force and violence").

Where Campbell's argument runs into trouble is when he attempts to use the fact that the pre-1970s cases recognized limits on the reach of the First Amendment's equality mandate as evidence that there was a fundamental shift in judicial conceptions of freedom of speech in the late Burger Court era.[47] That argument assumes that courts in the post-Burger period did not recognize significant limits on the reach of the First Amendment neutrality mandate, but that assumption is incorrect.

Mosley, despite its sweeping language, only applied to laws that regulated speech in traditional or designated public forums—that is to say, in the special public spaces that had always served, or that government officials had designated to be, sites of public expression.[48] When it came to other kinds of government property (such as government workplaces, public schools, jails, and military bases), government officials retained significant power to restrict speech because those officials believed it to be uncivil or disruptive or to otherwise threaten communicative harm.[49] In fact, changes the Court wrought to the doctrinal rules that governed the regulation of speech in these spaces in the years after *Mosley* was handed down granted government officials more power than they previously possessed to restrict speech in these nonpublic forums because they feared its communicative harms or disliked the messages it communicated.[50] First

47. Campbell, *supra* note 8, at 924-36.

48. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972) ("Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."); Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (defining traditional public forums to refer to "places which by long tradition or by government fiat have been devoted to assembly and debate" and designated public forums as "public property which the State has opened for use by the public as a place for expressive activity" and noting that "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place").

49. *See, e.g.*, Greer v. Spock, 424 U.S. 828, 838-39 (1976) (holding that military officials could exclude political speech from military base in order to preserve the appearance of military political impartiality); *Perry Educ. Ass'n*, 460 U.S. at 52-55 (upholding a rule governing a school mail system that granted access to a recognized teacher's union but denied access to its competitor after finding that it could "reasonably be considered a means of insuring labor peace within the schools [by] . . . 'prevent[ing] the District's schools from becoming a battlefield for inter-union squabbles'"); Morse v. Frederick, 551 U.S. 393, 409-10 (2007) (upholding school officials' power to restrict student speech that can plausibly be interpreted to promote illegal drug use).

50. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (denying First Amendment protection to "public employees [who] make statements pursuant to their official duties"); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988) (extending very deferential scrutiny to efforts by school officials to "exercise[] editorial control over the style and content of student speech in school-sponsored expressive activities"); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1743 (1987) (noting that the Burger Court cases turned away from the more speech-protective approach

Amendment law became, in this respect, *less* committed to an ideal of neutrality than it had previously been.

Even when it came to public fora, courts interpreted *Mosley* to permit the government to restrict speech because it feared its communicative harms when it could show that doing so was necessary to further a compelling government purpose.[51] This was a demanding standard to meet, but not an impossible one. In *Burson v. Freeman*, for example, the Court upheld a state law that made it a crime to engage in vote solicitation or campaigning near polling places because it found the law to be a narrowly tailored means of protecting the integrity of the elections.[52] The Court held, in other words, that the government could restrict messages about voting, even when they took place in a public forum, when it had good reason to believe that those messages would have the effect of intimidating or coercing voters to vote a certain way.

Similarly, notwithstanding Justice Marshall's assertion in *Stanley v. Georgia* that the First Amendment disabled the government from "telling a man, sitting alone in his own house, what books he may read or what films he may watch,"[53] in the decades after *Stanley* was handed down, courts continued to affirm that the government could entirely prohibit—and criminalize the watching of—obscenity, as well as child pornography, and could similarly restrict other kinds of low-value speech.[54]

Stanley in fact proves a particularly problematic case to use as evidence that by the late 1960s a strict content-neutrality rule had become "the constitutional lodestar."[55] This is because the decision was almost immediately limited to its facts. Just four years after *Stanley* was handed down, the Court interpreted it as a decision grounded in the extraordinary right of privacy in the home, not a generalized right to control the content of one's library. For that reason, the Court concluded that *Stanley* did not govern the regulation of obscene speech beyond the home.[56] Rather than demonstrating the Court's strong commitment to the

to the forum analysis employed by the Warren Court by "simply assum[ing] that in situations of proprietary control the government was empowered to abridge speech").

51. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 198 (1992).

52. *Id.* at 211.

53. 394 U.S. 557, 565 (1969).

54. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 363 (2003); New York v. Ferber, 458 U.S. 747, 764 (1982); Miller v. California, 413 U.S. 15, 36-37 (1973).

55. Campbell, *supra* note 8, at 941.

56. United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 126 (1973) (upholding a law prohibiting the importation of obscene materials and noting that "*Stanley* depended, not on any First Amendment right to purchase or possess obscene materials, but on the right to privacy in the home"); United States v. Orito, 413 U.S. 139, 142-43 (1973) (upholding a law

kind of absolute content-neutrality principle Campbell argues it committed to from then on, *Stanley* and the cases that follow after it demonstrate instead how nuanced—and contested—judicial conceptions of the First Amendment neutrality principle continued to be.[57]

In short, a complete account of the late twentieth-century free-speech cases makes clear that, in this period also, First Amendment doctrine simply did not embrace the principle of total or almost-total content neutrality that Campbell argues it does. Just as was true in earlier eras, the Court interpreted the First Amendment, and continues to interpret the First Amendment, to permit "socially defined limits on public discourse" in a wide variety of contexts.[58] This fact undercuts Campbell's claim that something significant, even epochal, changed as a result of the late 1960s and early 1970s cases—that after this point, courts understood First Amendment rights in a qualitatively different manner than they had before. It suggests, instead, that there is much more continuity to the story than Campbell's telling acknowledges.

Indeed, as I argue in the next Section, what close attention to the New Deal and mid-twentieth-century First Amendment cases makes clear is that Campbell vastly overstates the difference in how courts in the early and mid-twentieth centuries understood the First Amendment's neutrality or equality mandate, and how courts in the late twentieth century did so. At the same time, he understates how very differently nineteenth-century courts understood what it meant for the government to respect the "equality of status in the field of ideas" of its citizens and subjects, when compared to courts in the post-World War II and especially New Deal eras.[59] The result is a historical narrative that relies upon a qualitative distinction between eras of First Amendment toleration and First Amendment neutrality that the evidence simply does not support.

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criminalizing the possession of obscenity in the car and distinguishing *Stanley* on the grounds that "[t]he Constitution extends special safeguards to the privacy of the home").

57. For contemporary disagreement about how the Court construed the First Amendment's neutrality mandate in the post-*Stanley* cases, see *12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. at 130 (Douglas, J., dissenting) ("I know of no constitutional way by which a book, tract, paper, postcard, or film may be made contraband because of its contents. The Constitution never purported to give the Federal Government censorship or oversight over literature or artistic productions . . . ."); *Miller*, 413 U.S. at 44-45 (Brennan, J., dissenting) ("The First Amendment was not fashioned as a vehicle for dispensing tranquilizers to the people. . . . The use of the standard 'offensive' gives authority to government that cuts the very vitals out of the First Amendment.").

