



UNIVERSITAT DE
BARCELONA

Reframing Expressive Freedom

Free Speech Libertarianism, Republicanism, and the Political Economy of Communication

David Guerrero Martín

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Reframing Expressive Freedom

Free Speech Libertarianism, Republicanism, and the Political
Economy of Communication

PhD thesis

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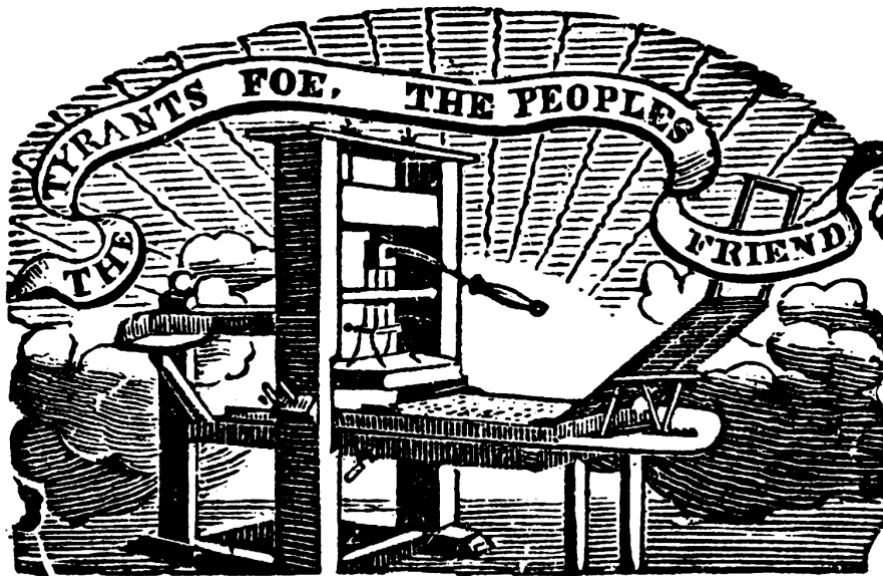
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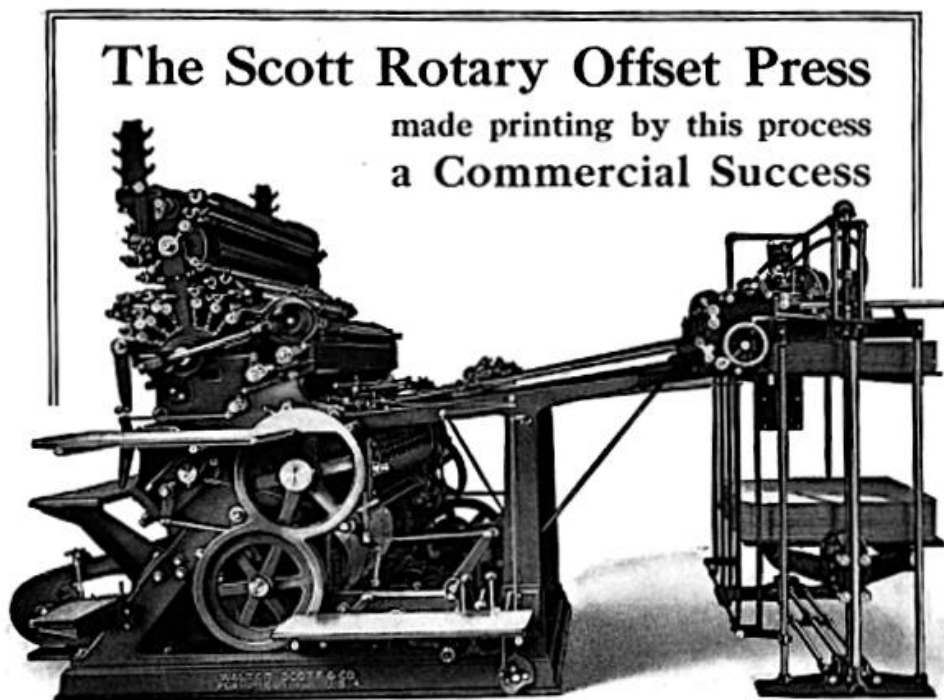
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Indeed, in nature nothing loves solitude and, as Aristotle says, we are all taken by nature to communication. If somebody, says Cicero, rose to heaven and saw the nature of the world and the beauty of the stars, the sight of such beauty would not be pleasing without a friend. (...) Therefore, given that human societies have been established for the purpose of bearing each other's burdens and that, among all societies, civil society is the one in which men most easily fulfill their needs, it follows that community is, so to speak, a most natural communication very convenient to nature.

Francisco de Vitoria, *De potestate civili*, Part I, §4



Engraving of a printing press (late eighteenth century, United States).
The inscription reads: "The tyrant's foe, the people's friend."



Advertising of a rotary press (*The Graphic Arts*, 4, n° 4, 1913).

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Abstracts

ENGLISH

Title:

Reframing Expressive Freedom: Free Speech Libertarianism, Republicanism and the Political Economy Of Communication.

Abstract:

The aim of this thesis is to reframe free speech, indicating the importance of the political economy of communications as a way integrate the analysis of expressive freedoms with the analysis of its empirical preconditions. Thus, the research is a critique of what the author calls the “free speech libertarian framework”: a common ground shared across the political spectrum and in different disciplines that identifies expressive freedoms as the epitome of negative rights against state interference.

Part I of the thesis historicizes the emergence and consolidation of this framework in the United States during the first half of the twentieth century. Interwar advocates of free speech championed negative expressive rights, emphasizing freedom from government intervention to unleash the truth-seeking potential of rational debate. In doing this, they projected back in history their ideas, contributing to creating a cross-centuries “libertarian tradition” of free speech. However, evolving communication technologies unraveled new forms of domination within media markets other than state overreach, prompting awareness about the risks of private power in the normative analysis of free speech. Much of this political-economic awareness, though, was lost during the second half of the twentieth century. A case study on John Rawls serves to show the pervasive influence, but also the practical limitations, of the free speech libertarian framework.

Part II discusses neorepublicanism as an alternative to the free speech libertarian framework. The idea of freedom as non-domination offers a promising path to integrate the political economy of communications in the reflection on expressive freedoms, because it scrutinizes power dynamics and emphasizes the role of public institutions in safeguarding liberty against threats from both public and private actors. However, this approach looks less promising when free speech is undermined by processes that are not easily imputable to the actions and intentions of specific agents. That is, cases of “structural domination” in communication give reasons to amend Philip Pettit’s neorepublican ideal of “protected speech.” Finally, some of these issues are explored in the context of contemporary media and advertising markets. The thesis proposes that non-dominated free speech and democratic decision-making require challenging the commodification of human attention in the public sphere. This involves going beyond protecting and resourcing “exit” strategies, as is often proposed by neorepublicans.

Key words:

Freedom of expression, toleration, mass media, political economy, structural domination, John Rawls, republicanism, liberalism, libertarianism.

NEDERLANDS

Titel:

Het herkaderen expressieve vrijheid: libertarisme van het vrije woord, republicanisme en de politieke economie van communicatie.

Samenvatting:

Het doel van dit proefschrift is om de vrijheid van meningsuiting te herdefiniëren. Het proefschrift duidt het belang van de politieke economie van communicatie als een manier om de analyse van expressieve vrijheden te integreren met de analyse van hun empirische randvoorwaarden. Het onderzoek is daarmee een kritiek op het “libertarische raamwerk van het vrije woord”: een van links tot rechts en door verschillende disciplines gedeeld raamwerk dat expressieve vrijheden begrijpt als negatieve rechten op vrijheid van staatsinmenging.

Deel I van het proefschrift beschrijft het ontstaan en de consolidatie van dit raamwerk in de Verenigde Staten gedurende de eerste helft van de twintigste eeuw. Tijdens het interbellum verdedigden voorstanders van de vrijheid van meningsuiting negatieve expressieve rechten, waarbij ze de nadruk legden op de vrijheid van overheidsinterventie om daarmee de weg vrij te maken voor rationeel debat als instrument voor waarheidsvinding. Ze projecteerden hun ideeën ook terug in de geschiedenis en droegen zo bij aan de creatie van een eeuwenoude “libertaire traditie” van vrije meningsuiting. Door de ontwikkeling van communicatietechnologieën ontstonden naast overheersing door de staat echter nieuwe vormen van overheersing op de mediamarkten, waardoor men zich bewust werd van de risico's van particuliere macht in de normatieve analyse van het vrije woord. Veel van dit politiek-economische bewustzijn ging verloren in de tweede helft van de twintigste eeuw. Een case study over John Rawls toont de alomtegenwoordige invloed, maar ook de praktische beperkingen, van het libertarische raamwerk van het vrije woord.

Deel II bespreekt het neorepublicanisme als alternatief voor het libertarische raamwerk van het vrije woord. Het idee van vrijheid als "afwezigheid van overheersing is een veelbelovend middel om de politieke economie van communicatie te integreren in de reflectie op expressieve vrijheden, omdat het machtsdynamieken onder de loep neemt en de rol benadrukt van van publieke instituties in het beschermen van vrijheid tegen bedreigingen van zowel publieke als private actoren. Deze benadering ziet er echter minder veelbelovend uit wanneer de vrijheid van meningsuiting wordt ondermijnd door processen die niet gemakkelijk toe te schrijven zijn aan de acties en bedoelingen van specifieke actoren. Met andere woorden, gevallen van “structurele dominantie” in communicatie geven aanleiding om Philip Pettit's neorepublikeinse ideaal van “beschermde meningsuiting” bij te stellen. Tot slot worden enkele van deze kwesties onderzocht in de context van hedendaagse media- en reclamemarkten. Het proefschrift betoogt dat niet-gedomineerde vrijheid van meningsuiting en democratische besluitvorming vereisen dat de commodificatie van menselijke aandacht in de publieke sfeer wordt bestreden. Dit houdt in dat we verder moeten gaan dan het beschermen en financieren van “exit”-strategieën, zoals vaak wordt voorgesteld door neorepublikeinen.

Sleutelwoorden:

Vrijheid van meningsuiting, tolerantie, massamedia, politieke economie, structurele overheersing, John Rawls, republicanisme, liberalisme, libertarisme.

CATALÀ

Títol:

Reemmarcar la llibertat expressiva: llibertarianisme de la llibertat d'expressió, republicanisme i economia política de la comunicació.

Resum:

L'objectiu d'aquesta tesi és reemmarcar el debat sobre la llibertat d'expressió, assenyalant la importància de l'economia política de les comunicacions com a manera d'integrar l'anàlisi de les llibertats expressives amb l'anàlisi de les seves precondicions empíriques. Així, la recerca critica el que l'autor denomina el "marc llibertarià de la llibertat d'expressió": un terreny comú compartit al llarg de l'espectre polític i en diferents disciplines que identifica les llibertats expressives com el paradigma dels drets negatius enfront de la interferència estatal.

La Part I situa històricament el sorgiment i la consolidació d'aquest marc als Estats Units durant la primera meitat del segle XX. Els defensors de la llibertat d'expressió en el període d'entreguerres advocaven per drets expressius negatius, emfatitzant la llibertat respecte a la intervenció estatal i justificant-la per les seves funcions epistèmiques. En fer això, van projectar les seves pròpies idees en la història, contribuint a crear una "tradició llibertariana" de les llibertats expressives. No obstant això, el desenvolupament tecnològic va revelar noves formes de dominació en els mercats de la comunicació diferents del poder de l'estat, la qual cosa va generar anàlisis normatives de la llibertat d'expressió sensibles al poder privat. Gran part d'aquesta consciència políticoeconòmica, però, es va perdre durant la segona meitat del segle XX. Un estudi de cas sobre John Rawls serveix per a mostrar la influència generalitzada, però també les limitacions pràctiques, del marc llibertarià de la llibertat d'expressió.

La Part II estudia el neorrepblicanisme com a alternativa al marc llibertarià de la llibertat d'expressió. La idea de la llibertat com a no-dominació ofereix un camí prometedor per a integrar l'economia política de les comunicacions en la reflexió sobre les llibertats expressives perquè identifica dinàmiques de poder i emfatitza el paper actiu de les institucions públiques en la protecció de la llibertat enfront d'amenaques d'actors públics i privats. No obstant això, aquest enfocament sembla menys prometedor quan la llibertat d'expressió es veu soscavada per processos que no són fàcilment atribuïbles a les accions i intencions d'agents específics. És a dir, els casos de "dominació estructural" en la comunicació donen motius per a esmenar l'ideal neorrepblicà d'"expressió protegida" proposat per Philip Pettit. Finalment, alguns d'aquests problemes s'exploren en el context dels mercats de comunicació i publicitat contemporanis. La tesi proposa que la no-dominació en matèria de llibertat expressiva i la presa de decisions democràtiques conviden a desafiar la mercantilització de l'atenció humana en l'esfera pública. Això implica anar més enllà de protegir i proporcionar estratègies de "sortida", com sovint proposen els neorrepblicans.