58. Campbell, *supra* note 8, at 866.

59. *Id*. at 941 (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972)).

B. Distorting the Historical Narrative

In order to draw the strong distinction he does between the pre-1970s regime of First Amendment toleration and the post-1970s regime of neutrality, Campbell is forced to deemphasize the significant continuities in how courts in the 1930s and 1940s and courts in the 1970s and later viewed the equality obligations imposed on government actors by the First Amendment guarantee of freedom of speech. This is problematic because although there has been significant evolution in how courts think about the First Amendment's equality obligations since the 1930s and 1940s,[60] many of the principles that govern the contemporary cases were first developed in the New Deal era.

Consider, for example, the important question of whether the government is ever permitted to restrict speech because it views that speech as a threat to the collective moral order—that is, as offensive to social norms. This kind of state action obviously violates the ideal of a neutral or dispassionate government. Indeed, what it represents at its core is an effort by the government to dictate to its citizens and subjects a conception of the public good and the collective morality that they may not share.[61] Nevertheless, Campbell argues that it was only in the 1960s and 1970s that the Supreme Court, in cases such as *Stanley* and *Street v. New York*, conceptualized the First Amendment as a close-to-absolute prohibition against this kind of morals-enforcing speech regulation.[62] But this is just not the case.

Although, as I noted in the previous Section, courts in the New Deal period interpreted the First Amendment to grant the government considerable power to sanction speech (at least certain kinds of speech) because it feared its communicative harms, they generally rejected the view that the government could sanction speech on any grounds whatsoever. Specifically, courts insisted—just as they insist today—that, except when it comes to low-value speech, the harm to collective social order caused by the utterance of a socially offensive message or word was not the kind of harm that the government could regulate against, consistent with the First Amendment. This principle was perhaps most fulsomely

60. *See infra* text accompanying notes 122-137.

61. *See* Ronald Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 113, 127 (Stuart Hampshire ed., 1978) (describing the core principle of liberalism to be the idea that "government must be neutral on what might be called the question of the good life").

62. Campbell, *supra* note 8, at 936-37 (asserting that it was only in the late 1960s that "the Justices categorically rejected viewpoint-based rationales for restricting expression" or concluded that the promotion of morality was "wholly inconsistent with the philosophy of the First Amendment" (quoting Stanley v. Georgia, 394 U.S. 557, 566 (1969))); Street v. New York, 394 U.S. 576 (1969).

articulated in the 1989 flag-burning case, *Texas v. Johnson*.[63] But it was eloquently expressed in—and an important motivation for—a number of the New Deal Court's most important First Amendment cases.

Take, for example, the 1941 decision in *Cantwell v. Connecticut*.[64] In that case the petitioner, a Jehovah's Witness, played a record that insulted the Catholic religion to two men he encountered on the street in a heavily Catholic area of New Haven, Connecticut.[65] He was arrested and convicted of breaching the peace, but the Court reversed his conviction, reasoning that his conduct could not constitutionally qualify as a breach of the peace under the First Amendment because it was not likely to lead to actual violence and merely communicated a message that was offensive to its listeners.[66] This was not sufficient basis to render the conviction constitutional, Justice Roberts explained, because the essential purpose of the liberties guaranteed by the First Amendment was to provide a "shield [under which] many types of life, character, opinion and belief can develop unmolested and unobstructed."[67] Accordingly, speech could not be sanctioned unless it involved "intentional discourtesy," "personal abuse," or "threat[s] of bodily harm," or otherwise posed a "clear and present menace to public peace and order."[68]

Cantwell articulated, in effect, the same principle that *Texas v. Johnson* famously articulated almost five decades later—namely, that under "the First Amendment . . . the government [could] not prohibit the expression of an idea simply because society found the idea itself offensive or disagreeable."[69] Campbell argues that, notwithstanding this fact, the *Cantwell* decision did not represent an "embrac[e of] neutrality in its modern sense" because the opinion did not conceive of the harm being done to Cantwell, or to those like him, as "discrimination as such," nor did it "categorically reject[] governmental interests that turned on communicative effects" of speech.[70] But *Johnson* also did not categorically reject the possibility that speech could be sanctioned because of its communicative effects.[71] Instead, like *Cantwell*, it required the government to satisfy

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63. 491 U.S. 397, 414 (1989).

64. 310 U.S. 296 (1940).

65. *Id.* at 300, 301, 303.

66. *Id.* at 310-11.

67. *Id.* at 310.

68. *Id*. at 310-11.

69. Texas v. Johnson, 491 U.S. 397, 414 (1989).

70. Campbell, *supra* note 8, at 909 n.245.

71. *Johnson*, 491 U.S. at 409 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)) (suggesting that speech can be punished because of its communicative effects when it "is directed to

a heavy burden of proof that the communicative harms caused by the speech involved more than offended feelings.[72] And like the *Johnson* opinion, Justice Roberts's opinion in *Cantwell was* centrally concerned with the possibility that the law at issue in the case could be, and had been, used to discriminate against the speaker, even if the opinion did not use the word "discrimination" itself.[73]

It is thus very difficult to see how the decision in *Cantwell* reflects an embrace of First Amendment toleration, whereas the decision in *Texas v. Johnson* represents an embrace of First Amendment neutrality. Both decisions make roughly the same doctrinal distinction between laws that target speech because it violates dominant civility norms and laws that target speech because it poses a serious threat of public disorder or directly insults or harasses another. And both opinions justify their doctrinal distinctions by making one of the most familiar arguments for liberal neutrality: that it is the only morally appropriate position to take in a pluralist society.[74]

Nor was *Cantwell* the only New Deal opinion to articulate the principle that speech could not ordinarily be sanctioned under the First Amendment merely because it contained socially offensive messages. The decisions in *Terminiello v. Chicago* and *Barnette v. West Virginia School Board* rely on essentially the same principle as well.[75] Campbell argues that neither of these decisions reflect a

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inciting or producing imminent lawless action and is likely to incite or produce such action" or when it constitutes fighting words).

72. *Id.* at 410-12 (requiring laws that target communicative effects to satisfy strict scrutiny).

73. The central claim of the opinion—that the First Amendment provides a "shield [under which] many types of life, character, opinion and belief can develop unmolested and unobstructed," *Cantwell*, 310 U.S. at 310, and therefore did not permit the government to enact laws that could be used to penalize speakers for their character, opinion, or belief—is an antidiscrimination argument. Robert C. Post notes this when he describes the purpose of the constitutional protection provided to uncivil speakers by the opinion as "ensur[ing] . . . a level playing field, in which no particular community can obtain an unfair advantage and use the power of the state to prejudge the outcome of this competition by enforcing its own special norms or civility rules." Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 630 (1990).

74. *Johnson*, 491 U.S. at 419 (arguing that the decision to invalidate the conviction "is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects"); *Cantwell*, 310 U.S. at 310 (asserting that the shield the First Amendment provides to "many types of life, character, opinion and belief" is "[n]owhere . . . more necessary than in our own country for a people composed of many races and of many creeds"); *see also* Koppelman, *supra* note 15, at 640-41 (discussing the justifications for government neutrality that rely on an argument of moral pluralism).

75. Terminiello v. City of Chi., 337 U.S. 1, 4-5 (1949) (holding that speech must be "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest"); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be

judicial commitment to neutrality, because in neither case did the Court declare there to be "anything *especially* problematic about content-based or viewpoint-based restrictions" on speech. According to Campbell, they merely made it very difficult for the government to, in the first case, restrict the "dissemination of certain ideas . . . no matter how abhorrent," and in the second case, compel the affirmation of government-sponsored orthodoxy.[76] What they granted speakers, consequently, Campbell argues, was "a right of nearly absolute toleration, not a right to neutral treatment."[77] But what is nearly absolute toleration but neutrality?

These examples—and there are many others that could be discussed—illustrate how thin and largely rhetorical the distinction Campbell draws between the New Deal and later cases ultimately turns out to be. Campbell's effort to draw a sharp line between the early and late twentieth-century First Amendment cases *understates* the important continuities in how the New Deal and Burger Courts, and later the Rehnquist and Roberts Courts, conceived of freedom of speech in a pluralist society—specifically, the very important continuities in the constitutional rules they applied to laws that regulated speech because it caused offense.

At the same time, Campbell's argument *overstates* the continuities in how courts in the 1930s and 1940s conceived of the First Amendment's neutrality obligations and how courts in the eighteenth and nineteenth centuries did. In particular, Campbell's effort to group the New Deal free-speech jurisprudence with the nineteenth- and early twentieth-century free-speech cases under the banner of "toleration," not "neutrality," leads him to argue that, as late as the 1940s, courts continued to believe that laws that targeted specific messages for restriction should be scrutinized more deferentially than laws that applied more evenhandedly to broad swathes of speech.[78] The Court had held as much in *Gitlow v. New York*, in 1925, to justify its conclusion that the New York criminal

orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

76. Campbell, *supra* note 8, at 917, 926-27.

77. *Id.* at 927.

78. *Id.* at 911 ("The idea that *statutes* targeting certain messages would be *less* problematic flips current doctrine on its head, but it made perfect sense [in the early 1940s]. From a jurisprudential standpoint, it was still axiomatic that constitutional freedom entailed liberty regulated *by law*, not arbitrary command. This gave legislators a key role in setting the boundaries of natural rights. . . .").

syndicalism statute was constitutional.[79] But, as Campbell notes, this was an idea that had its roots in the eighteenth- and nineteenth-century cases.[80]

Campbell argues that, as late as the mid-1940s, the Supreme Court continued to follow the *Gitlow* rule and was in this respect, not just *not* committed to a strong neutrality principle but actively "anti-neutral" in it approach to the First Amendment.[81] But in fact, as early as the late 1930s, the Court had begun to resist the idea that laws prohibiting a specific kind of speech or expressive activity should be scrutinized more deferentially than laws that applied more generally to all kinds of speech, in order to respect the authority of the legislature.

In *De Jonge v. Oregon*, for example, the Court rejected the idea that the legislature could justify the restriction of particular kinds of speech or expression merely by declaring that kind of expression a threat to public order. "[L]egislatures may protect themselves against that abuse," the Court explained, "[b]ut the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed."[82] What this meant, the opinion made clear, was that courts, not legislatures, would determine when particular instances of speech could constitutionally be prohibited in accordance with the clear-and-present-danger standard. This was necessary, the Court explained, in order to ensure that all members of the political community have an equal "opportunity [to participate in] free political discussion."[83]

In later decisions, the Court reaffirmed the position it had adopted in *De Jonge*: namely, that courts should strictly scrutinize, not defer to, legislative determinations that specific messages or activities posed a particularly severe threat to public peace.[84] And although it is true, as Campbell notes, that Justice Black

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79. 268 U.S. 652, 668 (1925) ("By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute.").

80. Campbell, *supra* note 8, at 882 (noting that a "prevalent strand of liberal thought" in the eighteenth century held that "the government should avoid using broad and overinclusive prohibitions and instead punish only those communicative acts that were socially harmful").

81. Campbell, *supra* note 8, at 922 (describing the *Gitlow* approach as an "*anti*-neutrality" framework); *id.* at 910 (citing the decision in *Bridges v. California,* 314 U.S. 252 (1941), as support for the claim that the Court continued through the early 1940s to embrace this anti-neutrality approach).

82. 299 U.S. 353, 363-65 (1937).

83. *Id.* at 364-65.

84. *See, e.g.*, Thomas v. Collins, 323 U.S. 516, 531-32 (1945) ("[I]n our system where the line can constitutionally be placed [when it comes to rights of free expression] presents a question this Court cannot escape answering independently . . . . And the answer, under that tradition, can

quoted *Gitlow* approvingly in his majority opinion in *Bridges v. California*, he did so only to distinguish the facts in the two cases.[85] Nothing in the holding rested on *Gitlow*.

It is therefore simply incorrect to suggest, as Campbell does, that the New Deal cases employed the same approach to the review of targeted speech regulations as nineteenth- and early twentieth-century cases had. As *De Jonge* makes clear, the approach taken by the Court during the New Deal era was, for the most part, diametrically opposite to the approach articulated in *Gitlow* and earlier cases. The Court came to recognize, as it earlier had not, the possibility that these kinds of targeted speech laws could be used to favor or disfavor specific speakers or messages, and thereby undermine the basic political equality, or governmental neutrality, that a healthy democracy requires. Like the late twentieth-century cases, the New Deal cases were not, in other words, anti-neutral in their approach to the First Amendment. They embraced instead a relatively strong neutrality principle when it came to freedom of speech, albeit one that remained limited in important respects.

Of course, to say that the New Deal cases have in this respect more in common with the late twentieth-century cases than they do with the nineteenth- and early twentieth-century cases is not to say that there are *no* differences in how courts conceptualized the neutrality obligations that the First Amendment imposes on government actors during the New Deal and how they do today. There are significant differences in how they did so. But those differences cannot be understood through the distinction between toleration and neutrality that Campbell employs. Not only does that distinction misconstrue the relationship between the early and late twentieth-century free-speech cases, but it also reduces the complexity of the questions that the history of neutrality in First Amendment law raises. Once one recognizes that a commitment to a certain kind of neutrality has always been a part and parcel of First Amendment law, the interesting question is not why courts came to embrace a neutrality principle in the 1970s. Rather, it is why they embraced a neutrality principle at all, and why—and how—judicial conceptions of neutrality changed over time. I turn to these issues in the next Part.