Paraules clau:

Llibertat d'expressió, tolerància, mitjans de comunicació, economia política, dominació estructural, John Rawls, republicanisme, liberalisme, llibertarianisme.

CASTELLANO

Título:

Reenmarcar la libertad expresiva: libertarianismo de la libertad de expresión, republicanism y economía política de la comunicación.

Resumen:

El objetivo de esta tesis es reenmarcar el debate sobre la libertad de expresión, señalando la importancia de la economía política de las comunicaciones como forma de integrar el análisis de las libertades expresivas con el análisis de sus precondiciones empíricas. Así, la investigación critica lo que el autor denomina el “marco libertario de la libertad de expresión”: un terreno común compartido a lo largo del espectro político y en diferentes disciplinas que identifica las libertades expresivas como el paradigma de los derechos negativos frente a la interferencia estatal.

La Parte I sitúa históricamente el surgimiento y la consolidación de este marco en los Estados Unidos durante la primera mitad del siglo XX. Los defensores de la libertad de expresión en el período de entreguerras abogaban por derechos expresivos negativos, enfatizando la libertad respecto a la intervención estatal y justificándola por sus funciones epistémicas. Al hacer esto, proyectaron sus propias ideas en la historia, contribuyendo a crear una “tradición libertaria” de las libertades expresivas. Sin embargo, el desarrollo tecnológico reveló nuevas formas de dominación en los mercados de la comunicación distintas del poder del estado, lo que generó análisis normativos de la libertad de expresión sensibles al poder privado. Pero gran parte de esta conciencia político-económica se perdió durante la segunda mitad del siglo XX. Un estudio de caso sobre John Rawls sirve para mostrar la influencia generalizada, pero también las limitaciones prácticas, del marco libertario de la libertad de expresión.

La Parte II estudia el neorepublicanismo como alternativa al marco libertario de la libertad de expresión. La idea de la libertad como no-dominación ofrece un camino prometedor para integrar la economía política de las comunicaciones en la reflexión sobre las libertades expresivas porque identifica dinámicas de poder y enfatiza el papel activo de las instituciones públicas en la protección de la libertad frente a amenazas de actores públicos y privados. Sin embargo, este enfoque parece menos prometedor cuando la libertad de expresión se ve socavada por procesos que no son fácilmente atribuibles a las acciones e intenciones de agentes específicos. Es decir, los casos de “dominación estructural” en la comunicación dan motivos para enmendar el ideal neorepublicano de “expresión protegida” propuesto por Philip Pettit. Finalmente, algunos de estos problemas se exploran en el contexto de los mercados de comunicación y publicidad contemporáneos. La tesis propone que la no-dominación en materia de libertad expresiva y la toma de decisiones democráticas invitan a desafiar la mercantilización de la atención humana en la esfera pública. Esto implica ir más allá de proteger y proporcionar estrategias de “salida”, como a menudo proponen los neorepublicanos.

Palabras clave:

libertad de expresión, tolerancia, medios de comunicación, economía política, dominación estructural, John Rawls, republicanism, liberalismo, libertarianismo.

Defensible propositions

(*Stellingen*)

According to the PhD regulations of the University of Groningen (art. 4.2), candidates must submit at least six “academically defensible propositions.” This thesis contains the following:

1. A set of assumptions framing expressive liberties as essentially negative rights against state interference were consolidated in the United States during the 1920s. They became part of the mid-twentieth century political and scholarly consensus in disciplines such as constitutional law, intellectual history, media policy, or the sociology of communication.
2. This contributed to a loss of political-economic awareness in the study and advocacy of expressive liberties during the second half of the twentieth century. That is, the relationship between expressive liberties and their empirical preconditions was obscured. In this vein, compared to the cross-ideological demise of “laissez faire” as a feasible regulative ideal in the economy, “laissez faire” was kept as a suitable model in the realm of expressive liberties.
3. In the late 1970s, protective First Amendment jurisprudence from the interwar period was mobilized by the US Supreme Court to argue for a broader constitutional libertarianism. In *Political Liberalism*, John Rawls used and modified his earlier views on justice to explain what was wrong with the unleashed free speech libertarianism of the Court. However, his historical account of toleration still reproduces many of the mid-century libertarian assumptions on expressive freedom.
4. Neorepublicanism is an appropriate alternative to the free speech libertarian framework. It is able to integrate concerns deployed by free speech libertarians, and does so through a less biased, more parsimonious, and more institutionally realistic approach to expressive freedom.
5. In this sense, Philip Pettit’s neorepublican concept of “protected speech” offers a promising alternative to common liberal-libertarian intuitions on free speech. However, it carries with it the problems of neorepublicanism concerning structural domination. Unless amended, this account of “protected speech” is at best ambivalent about identifying and dealing with threats to liberty that are not imputable to the will and power of particular agents.
6. In light of the effects that advertising markets generate on mass communication, the neorepublican strategy of resourcing and protecting “exit” options from these markets will fall short. Since the problem with these markets is not agent-level domination but the commodification of the attention of audiences, neorepublicans should consider other strategies to make today’s political economy of communication compatible with free, democratic self-government.

Acknowledgments

Honoring one of the major claims of this research, allow me to devote a few pages to the set of material resources and social relationships that have supported my writing—a few words, so to speak, to the political economy behind this thesis.

The way my parents have looked after me explains much of the person I am today. The attention of Encarna and José, from their smallest caress to their unconditional material assistance, has allowed me to go out into the world knowing that my back is always covered. My sister, María, has come of age during my doctoral studies, and the fact that she has allowed me to know her better during these years has taught me a ton of things about myself and others that (I think) have made me a better person and social scientist than when I started. Probably, if it were not for all the time I spent with Carmen and Juan, my grandparents, I would feel rootless today. Whenever they show how proud they are, express their love, or convey their life experience, they help me identify, as no one has ever done, where I come from—which is, I guess not by chance, a place that looks a lot like where I want to be.