II. AN ALTERNATIVE FRAMING

As the previous Part makes clear, from 1792 to the present, two things have been true of First Amendment law. First, courts have recognized that the

be affirmative, to support an intrusion upon this domain, only if grave and impending public danger requires this.").

85. *Bridges*, 314 U.S. 261.

constitutional guarantees of freedom of speech and press grant speakers and publishers a right to equal treatment at the government's hands. Second, courts have interpreted this right to equal treatment to apply only in certain contexts — to laws that regulate well-intentioned speech on matters of public concern, for example, or that takes place in the public forum, or is considered of high constitutional value.

American free-speech jurisprudence has, in other words, always been organized around an ideal of "toleration," as Campbell defines it, rather than the close-to-absolute content-neutrality principle he unconvincingly reads into contemporary law. Put differently, because the term "toleration," at least as it is conventionally understood, provides a poor fit for what Campbell uses it to mean, one might say that First Amendment law has always been organized around an ideal of "neutrality" — but that ideal has always been, and continues to be, limited in significant ways.[86]

This fact is important to recognize for two reasons. First, it strongly suggests that it was *not* the "individualism[] and social fragmentation" of the 1960s and 1970s that led courts, and specifically, the Supreme Court, to construe the speech

86. The term "toleration" is typically used in philosophical discussions of political liberalism to refer to an approach to regulation in which "something is objected to, yet the power to negatively interfere with it or its holder is intentionally withheld." PETER BALINT, RESPECTING TOLERATION: TRADITIONAL LIBERALISM AND CONTEMPORARY DIVERSITY 24 (2017). To say that a regulatory regime "tolerates" a practice typically means, in other words, that the regime allows that practice to continue but disapproves of its exercise. *See* Steven D. Smith, *The Restoration of Tolerance*, 78 CALIF. L. REV. 305, 309 (1990) (arguing that regimes organized around the principle of tolerance "retain a political, religious, or moral orthodoxy, but . . . refrain from the repression of difference and dissent"). This is not, however, how courts have historically viewed the extension of free-speech protection to heterodox speech. As jurists in the nineteenth century made clear, those who participated in public discourse in what Post calls the "proper spirit" were not disapproved of, even when they conveyed opinions that the court might not share. Post, *supra* note 37, at 552. To the contrary, they were thought to perform an important social role: contributing to public discourse that was "essential to the nature of a free state." STORY, *supra* note 33, § 1878, at 736. It was those who did not engage in public discourse in the "proper spirit" who were disapproved of; but these uncivil speakers were not tolerated, and no one argued that they should be. Joseph Story was only one of many who argued that the imposition of punishment on these uncivil or immoral speakers was "necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty." *Id.* In the twentieth and twenty-first centuries, similarly, courts may not have personally approved of the messages that litigants communicated but they recognized that they performed a socially valuable function. For example, in *Winters v. New York*, the Court explained why even "true crime" magazines were entitled to full First Amendment protection by noting that "[e]veryone is familiar with instances of propaganda through fiction" and [w]hat is one man's amusement, teaches another's doctrine." 333 U.S. 507, 510 (1948). Although the Court admitted that its members could "see nothing of any possible value to society in these magazines," it recognized that they might prove valuable to others and were therefore "as much entitled to the protection of free speech as the best of literature." *Id.* This is not an articulation of toleration, as it is conventionally understood, but of neutrality.

and press rights guaranteed by the First Amendment as protecting a "sphere[] of personal liberty, free from socially prescribed ideas of morality," and to consequently embrace a strong content-neutrality rule.[87] The fact that, even in the speech-repressive early nineteenth century, courts insisted that what freedom of speech meant was that "[n]o author or printer, who fairly and conscientiously promulgates the opinions with whose truths he is impressed, for the benefit of others, [could be] answerable as a criminal" suggests that there is something deeper, and more overdetermined, about the judicial embrace of neutrality in American free-speech law than Campbell's account suggests.[88]

This should not be surprising. After all, the ideal of the neutral state—the idea that "the state should not favor, promote, or act on any particular conception of the good"—is a central animating feature of liberal political systems like our own.[89] It is entirely predictable that this ideal would inform the discourse and practice of one of the most important liberal rights guaranteed by the federal as well as state constitutions.

Certainly, in other reaches of American constitutional law, courts have historically read neutrality mandates into rights that, like the First Amendment, appear on their face to guarantee only liberty, not equality. This is true for example of the Due Process Clause of the Fourteenth Amendment. As Howard Gillman and others have argued, courts in the nineteenth century interpreted the Due Process Clause to strictly prohibit laws that favored or disfavored differently positioned groups when it came to the exercise of their due-process rights.[90] It was by imposing this duty of neutrality on the government, rather than by limiting the government's ability to regulate the market or the home more generally,

87. Campbell, *supra* note 8, at 869.

88. Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 405 (Pa. 1824).

89. GEORGE SHER, BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS 1 (1997).

90. HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 20 (1993) (describing the essential features of late nineteenth- and early twentieth-century due-process jurisprudence to include "the belief that market liberty could be interfered with if legislation promoted a valid public purpose, [but] that valid public-purpose legislation was distinct from laws that merely promoted the interests of some classes at the expense of others"); *see also* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 874 (1987) ("For the *Lochner* Court, neutrality, understood in a particular way, was a constitutional requirement. . . . Governmental intervention was constitutionally troublesome, whereas inaction was not; and both neutrality and inaction were defined as respect for the behavior of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements. Whether there was a departure from the requirement of neutrality, in short, depended on whether the government had altered the common law distribution of entitlements.").

that courts attempted to preserve the independence of a private sphere of activity and expression from governmental control.[91]

The same was historically true—and is still true today—of the First Amendment. By requiring the government to grant anyone who wished it an opportunity to contribute to the public discourse, and by vesting those who did so a right to speak in good faith on matters of public concern without fear of government sanctions, courts in the eighteenth and nineteenth centuries attempted to prevent the government from controlling the formation of public opinion, without depriving the government of the power to regulate speech in other ways.[92] In the twentieth century, similarly, it was by requiring the government to treat all "opinion[s] and exhortations" alike that courts attempted to protect the independence of the "free trade in ideas" without categorically preventing the government from regulating the speech market.[93]

What this suggests is that courts have read a neutrality mandate into the First Amendment because doing so has enabled them to reconcile what we might think of as the liberal and the democratic commitments implicit in the guarantee of freedom of speech. It has allowed them to protect the autonomy of the private-speech marketplace from government control without depriving the popularly elected government of the power to regulate speech in other ways. Construed as such, neutrality plays and has long played a fundamental role in First Amendment law.

That does not mean, of course, that courts have always interpreted the principle of equal value they have read into the First Amendment in the same way. To the contrary, recognizing the courts' longstanding embrace of a neutrality principle in First Amendment law helps to clarify why courts have imputed a principle of equal value into the First Amendment, as well as what role the equal-

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91. GILLMAN, *supra* note 90, at 21 (noting that the principle that government should impose no special burdens or benefits was intended to preserve the "harmonious and liberty loving" characteristic of market society).

92. That this was how the ban was intended to operate is evident in Blackstone's description of the ban on prior restraints as a rule that allowed any "freeman . . . to lay what sentiments he pleases before the public" but that did not prevent the government from punishing him "if he publishes what is improper, mischievous, or illegal." 4 WILLIAM BLACKSTONE, COMMENTARIES *142, *152.

93. Abrams v. United States, 250 U.S. 616, 630-31(1919) (Holmes, J., dissenting). For an example of the relatively deferential review the Court applied to laws that did not engage in "unfair discrimination" (i.e., did not violate the neutrality principle), see *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941). *See also* Genevieve Lakier, Reed v. Town of Gilbert*,* Arizona *and the Rise of the Anti-Classificatory First Amendment*, 2016 SUP. CT. REV. 233, 241 (describing how the relatively deferential scrutiny afforded content-neutral laws protects "the regulatory autonomy of the democratically elected legislature").

value principle plays in free-speech law. It also makes evident how varied judicial understandings of the neutrality principle have been.

Indeed, if we examine Campbell's historical evidence, we can identify at least three distinct conceptions of the First Amendment neutrality principle that have been dominant in the case law over time. The first view we might describe as articulating a *majoritarian* notion of the First Amendment's neutrality guarantee. The second view we might describe as articulating a *pluralist* conception of First Amendment neutrality. And the third view—the view that is dominant but by no means uncontested today—we might describe as articulating a *formalist* notion of First Amendment neutrality.

A. The Majoritarian View of First Amendment Neutrality

Until relatively recently, it was common for free-speech scholars to dismiss the eighteenth- and nineteenth-century free-speech jurisprudence as a "First Amendment wasteland," or as a period in which courts failed to take the First Amendment "seriously" as a constraint on governmental power.[94] Scholars viewed this period as a First Amendment wasteland, of course, because—as David Rabban put it in his overview of the First Amendment's "forgotten years"—"[t]he overwhelming weight of judicial opinion in all jurisdictions offered little recognition and even less protection of free speech interests."[95]

One of the great virtues of Campbell's historical account is that it shows why the conclusion that the First Amendment was "not taken seriously" because courts did not invalidate many speech regulations, or reverse the convictions of those accused of immoral or dangerous speech, is a mistaken one. As *The Emergence of Neutrality* demonstrates, courts in the eighteenth and nineteenth centuries did not allow government actors to restrict speech because they lacked a theory of freedom of speech. Rather, they permitted government actors considerable power to restrict speech because they interpreted the First Amendment's neutrality obligations very differently than courts do today.

Specifically, and as the discussion in Part I makes clear, eighteenth- and nineteenth-century courts interpreted the First Amendment to grant speakers an equal right to participate in public discourse without fear of punishment so long as they complied with the civil and substantive norms that courts perceived to undergird respectable public discourse.[96] They understood the First Amendment's neutrality obligations to be limited, in other words, by majoritarian—or

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94. Menahem Blondheim, *Rehearsal for Media Regulation: Congress Versus the Telegraph-News Monopoly, 1866-1900*, 56 FED. COMMC'NS L.J. 299, 300 (2004); Stephan, *supra* note 19, at 203.

95. David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 557 (1981).

96. *See supra* notes 33-42 and accompanying text.

at least conventional—social norms. As Stephen M. Feldman notes in his history of free speech in America, nineteenth-century Americans were "free to speak or write [what they wanted] so long as [they] remained roughly within the broad mainstream of culture and opinion, but social penalties were severe for those who ventured outside those borders."[97]

The result was a much more constrained neutrality ideal than we are accustomed to today, but still a meaningful one. It was this majoritarian conception of neutrality that led no less a defender of Southern slavery as John C. Calhoun to argue that laws that denied access to the mails to abolitionist literature violated the First Amendment because they treated with disfavor speech that, quite intentionally, adopted the conventional norms and forms of the institutional press.[98] Belief in the importance of a neutrality principle to the independence of the marketplace of ideas also led Congress to grant all newspapers, no matter their partisan character, a right of access to the U.S. mails.[99]

Looking back at this era of free-speech jurisprudence, it may seem bizarre to narrowly construe the liberal state's neutrality obligations as only applying to those who were willing to obey, both in substance and in form, conventional social norms. But in fact, even well into the twentieth century, echoes of this conception of neutrality lingered in the cases. It explains, for example, the *Cantwell* Court's unreflective assumption that speakers who engaged in "intentional discourtesy" or "personal abuse" forfeited the protection that other denizens of the pluralist democracy enjoyed.[100] In nongovernmental spaces, meanwhile, speech rules continue to be organized around a socially embedded notion of regulatory neutrality. On social-media platforms, for example, all speakers are—in theory at least—welcome to contribute to the public discourse, but can be

97. STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 119-20 (2008).

98. *See* Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 NW. U. L. REV. 785, 825 (1995) (noting Calhoun's argument, in a report to Congress, that "the jealous spirit of liberty which characterized our ancestors . . . forever closed the door" against federal restrictions on the press); RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE 262-63 (1995) (noting that because "[u]nder postal regulations, postal officers were required to transmit without discrimination *every* newspaper that had been issued in the proper format . . . the abolitionists took care to issue two of their four major publications . . . in a newspaper format, and to issue their two other principal publications . . . in a magazine format that was indistinguishable in format from many magazines that postal officers routinely admitted into the mail" and noting also the decision by abolitionist groups to send their mailings only to "prominent men of affairs").

99. *See* Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671, 697-98 (2007).

100. Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

sanctioned for their speech, or kicked off a platform, if they violate the basic civility rules that the platforms enforce.[101]

The particular vision of neutrality that courts in the eighteenth and nineteenth centuries relied upon may thus not be as distant from us as it might appear at first glance. Nevertheless, it is a vision of neutrality that by the first few decades of the twentieth century appeared increasingly unsatisfying because it granted no protection to those who wished to challenge the civil as well as the substantive norms that undergirded polite society. The result was a growing push for another conception of freedom of speech, and along with it, First Amendment neutrality.

B. A Pluralist View of First Amendment Neutrality

As has been narrated many times before, beginning in the early twentieth century, a variety of groups began to express frustration with the limited protection that existing law provided to radicals, union activists, feminists, and others who wished to challenge the conventional norms that governed public discourse.[102] What motivated this frustration were many things, including: the growing intrusiveness of the government's regulatory apparatus when it came to speech, particularly sexually explicit speech;[103] the intense repression of labor and radical speech during and in the wake of World War I;[104] and perhaps also the increasing diversity of American society, which undermined the ability of judges or juries to convincingly claim to represent a homogeneous public good.[105]

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101. *See, e.g.*, *The Twitter Rules*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules [https://perma.cc/BRT7-QW55] (noting that the purpose of the rules is "to ensure all people can participate in the public conversation freely and safely" but that participants in the forum may not, among other things, "engage in the targeted harassment of someone, or incite other people to do so," "promote violence against . . . other people on the basis of race, ethnicity, national origin, caste, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease," "promote or encourage suicide or self-harm," or engage in other kinds of violent and/or uncivil speech).