A second, chosen (or rather fortunately found) family explains the researcher I am today too. I mean the partially overlapping crowds of the magazine *Sin Permiso* and GREECS, my research group at the University of Barcelona. Their institutional support and the political and scientific traditions they embody shape this thesis to the core. I have read most of what they have published, and from them I have learned to value interdisciplinarity, the *longue dureé* and that seeking truth must be an autotelic activity. The frequent footnotes that mention them or their work during the thesis are not enough to acknowledge this debt. Let me mention them in the order I met them.

Antoni Domènech's teaching and research, including the way his colleagues have transmitted it to me, have left an indelible mark on me. I would like this project to be interpreted as an attempt to answer some of the questions he raised. Jordi Mundó's work introduced me to seventeenth-century England for the first time, which has been the locus of my deepest fascinations since then (the historical part of this project was originally devoted to early modern English politics). Most importantly, his research sets the standard that I want my own work to meet. I have attempted to do here with expressive liberties the archeology that Jordi does with property rights. A main theme of such archeology is that guaranteeing freedom involves securing its material preconditions, and the person who has made this argument most clearly to me is Daniel Raventós. He was also who, supervising my undergraduate dissertation, put together the words "republicanism" and "free speech" in my mind for the first time; Dani helped me, in other words, identify the mountain that I was about to climb for the next six years.

At Dani's suggestion, I read Bru Laín's doctoral thesis very soon, and that explains much of why the American Founding is an occasional point of

reference in this project. Bru treated me as an equal from the outset, which gave me self-confidence and a strong feeling of being part of a team (to his credit, this is a very scarce virtue in academia!). Afterwards, I met Edgar Manjarín, who is the most curious person I know—it has been inspiring to have him around while I was learning how to develop my own curiosity. His friendship has made much easier to cultivate side academic interests that have made this project richer and much more mine. Having Edgar’s approval after he read parts of the final draft made me know I was on the right track. Lastly, María Julia Bertomeu has been monitoring the progress of the thesis since the beginning, which made me feel safer. Moreover, her cross-centuries approach to natural law and her views on how property rights are built on essentially public-common resources and norms have given my arguments a historical-philosophical coverage that turned out to be determinant, to my own surprise, in my reading of John Rawls and in the normative proposals sketched in last chapter. They all have read drafts and papers that later became the thesis.

I have skipped two people from this academic family tree that deserve special mention. The first is Julio Martínez-Cava, who has been my best intellectual ally and friend during these years. Working with him has been fun and stimulating. The following pages try to mimic the way he uses social history to account for broad conceptual changes in political thought. In our joint ventures (and there are many) I have always felt that we could do big things. His passion for knowledge is contagious, which has made me believe that the otherwise lonely job of being a researcher *must* be a cooperative undertaking. I love whenever we read each other, and his ideas, comments, and work appear at many points of the text. Now that I have finished this thing, I hope to prod him into writing together again soon.

The second is David Casassas, one of my supervisors. His first book was one of the first monographs on republicanism I read, and I still return to it in search of arguments on the relationship between economy and society that left enduring models in my way of seeing many of the issues below. Additionally, I intend this project to be an exercise in what he calls the “trojan” strategy: instead of rejecting the Western canon as eminently incompatible with today’s emancipatory ideas, David has called for challenging received narratives that have distorted the canon—and doing so from within. The notion of recovering the lost emancipatory content of ideas and institutions that today only look like pretexts to sustain injustice is a very fruitful strategy of doing social science that I owe to him; very fruitful indeed to approach free speech! Additionally, I am moved by how he champions my work since day one. This has given me the biggest morale boost that a doctoral student could ever ask for. His always explicit support has contributed to keep me sane all along.

David encouraged me to establish academic relationships outside of our Barcelona group. Thus, thanks to him I wrote to Lisa Herzog, also the supervisor of this thesis. Around five years ago I emailed her from out of nowhere with a half-baked PhD proposal. I find it very illustrative of her huge intellectual generosity that she was willing to know me, read my work, and support me in grant applications. From the day she started to have a say on

this project, I noticed how it became sharper. Lisa has trained me in the precious skill of identifying what is salient in an argument and what is not. She has made me a better writer by urging me to send very early outlines of chapters and drafts and by commenting and editing them profusely. Having her taking my arguments seriously and connecting them to the empirical world has been an incredible experience. On a different level, any reader familiar with her work will notice that her views structure some argumentative steps in the following pages. Among other things, I want this thesis to deepen our understanding of what she calls the “epistemic seduction” of markets. As I was finishing this thesis and Lisa’s latest book came out, it became clear to me that her institution-centered normative work shows us an important way to make progress in political and social thought. Now that I see my finished thesis, I wish I could have spent more time practicing this approach.

Finally, both Lisa and David have written a lot on markets, specifically on the issue of what is required to enjoy liberty within them and from them (which should not be surprising coming from two superb Adam Smith scholars). To the extent that political economy is one of the main characters of this project, David and Lisa’s voice is present in all of the chapters below. For these and many other reasons, they are exemplary supervisors: evenhanded in their criticisms, nurturing my autonomy, and never forgetting that suitable doses of praise are an essential part of a constructive review. They are, each in their own way, role models of what I would like to become as an academic. I feel so lucky to have had access to their attention during these years.

I want to mention other people who pitched in by reading my manuscripts. Teresa Bejan reviewed several drafts during a research stay under her supervision at Oxford University and so did Geertje Bol. Charles Girard and Clotilde Nouët invited me to their Egalibex project in Lyon; I got there also thanks to Christopher Hamel, who has been checking my progress as a member of my supervisory committee. Pablo Scotto thoroughly read and made comments to many pages of the final draft and invited me to share my results at the Philosophy of Law Seminar at the University of Barcelona. Víctor Méndez supervised my master’s dissertation, a steppingstone for this project. Other senior scholars have contributed to this thesis at different stages by sharing their thoughts on some of its arguments, making me feel that I could say something relevant: Ricardo García Manrique, Andreas Mulvad, Julio César Guanche, Yannick Bosc, Ben Lewis, and Camila Vergara. Mike Gregory did this too, while also becoming a friend during some exceptionally isolated months at Groningen. Janine Weeting made things a lot easier as well when I was there.