102. *See, e.g.*, WEINRIB, *supra* note 13, at 14-53; David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 STAN. L. REV. 47, 53-54 (1992); PAUL L. MURPHY, THE MEANING OF FREEDOM OF SPEECH: FIRST AMENDMENT FREEDOMS FROM WILSON TO FDR 59-75 (1972).

103. Rabban, *supra* note 102, at 53-54.

104. *See generally* MURPHY, *supra* note 102, at 38-58 (describing that the legislation enacted to punish those who "undermine[d] morale" after World War I restricted many forms of freedom of expression).

105. As Michael J. Klarman notes, between 1880 and 1915, there was a "dramatic increase in the religious pluralism of the American population resulting from [] mass Catholic and Jewish immigration." Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82

Whatever its cause, dissatisfaction with the existing speech rules among progressive elites in particular pushed first Justices Holmes and Brandeis, and later a majority of the Supreme Court, to read into the First Amendment a much more expansive neutrality principle than it had previously recognized.[106] What the First Amendment demanded, the Court now asserted, was not just that the government not disfavor those who spoke with good intentions about matters of public concern. What it required were speech rules that were not, as the Court put it in *West Virginia School Board v. Barnette*, the "enemy of any class, creed, party or faction."[107]

In contrast to the narrow, jury-centric, majoritarian neutrality rule that it had previously relied upon in cases such as *Gitlow*, the Court set about fashioning a neutrality rule that was appropriate for what it now recognized to be a diverse and pluralist society. The result was decisions like *Cantwell* and *Terminiello* — decisions that made it very difficult for the government to restrict the dissemination of speech or punish speakers for violating civil or social norms. But it is important to note that these were not the only decisions in which the Court articulated a new First Amendment neutrality rule.

This becomes evident if one takes a look at a case such as *Murdock v. Pennsylvania*, which struck down a municipal ordinance that required Jehovah's Witnesses or other religious groups to pay a license fee in order to go door-to-door selling religious materials.[108] Campbell points to the decision — and in particular, its total disregard for the fact that the ordinance it struck down was facially content-neutral — as further evidence of the New Deal Court's failure to read the First Amendment to require neutrality.[109] But the opposite is true. Although Justice Douglas's majority opinion did note that the "nondiscriminatory" nature of the law (i.e., its facial content neutrality) was "immaterial" to the constitutional

VA. L. REV. 1, 49 (1996). The result was "the gradual undermining of the nation's unofficial Protestant establishment and a concomitant transformation in thought about church-state separation." *Id.* Immigration and growing religious pluralism impacted the speech and press cases as well, however. *Id.* Indeed, many of the important New Deal free-speech cases involved the repression of minority religious speech. *See* Harry Kalven Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 1 (noting that the "robust evangelism" of Jehovah's Witnesses "stimulated the expression by the Court of a full chapter of constitutional law").

106. *See, e.g.*, Bridges v. California, 314 U.S. 252 (1941); Thornhill v. Alabama, 310 U.S. 88 (1940); De Jonge v. Oregon, 299 U.S. 353 (1937).

107. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (arguing that this was what was required to be "faithful to the ideal of . . . political neutrality").

108. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

109. Campbell, *supra* note 8, at 919 (interpreting *Murdock* as evidence that for members of the Court who voted with the majority, "neutrality made no constitutional difference," and instead, "[t]heir focus was on ensuring that privileged freedoms were secured against all legal threats").

analysis, the explanation he provided for why the law was unconstitutional made clear that equality concerns were central to the ruling.[110] The problem with the law, Douglas explained, was that it could be used to "make [the Witnesses' religious] exercise so costly as to deprive it of the resources necessary for its maintenance."[111] "Those who can tax the privilege of engaging in this form of missionary evangelism," Douglas wrote, "can close its doors to all those who do not have a full purse."[112] As a result, "[s]preading religious beliefs in this ancient and honorable manner would . . . be denied the needy."[113]

The Court struck down the law, in other words, because it believed that it threatened the equality of status of religious minorities, if not on its face, then in its *effects*. It assumed that what the First Amendment neutrality principle required was not only—or not primarily—formally evenhanded treatment by the government, but a body of law that did not disparately burden poorly funded speakers. This was an assumption it would make in a wide variety of other cases as well.[114]

This concern with the possibly disparate effects of facially neutral laws reflects the largely functionalist approach that the Court took when construing the First Amendment's equality obligations during this period. Rather than focusing on the form of the law (whether it was a prior restraint or an ex ante regulation) or the good character and intentions of the speaker, as courts had in earlier periods, in these cases, the Court evaluated the constitutionality of given speech laws by asking whether in practice, those laws were, or could be used, to threaten the "equal status in the field of ideas" of minorities, dissidents, or those Justice Douglas described simply as "the needy."[115]

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110. *Murdock*, 319 U.S. at 115.

111. *Id.* at 112.

112. *Id.*

113. *Id.*

114. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 508-09 (1946) (refusing to enforce a state trespass law against a Jehovah's Witness who wished to speak in a company town after finding that enforcing the law would deprive the town's residents of the rights that residents of publicly owned towns enjoyed); Martin v. Struthers, 319 U.S. 141, 146 (1943) (striking down a law prohibiting door-to-door solicitation because "door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes" and "[d]oor to door distribution of circulars is essential to the poorly financed causes of little people"); Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939) (plurality opinion) (striking down ordinance that permitted government official to deny groups a parade permit in order to prevent "riots, disturbances or disorderly assemblage[s]" after finding that the law could be, in application, turned into an "instrument of arbitrary suppression of free expression").

115. *Murdock*, 319 U.S. at 112.

The result was a body of free-speech law that was in some respects more speech-protective than the First Amendment is today. The protectiveness of the doctrine generated, in fact, significant pushback from members of the Court. Dissenting Justices argued vigorously that the decisions in *Terminiello*, *Murdock*, and other cases, such as *Marsh v. Alabama*, unduly constrained the government's power by striking down even facially neutral laws.[116] Critics also argued that decisions like the one in *Murdock* were unprincipled, because they suggested—but surely could not mean—that the First Amendment disallowed the taxation of any constitutionally protected expression.[117]

These critiques had merit. The Court did in fact struggle a great deal to identify principled ways to limit the reach of decisions such as *Murdock* and *Marsh v. Alabama*[118]—and for good reason. In an economically and politically unequal society like the United States, many—perhaps most—laws will have a disparate impact on the poor and the powerless. This helps explain why, by the 1950s, the

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116. *See, e.g.*, Jones v. City of Opelika, 319 U.S. 105, 118 (1943) (Reed, J., dissenting) (criticizing *Murdock* for invalidating the license tax law notwithstanding the fact that there was "no evidence . . . to show the amount [was] oppressive," nor was the tax "unequal[ly] . . . levied on the activities of distributors of informatory publications," nor any evidence of "an improper application by a city, which resulted in the arrest of Witnesses and failure to enforce the ordinance against other groups"); *Struthers*, 319 U.S at 154-55 (Jackson, J., dissenting) (criticizing the decision to strike down a municipal ordinance banning door-to-door solicitation because, unlike a law that "prohibit[ed] the distribution of literature, while permitting all other canvassing," it was "not discriminatory" but merely "protected [residents of the town] from the annoyance of being called to their doors to receive printed matter"); W. Va State Bd. of Educ. v. Barnette, 319 U.S. 624, 654 (1943) (Frankfurter, J., dissenting) (arguing that the majority's decision to strike down a compulsory flag-salute law was wrong because the First Amendment required that "no religion shall either receive the state's support or incur its hostility" but did not require the invalidation of all "non-discriminatory law[s] that [] may hurt or offend some dissident view").

117. *See, e.g.*, *Opelika*, 319 U.S. at 129-30 (Reed, J., dissenting) ("Can it be that the Constitution permits a tax on the printing presses and the gross income of a metropolitan newspaper but denies the right to lay an occupational tax on the distributors of the same papers? Does the exemption apply to booksellers or distributors of magazines or only to religious publications? And if the latter to what distributors? Or to what books? Or is this Court saying that a religious practice of book distribution is free from taxation because a state cannot prohibit the 'free exercise thereof' and a newspaper is subject to the same tax even though the same Constitutional Amendment says the state cannot abridge the freedom of the press?" (footnote omitted)); *see also* Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1973-76 (2016) (discussing the serious concerns Justice Reed and other members of the Court raised about the expansiveness of the rule announced in *Murdock* and similar cases).

118. *See* Kessler, *supra* note 117, at 1977-85 (discussing the difficulties that the Court faced after it opened the "Pandora's Box" of the license-tax cases and its ultimate retreat from the principle it announced in *Murdock*); *see also id.* at 1981 (noting that the "Supreme Court gradually marginalized the *Marsh* doctrine").

Court evinced much less willingness to strike down facially neutral laws that had a disparate impact on the "little people."[119]

Nevertheless, throughout the 1960s, the Court continued to employ a functional rather than a formal conception of First Amendment neutrality: when assessing whether a given regulation threatened the equal status of a particular creed or class or party, the Court did not only look at the text of the law, but also at the economic, social, and political context in which it operated.[120] The result was a body of law that paid more attention than contemporary First Amendment law to how speech regulations effectively disfavored marginalized speakers and groups, but paid much less attention to the formal question of whether a law made content-based distinctions on its face.[121]

C. The Formalist Neutrality Rule

It was only in the 1970s that the Court embraced the much more formal neutrality rule that organizes the contemporary First Amendment cases. Our current understanding of the First Amendment neutrality principle is of recent origin, just as Campbell argues. In fact, the contemporary First Amendment neutrality principle may be somewhat *more* recent than Campbell suggests. This is because, as I suggested in Part I, it is not at all obvious that *Stanley v. Georgia*, *Street v. New York*, or any of the other Warren Court decisions that Campbell uses as evidence of the shift from toleration to neutrality articulated a meaningfully different conception of First Amendment equality than prior cases had—or certainly not a different conception the Court was willing to embrace consistently.[122] But *Mosley*, and the other Burger Court decisions that followed from it, did articulate something new. As Paul Stephan notes,

> The principle that the Constitution forbids government discrimination against the expression of particular messages or ideas . . . was not new [when the decision was handed down]. . . . On the other hand, the notion that the Constitution with equal force forbids distinctions based

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119. *Martin*, 319 U.S. at 146. For a good example of the Court's retreat from consideration of disparate effects, see the majority opinion in *Kovacs v. Cooper*, 336 U.S. 77 (1949), as well as Justice Black's scorching dissent, *id.* at 98 (Black, J., dissenting).

120. *See* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2141-53 (2018) (discussing the many Warren Court cases that "pushed strongly against a formalist conception of the First Amendment equality guarantee").

121. *Id.* at 2140-53.

122. *See supra* notes 53-62 and accompanying text.

> only on the subject matter of expression, or on any aspect of its content, was new.[123]

"No prior Court decision," Stephan adds, "ever had rested its result on the premise of absolute content neutrality."[124]

Even if we may quibble on the precise dating of the change, Campbell is therefore broadly correct when he points to the early 1970s as a period during which ideas about First Amendment equality changed significantly. But the change he identifies is wrong. It was not the Court's insistence in cases such as *Stanley v. Georgia* that mere offensiveness could not justify speech regulation that was new. What was new was the *Mosley* Court's apparent insistence that any law that made facial content distinctions violated the First Amendment neutrality principle, even when those distinctions did not reflect a belief in the offensiveness of that expression, or really any concern with the specific communicative harms of different messages.

As Paul Stephan noted, the "absolute content neutrality" rule that *Mosley* appeared to articulate, if "[t]aken literally [would] mean[] that governmental bodies must disregard all differences in the content of expression and therefore must treat all speech as indistinguishable."[125] In fact, the Court wrestled a great deal with how broadly to apply the *Mosley* principle. It took years for the Court to embrace the broad, but still far from absolute, interpretation of it that it employs today.[126] As a result, it is somewhat simplifying the historical narrative to assert that a new conception of First Amendment neutrality emerged fully born in the 1970s.

Nevertheless, there is no question that beginning in the 1970s, and continuing to this day, the Court began to interpret the requirement that the government respect the "equality of status in the field of ideas" of its citizens and subjects much more formalistically than it had previously.[127] Rather than exploring whether, in practice, speech regulations disparately affected the ability of differently positioned groups to engage in protected expression, the Court made clear that the First Amendment neutrality principle was violated only by laws that either on their face, or as a product of their legislative purpose, treated some speakers differently than others because of the content of their speech.[128] The Court

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123. Stephan, *supra* note 19, at 203-04.

124. *Id.* at 204.

125. *Id.*

126. For a detailed account of the twists and turns of the Court's jurisprudence, see Lakier, *supra* note 93, at 238-52.

127. Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).

128. *Id.* at 239.

adopted, in other words, what I have called in an earlier work an "anticlassificatory" view of First Amendment neutrality.[129]

The new approach had clear advantages over the prior and somewhat uncertain functionalist rule, insofar as its boundaries were easier to delimit. Whether or not the law disparately burdened the protected expression of religious minorities, the poor, or the propertyless no longer factored into the analysis.[130] This made it much easier for courts to determine, in principle at least, what laws were and were not neutral.