On a more personal level, I would not have dared to write this in English were it not for Alexandra Constantin. Her compassionate attitude toward the world also explains many of my research concerns today. Aura Roldán also contributed to this with many conversations in which I was silently learning. They, with Magalí Daich, Vicente Esteban, Nika Pona, and Álvaro Arizaleta were my home when all this started. Before them, Alejandro Gómez was the

one who made me feel at home, even when I wanted to go far away. With Pol Tramuns I discovered that politics is about communication, and vice versa: his friendship has determined the topic of this research. All of them, but particularly Jorge Juan Fernández, schooled me into loving life, which turned out to be a requirement to love and carry out my work.

My final words are for Andrea Pérez. Her involvement in this thesis should be justly described as a combination of all the things I mentioned above. She is the most intellectually challenging person I have ever met. It is by living with her that I got to recognize the effects that social norms have on the structure of communicative interactions, not to mention how she frequently outsmarts me when we discuss politics. For these and other reasons she has thoroughly transformed the original project. She is a terrific coauthor, and we have thought together about the economics of mass media, cultural politics, the goods and burdens of community, the history of socialism...—all of them topics part of this thesis. With these words I would like to contribute, in return, to make her understand how amazing she is. She has been just in front of me most of the time, on the other side of our desk, smiling and frowning while writing her thesis as I was finishing mine. But what I have enjoyed the most in this period has been taking care of each other and our *oikos*.

Certainly, Andrea says acknowledgments track essential community obligations: nurturing mindful interactions, generating open-heartedness... Since she has convinced me that these are essential virtues in a republican society of free and equals, the readers should blame her for these pages taking too long. One of the best things about concluding them is that I will now have the time to give her a cuddle.

Santa Coloma de Gramenet, January 2024

INTRODUCTION

Before and after the free speech libertarian framework

Others apart sat on a hill retired,
In thoughts more elevate, and reasoned high
Of Providence, Foreknowledge, Will, and Fate—
Fixed fate, free will, foreknowledge absolute,
And found no end, in wandering mazes lost.
Of good and evil much they argued then,
Of happiness and final misery,
Passion and apathy, and glory and shame:
Vain wisdom all, and false philosophy!—
Yet, with a pleasing sorcery, could charm
Pain for a while or anguish, and excite
Fallacious hope, or arm th' obdured breast
With stubborn patience as with triple steel.

John Milton¹

This thesis is written against an idea. In a nutshell, this idea is that free speech and other expressive freedoms are mostly, or essentially, negative liberties. I write against the assumption that free speech, religious toleration, liberty of thought or freedom of the press stand on an inverse relationship with political power—that if the former are to grow, the latter must shrink, and vice versa. This view is prevalent in much research and public discourse and acts as a common ground that frames explanations of what expressive liberties were, are, or should be. I will call the set of historical, conceptual, and normative intuitions that structure this widespread view the “free speech libertarian framework.” My intention is to capture the fact that even if “free speech libertarianism” has been much criticized on normative grounds, its explanatory worth remains unquestioned—hence its role as a “framework” that sets the starting suppositions and the boundaries of scholarly and political conversations, often inadvertently. Since I consider this libertarian framework unsatisfactory for addressing the past and present realities of expressive freedoms, my project should be interpreted, above all, as a call for reframing free speech.

One of the major problems of the free speech libertarian framework is that it leads to a detachment of the normative reflection on expressive freedoms

¹ John Milton, *Paradise Lost*, II: 557–569. The edition I use is *El paraíso perdido*, trans. Enrique López Castellón, Edición bilingüe (Abada, 2005). I have modernized the spelling of all quotes.

from the reflection about the empirical background conditions in which these freedoms are practiced. In an extreme version of this view, a right to freedom of expression only requires the absence of coercion: abolish censorship and you will have a free press; abolish religious persecution and you will have toleration, etc. The rights upholding these liberties, the argument goes, must be negative rights that prevent interferences by the state in these areas. However, as we will see, being able to freely communicate ideas using a printing press, or freely communicating one's religious views requires something else than constitutional provisos. This Introduction (§I) starts by developing a very general way of conceptualizing this "something else" that communication requires and that I will call "political economy" and conceive it as unavoidably connected with expressive liberties.

The second section provides an overview of the historical pedigree of the social and political-economic awareness in the analysis of freedom that I defend (§II). I will argue that the notion of citizenship that structures many of our insights about rights is an egalitarian, distributively demanding institution that invites us to take very seriously the political economy of communication when examining the guarantee of expressive liberties.

In the third section I suggest that much of that historical lesson has been lost, and show how the "free speech libertarian framework" contributes to that erasure (§III). What makes this framework truly remarkable is its acceptance, if only for explanatory or descriptive purposes, by scholars and activists that want to defend, on a normative level, an anti-libertarian agenda for the public sphere. Thus, free speech libertarianism may be said to act as an unquestioned common ground, getting strengthened thanks to the many times conflicting sources that reproduce it. To emphasize this, I will present free speech libertarianism as an "interpretive conjuncture."

In the fourth section, I will delve into some of the interpretive and normative problems of the free speech libertarian framework (§IV). First, since free speech libertarianism disconnects expressive freedom from its empirical preconditions—ignoring them or taking them as given—it leads to the belief that past thinkers did the same (when, in fact, many of them did just the opposite). This produces a hermeneutical problem in the history of ideas, tilting the interpretation of past political thought towards libertarian positions. However, as I will argue, many of these thinkers did *not* take the preconditions of free and rational discussion as given; they held, on the contrary, that these conditions had to be created by using political power to transform society. Second, the free speech libertarian framework fosters a lack of historical awareness. Even assuming that the preconditions of free speech fortunately obtain at a particular moment in time, historical experience shows that they are highly volatile and vulnerable to socioeconomic and technological change. The lesson from the past, with great relevance for today, is more methodological than substantive, namely: that reflecting on, and struggling to realize, the preconditions of expressive freedoms is both a worthy scientific endeavor and a political agenda on its own terms.

I will then take the opportunity to make a clarificatory note on what I mean by “state interference,” and make explicit the political context of this research (§V). In the last section I give an overview of the structure of the thesis (§VI).

I. THE POLITICAL ECONOMY OF EXPRESSIVE LIBERTIES

On Liberty is arguably one of the most influential books in the Western contemporary imaginary on free speech. Its shadow looms large, as we will see, in the reconstructions of a liberal-libertarian tradition of expressive freedom. I am interested here in its first paragraph—a disclaimer in which John Stuart Mill demarcates the scope of applicability of all that he is going to say. First, he makes clear that the object of his attention is not freedom in a metaphysical sense, but only “Civil, or Social Liberty.” In justifying his interests, he narrows down the object of study a bit further. The question of liberty attracted his attention because, in the second half of the nineteenth century, “it presents itself under new conditions”—conditions, Mill adds limiting the scope even more, that affect only “more civilized” peoples.² This restricted approach to freedom resurfaces in what many readers will consider one of the leading passages of the essay. Thus, the first formulation of the so-called “harm principle” is curiously circumscribed: it applies only to “member[s] of a civilized community.”³ Put differently, Mill’s reflections on expressive liberties are unavoidably embedded in a concrete socio-historical setting, informed by the very particular empirical conditions he calls “civilization.” As he put it in an earlier text, this meant “the diffusion of property and intelligence, and the power of co-operation.”⁴ Without civilization, he said, there was little chance that humans would be able to improve themselves through “free and equal discussion.”⁵

What I want to emphasize is not so much the specific attributes that constitute “civilization” according to Mill, neither the ends of it—nor the much more controversial issue of which peoples and places lacked civilization in his view, and the imperial implications of this belief. For the moment, the point I want to stress is more methodological than substantive; more about *how* to think liberty than *what* it is or requires. I want to highlight that Mill’s normative study of expressive freedoms shows a significant awareness of the historical, political, social, and economic circumstances of freedom, of how empirical conditions make liberty flourish or decay. This is an awareness, in other words, of what we may aptly call the *preconditions* of freedom, because Mill made plain that, in the absence of civilization, “Liberty, as a principle, has no application.”⁶ With him, the first assumption of this thesis is that it is

² John Stuart Mill, *On Liberty* (1859), in *Collected Works of John Stuart Mill*, ed. John M. Robson (Routledge and Kegan Paul, 1991), vol. XVIII: 217.

³ *Ibid.*, 223.

⁴ Mill, “Civilization” (1836), in *CWJSM*, vol. XVIII: 124.

⁵ Mill, *On Liberty*, in *CWJSM*, vol. XVIII: 224.

⁶ *Ibid.*, 224.

as important to think about expressive liberties as to think about their preconditions: the empirical background that enables or hampers the wide range of subjective experiences that we associate with thinking and speaking freely, without fear, with sharing our thoughts with others, and so on.

The thinnest conceivable notion of social and political life requires some form of human communication, of transmission and reception of information.⁷ Communication, in turn, never takes place in the abstract, but in the physical and social world that materially and symbolically supports the exchange of speech acts between agents. This physical and social background of interaction can be understood as a mixture of resources: means to transmit, receive, and save information—from languages, rules of politeness and social perceptions of others, to constitutional law, technology, or infrastructures of communication.⁸ Moreover, the said background or preconditions of freedom do not only include the “things” (the resources and capabilities), but also the ways in which they are socially organized and distributed. For example, it is not just about languages, but also about how they are taught, who can use them, or how history makes listeners attach different epistemic authority to specific accents or ways of speaking. In the same vein, it is not just about communication infrastructures, such as mass media or fiber optic cables, but also about the institutions that manage these resources; and at the same time, about the governance of such institutions—who controls them, whose interests they represent, etc.

Successful communication, therefore, is contingent on having access to, or control of, particular resources. This should come as a truism: communication requires empirical background conditions. Yet note how this view invites us to consider the exercise and guarantee of expressive liberties both from the point of view of emission (e.g., as including the right to free speech, to a free press, to express religious views) and of reception (e.g., the right to be freely informed, to freely listen to others). This thesis studies these two dimensions as connected. To speak freely—in the sense of freedom that this thesis will develop—requires a particular arrangement of the empirical world in which speaking takes place, and one of the features of this arrangement must be accessibility to free flows of information produced, in turn, under conditions of liberty. A polity promoting expressive liberties, in this view, must be as attentive to the rights of speakers as to legal protection to one of the raw matters of speech: available information and knowledge. To put it the other way round, this thesis considers that free speech deficits take place not only when agents are prevented from speaking, but also when they lack adequate

⁷ For an illuminating discussion on the urge and capacity to communicate as a central element in early modern Western ideas of natural sociability and civilization, see Anthony Pagden, *The Enlightenment: And Why It Still Matters* (Random House, 2013), chaps. 6 and 7. For a very clear example relying on classical sources, see the opening quote of this thesis in its context: Francisco de Vitoria, *De potestate civili*, Part I, §4. I have used the following Spanish edition: *Sobre el poder civil. Sobre los indios. Sobre el derecho de la guerra*, ed. Luis Frayle (Tecnos, 2007).

⁸ Note that except for “natural talents,” so-called “capabilities” may also be considered here to the extent that they rely on the use of resources to be acquired and developed.

epistemic means to autonomously choose what to say, and also when the listeners' uptake is distorted. The idea of expressive freedom is here meant to capture all these processes in their relationship with the diverse background phenomena that make them possible.⁹

I will refer to this diverse set of phenomena as the “political economy of” communication or, more specifically, when they are to be prearranged to promote more definite values: “political economy of free speech,” “of democracy,” “of citizenship,” “of toleration,” and so on. Therefore, “political economy” will not simply refer here to its perhaps more conventional meaning as an academic discipline focused on the study of power relations in the distribution of resources or, more classically and normatively, to the public administration of those resources to promote some form of social life.¹⁰ Engaging in an already established use in diverse areas, “political economy” will here also refer to the power relations themselves that, broadly understood, are in fact determining the distribution of resources significant for the exercise of my object of study: expressive liberties.¹¹

Perhaps some readers find this approach unavoidably devoted to a contentious conception of the good life. Nonetheless, I hope that the next pages will show up to what point what I propose is rather vintage political and social theory. That is, I hope to be able to show that, regardless of one's conception of the good, developing a political economy of free speech is a

⁹ For a definitional discussion that leads to see free speech as a “social condition,” justifying to include most of these issues, see David Braddon-Mitchell and Caroline West, “What Is Free Speech?,” *Journal of Political Philosophy* 12, no. 4 (2004): 437–60.

¹⁰ J. G. A. Pocock, *Virtue, Commerce, and History* (Cambridge University Press, 1985), 193–95; Florence Gauthier, “Political Economy in the Eighteenth Century: Popular or Despotic? The Physiocrats Against the Right to Existence,” *Economic Thought* 4, no. 1 (2015): 47–66.