The *Mosley* rule had clear disadvantages too, however. For one thing, it failed to provide robust protection to groups who, because of broader economic and political inequalities in society, were singularly disadvantaged by facially neutral speech regulations.[131] Its demand for absolute content neutrality also proved—and continues to prove—quite difficult to justify by reference to the democratic and expressive purposes that the First Amendment is supposed to further.[132] For this reason, lower courts frequently resisted a broad interpretation of the absolute content neutrality principle. The result was, in practice, a great deal of judicial confusion about how broadly the rule applied and what it required.[133]

These problems with the *Mosley* rule and its evolution in more recent cases such as *Reed v. Town of Gilbert*, point to another reason why Campbell's framing of the historical narrative is problematic.[134] To frame the story in terms of the shift from toleration to neutrality implies that the story is a progressive one: that what Campbell describes as the "modern" conception of First Amendment neutrality reflects the fulfillment of a promise that was implicit, but imperfectly realized, before.[135] This is not what Campbell intends, clearly.[136] But it is a consequence of the fact that most discussion of the relationship between regimes of

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129. *Id.* at 236.

130. *Id.*

131. *See* Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 589-616 (2006) (describing spatial tactics that appear facially neutral, but in practice can alter how protest and dissent is publicly expressed).

132. *See* Lakier, *supra* note 93, at 277-78; Stephan, *supra* note 19, at 207.

133. *See* Brief of the Knight First Amendment Institute at Columbia University and Professor Genevieve Lakier as Amici Curiae in Support of Petitioner at 10-15, City of Austin v. Reagan Nat'l Advert. of Austin, Inc., No. 20-1029 (U.S. Aug. 20, 2021) (describing judicial confusion over how to apply the content-neutrality rules).

134. *See generally* Reed v. Town of Gilbert, 576 U.S. 155 (2015) (holding that laws employing content distinctions are necessarily content based, irrespective of a given law's purposes).

135. Campbell, *supra* note 8, at 868-69.

136. *Id.* at 874 (explaining that the purpose of Campbell's history is to challenge "the notion that neutrality was baked into the core of the First Amendment and the very definition of rights from the beginning").

toleration and neutrality assume that the former is, as Steven D. Smith puts it, a "kind of halfway house" to the latter, an early stage in the development of liberal politics, "praiseworthy perhaps for what it departs from and leads to, but unsatisfactory as a permanent abode."[137]

In fact, it is far from obvious that the highly formalist neutrality rule the Court has embraced in recent decades is a necessary progression from what came before. Had President Nixon not been able to appoint four new Justices to the Court, the First Amendment neutrality principle might look very different than it does today.[138] By the same token, a different makeup of the Court could easily steer the doctrine away from its current, formalist neutrality rules. There is nothing inevitable about how contemporary First Amendment law doctrinally vindicates the equality concerns woven into the American free-speech tradition.

Although Campbell clearly means to disavow what he calls "liberal essentialism," the effect of narrating the story he tells as a shift from tolerance to neutrality is to obscure how contested the idea of First Amendment equality has been in the past, and continues to be.[139] It obscures, consequently, the fundamentally political stakes of debates about the meaning of the First Amendment neutrality principle, and about what kinds of equality the Constitution requires the government to privilege and protect.

CONCLUSION

In recent years, frustration with how insensitive current free-speech law, and current constitutional law generally, tends to be towards many of the economic, social, and political inequalities that impact the exercise of constitutional rights has led a number of scholars to argue that courts should dispense with neutrality as an organizing doctrinal principle of American public law. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski, and K. Sabeel Rahman have argued, for example, that although "[n]eutrality is a valid goal for the law in certain circumstances (such as fact-finding in criminal prosecutions)," as an organizing principle of constitutional law, it fails to further democratic or egalitarian ends and should be resisted.[140] In a somewhat different context, Laura Weinrib

137. Smith, *supra* note 86, at 306.

138. *See generally* MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT (2016) (describing the significant doctrinal changes instituted by the Burger Court).

139. Campbell, *supra* note 8, at 874.

140. *See* Britton-Purdy et al., *supra* note 13, at 1823-27; *see also* Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2175-76 (2018) (arguing that "the jurisprudential goal of enforcing state neutrality via the First Amendment is a chimera").

has argued that the embrace by the American Civil Liberties Union (ACLU) of a values-neutral conception of First Amendment neutrality in the early part of the twentieth century enabled the "taming of free speech."[141] By this she means that the embrace of a strong neutrality principle by the ACLU, and later, by the courts, deradicalized the First Amendment and made it less useful than it might otherwise have been as a tool of progressive redistribution and egalitarianism.[142] The suggestion here, of course, is that a less neutral First Amendment might have been a better and stronger instrument of class struggle and, ultimately, democracy than the First Amendment that actually exists.

Campbell argues that the history he presents in *The Emergence of Neutrality* provides support for these and other critiques. This kind of history, he contends,

> can be especially valuable in opening our eyes to new ways of thinking about topics that we otherwise tend to view uncritically. Today, our understandings of expressive freedom and of rights are so infused with ideas of neutrality that those who dissent from the modern orthodoxy are often portrayed as challenging the very concept of free speech or the very concept of rights. Tracing doctrinal genealogies from an internal standpoint can . . . free our minds from this type of liberal essentialism.[143]

In this Response, I have suggested that the historical evidence is more complex. Although Campbell is entirely correct to argue that the current content-neutrality rules are not hardwired into the doctrine, and are by no means an inevitable consequence of a basic commitment to free speech, the historical evidence he provides suggests that some version of a neutrality rule has played an important role in free-speech law from its beginning.

This does not mean that the critics of the current neutrality rules are wrong. As I suggested in Part II, there is much to dislike about the current rules. But it is too simple to argue that the idea of the neutral state is the problem. So long as we continue to believe that it is important for democratic government that the content and character of democratic public discourse not be controlled or manipulated by the government, a concept of neutrality will have to be a part of free-speech law. This is because, given how pervasively the government orders the public sphere, it is impossible to imagine a world in which the government is not able to use either its soft or hard powers to influence what gets said (or not said) as part of public discourse. And this has, to a greater or lesser degree,

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141. *See* WEINRIB, *supra* note 13, at 19-13.

142. *Id.*

143. Campbell, *supra* note 8, at 874 (footnote omitted).

always been true — which is why neutrality has always played an important role in American free-speech law.

What the historical evidence that Campbell provides makes clear, however, is that what neutrality requires is not itself fixed and determinate. It is instead an ideal that can be, and as I have shown, has been interpreted in multiple ways, in response to differing conceptions of democracy, the political community, and the role and responsibilities of courts. This suggests that those who are dissatisfied with the current state of First Amendment law should think of neutrality not as a problem to be avoided, but as the terrain of struggle.

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