¹¹ This usage will be familiar to scholars with some experience in media studies, where “political economy of communication” is a common wording to name either the discipline (the study of media power) or the object of study (the actual distribution of power). In the Marxist tradition, it is sometimes used as “critical political economy” to stress that the study of power relations already involves a negative judgment of conventional (“bourgeois”) political economy because it naturalizes commodity exchange, self-interest, and so on. Although I share many of these concerns, I have avoided the usage of “critical” because I find it obsolete. After the emergence of modern “economics” (with its own methodological commitments and ways of modeling reality), most uses of “political economy” today (especially by non-economists) already include “critical” intuitions on what a traditional Marxist may have called “bourgeois society.” On cross-disciplinary use of “political economy” in this sense, just to cite some examples used during this thesis, see Richard R. John and Jonathan Silberstein-Loeb, eds., *Making News: The Political Economy of Journalism in Britain and America from the Glorious Revolution to the Internet* (Oxford University Press, 2015) (media history); David Casassas and Jürgen De Wispelaere, “Republicanism and the Political Economy of Democracy,” *European Journal of Social Theory* 19, no. 2 (2016): 283–300 (political and social theory); Elena Kim and Karina Standal, “Empowered by Electricity? The Political Economy of Gender and Energy in Rural Naryn,” *Gender, Technology and Development* 23, no. 1 (2019): 1–18 (sociology); Jedediah Britton-Purdy et al., “Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis,” *Yale Law Journal* 129, no. 6 (2020): 1784–1835 (law); Morten Axel Pedersen, Kristoffer Albris, and Nick Seaver, “The Political Economy of Attention,” *Annual Review of Anthropology* 50, no. 1 (2021): 309–25 (anthropology).

meaningful scholarly endeavor to understand how freedom of communication works and how to promote it in case one is interested in doing that.

Importantly, then, my view should be understood as a descriptive model that accounts for how processes of communication are rooted in certain empirical phenomena. As such, the political-economic awareness of communication for which I am advocating is independent of normative conceptions of how communication should be regulated. In other words, my model is intended to be acceptable across the most common lines of disagreement about what counts as “freedom of” communication. I defend that the analysis of communication must be aware of its political economy to be reliable, regardless of whether one favors censorship or free speech, or whether one advocates for a positive or a negative conception of free speech. One may, for normative purposes, want to change such a political economy or to keep things as they are. But what I want to avoid is a characteristic analytical strategy in contemporary accounts of free speech in political philosophy, economics, or even law: namely, the inclination to theorize political economy away—assuming, in the worst case, that it is not relevant at all for expressive liberties or, at best, that the suitable political-economic circumstances of freedom already obtain.

Let me insist on the merely descriptive or explanatory status of this point. Note how, for example, the politics of a deliberative democracy call for organizing communication resources just as much as does the politics of a personal despot. In other words, any polity requires a certain political economy of communication to promote its desired ideal of human interaction. The well-functioning deliberative polity, it is true, calls for a distinctively demanding management of communication resources: say, rules of equal speaking time, institutions promoting epistemic deference toward specific groups (e.g., minorities, experts...), a specific arrangement of seats in the places of deliberation that favors non-hierarchical exchanges, free and mandatory education and literacy, a balanced allocation of telecommunication technologies, and so on. But this is no less true for a regime of personal despotism, which requires a widely different organization of the means of communication, but a specific organization nonetheless: think of speaking priority for the despot, institutions that allow the tyrant to discern pure adulation from useful information, education of subjects in legitimizing tropes, a distribution of speech opportunities and technologies that benefits the despot’s supporters, etc. It is not by chance that modern coups d’état often start by taking control of mass media.

But what about a libertarian polity that aims to maximize non-interference, leaving people and communication resources “as they are”?¹² Will it have to make distributive decisions as the examples above? Does the libertarian polity

¹² For the sake of argument, I am putting aside the idea that leaving resources “as they are” should be understood as a political, distributive decision itself, which is a view that denies libertarianism most of its normative distinctiveness. On this point, see the criticism of “status quo neutrality” in Cass R. Sunstein, *The Partial Constitution* (Harvard University Press, 1993), 68–92.

also involve a political economy of communication? Think of the speech turns that are essential to the most minimal forms of successful communication—I cannot listen while speaking, I cannot read while writing, and so on. Taking turns is also a regulation of a resource: the use of time. Making offers, promising, contracting, auctions and many other speech acts required for commercial exchanges involve distributive “rules of order” that regulate communication. Certainly, a fair allotment of speech time and silence to make communication possible can emerge “spontaneously,” without the need for political institutions, as it happens in many conversational contexts (albeit not in many others, whenever speakers do not need to recognize each other as equals). But even if we accept, for the sake of argument, that a fair allotment of speech time can arise naturally and without coercion in a tête-à-tête, this does not make it less of a distributive choice. In any case, if a minimal preference for the speech turns that are required for conversational success is to be conveyed to larger social contexts, it will plausibly need to be institutionalized and enforced. Insofar as a libertarian polity will have, say, courts of justice, markets, or forums of gathering, discussion, and information, it will also have to make distributive decisions about communication resources in each of these contexts. Would the ideal libertarian polity allow me to interrupt a court session by speaking loudly, or to skip my turn in an auction? What about impeding others from communicating prices? Probably not, for the same reason it would not allow graffiti to be painted over areas designated for commercial advertising, or pirate radios broadcasting over privately owned sections of the broadband spectrum. None of it would be legal, at least not until all participants agree on allowing some of these things (assuming the libertarian polity is also a democracy). The point is that any conceivable political regime relies on communication and therefore on its resources and their organization, regardless of how demanding the communicative ideals are that regulate such regime. This is the sense in which I intend to make the awareness of free speech’s political economy a descriptive or explanatory commitment.

Now, if the normative study of communication takes into consideration the general political-economic outline that I have just described, then each communicative ideal must be understood as involving some specific distributive demands regarding communication resources. If communication does not take place in the abstract, it follows, in the words of a US Supreme Court Justice, that “freedom of speech does not exist in the abstract” either: that “the right to speak can flourish only if it is allowed to operate in an effective forum,” and that “in the absence of an effective means of communication, the right to speak would ring hollow indeed.”¹³ Or, in the words of the Federal Constitutional Court of Germany, that “the right to freedom would be valueless without the factual prerequisites for being able to

¹³ *CBS. v. Democratic National Committee*, 412 U.S. 94 (1973), 193 (William Brennan, dissenting).

use it.”¹⁴ From our point of view, any ideal of “freedom of” communication or speech will comprise a distributive ideal—it will call for allocating the means of transmitting and receiving information so that the ideal of freedom at issue is promoted. Thus, we may wonder what the distributive demands of free speech are. Does free speech call for a completely egalitarian access to communication resources? Or does it involve a distributive pattern compatible with disparities according to specific criteria (e.g., purchasing power, expertise, having stakes in the issue under discussion, special talent for grabbing the attention of others, and so on)?

II. EXPRESSIVE LIBERTIES AS RIGHTS OF CITIZENSHIP

II.1. The distributive demands of citizenship

To answer these and related questions, I must make explicit the second basic set of assumptions of this thesis: that human beings deserve moral consideration as equals, that this entails self-government (i.e., having a say in one’s conditions of social existence), and that democratic institutions with fundamental rights of citizenship are a reasonable way of practicing and fostering the said moral equality. I will simply build on these beliefs, and all the text that follows should be understood as framed by them. My attention, therefore, will be focused on things such as whether these assumptions are upheld or undermined by institutions, or whether certain distributions of resources structure social relationships in ways compatible with these ideals—hoping all along that most of my readers will share them (or at least a version of them), albeit they may disagree profoundly with me on how best to realize them.¹⁵

Thus, the first step to address the questions above is to include free speech and other expressive liberties in a larger category that informs the distributive demands of fundamental rights: the notion of citizenship. Free speech, in this sense, is part of the equal legal status that regulates relationships of citizens among themselves and with the state.¹⁶ If we understand citizenship (and the

¹⁴ BVerfGE 33, 303, at 331, quoted by Robert Alexy, *A Theory of Constitutional Rights*, trans. Julian Rivers (Oxford University Press, 2002), 338.

¹⁵ This is a perspective that Lisa Herzog has recently called “democratic institutionalism” (i.e., taking for granted the justification of democratic principles and focusing instead on the institutions that realize them). See her *Citizen Knowledge: Markets, Experts and the Infrastructure of Democracy* (Oxford University Press, 2023), §I.2.

¹⁶ For three conventional arguments of citizenship as an egalitarian status, see, respectively, the historical, sociological and philosophical accounts of J. G. A. Pocock, “The Ideal of Citizenship since Classical Times,” in *Theorizing Citizenship*, ed. Ronald Beiner (State University of New York Press, 1995), 29–52; T. H. Marshall, “Citizenship and Social Class,” in *Citizenship and Social Class*, by T. H. Marshall and Tom Bottomore (Pluto Press, 1992), 3–

goods it gives access to) from a distributive point of view, its demands are in many cases intensely egalitarian. Think of the right to vote, or of nationality: because each citizen must have an equal amount of such a good, they cannot legally alienate what they enjoy in this sphere, nor acquire more of it. The most basic political and civil rights are often framed as involving these strongly egalitarian standards. Insofar as they are seen as fundamental rights that organize the relationship between citizens, and between them and the state (i.e., each citizen's capacity to co-determine public norms, its protection against public power, etc.) most instances of inequality on this front will be seen as undermining the essentially egalitarian ethos of citizenship. Thus, the thought that some citizens could buy an additional right to vote, a further passport, or a stronger right not to be stopped and frisked—or, on the contrary, that they could sell the basic interests they have as citizens in these things—contradicts the very ideal of citizenship as a community of equals, even if citizenship is considered only in a purely formal sense. In this regard, citizenship has been conceived as a distributive pattern independent of, and even opposed to, other allocative criteria such as market pricing, merit-based distributions, or whimsical allowances by a higher authority.¹⁷ Citizenship, in this view—connecting here with the first of my assumptions—is an institution involving its own “political economy” comprised of specific distributive preconditions and delimiting a range of acceptable distributive outcomes of private interaction.¹⁸

In some other cases, the distributive demands of citizenship can be understood in a sufficientarian manner (if not in principle, at least in practice). This holds in particular for the “social” or “economic” rights associated with the modern welfare state, such as education, healthcare, or retirement benefits. Take the right to education: citizens enjoy a minimum threshold of educative goods that they cannot alienate; however, they can legally acquire “more” of them in the market or through some other private arrangements.¹⁹ There are public rules that ensure that I can access a minimal amount of such goods at zero or very low cost. But if I have the means, I can privately acquire more and/or better versions of those goods. I can pay for private teachers or enroll in institutions of a higher level not covered by the right to education. In some other cases, my actual enjoyment of these rights can be conditional on some

54; John Rawls, *Political Liberalism*, Expanded ed. (Columbia University Press, 2005), 29–35. For a review of the limits and promises of citizenship in contemporary inclusive societies, see Will Kymlicka and Wayne Norman, “Return of the Citizen: A Survey of Recent Work on Citizenship Theory,” *Ethics* 104, no. 2 (1994): 352–81; M. Victoria Costa, “Citizenship and the State,” *Philosophy Compass* 4, no. 6 (2009): 987–97.

¹⁷ Antoni Domènech, “Individuo, comunidad y ciudadanía,” in *Retos pendientes en ética y política*, ed. José María Rosales, José Rubio-Carracedo, and Manuel Toscano Méndez (Trotta, 2002), 29–46; Alan P. Fiske, “The Four Elementary Forms of Sociality: Framework for a Unified Theory of Social Relations,” *Psychological Review* 99, no. 4 (1992): 689–723.

¹⁸ See e.g., Part II, “The political economy of citizenship” in Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (The Belknap Press, 1996), 124ff.

¹⁹ For a critical description of this process, see Ricardo García Manrique, *La libertad de todos: una defensa de los derechos sociales* (El Viejo Topo, 2013).

merit, as when participation in the labor market is required to get unemployment, retirement, or healthcare benefits. Thus, the ideal of citizenship seems to be open, at least in practice, to inequalities on this front as long as a minimum threshold of the goods associated with the right is guaranteed.²⁰ In this light, once the minimum established by citizenship rights is secured, other allocative strategies may come into play: here, for example, market and citizenship are not necessarily seen as conflicting distributive patterns, but as complementary.

Expressive freedoms occupy an odd place in this schema. On the one hand, they are often grouped with the first category, calling for a strong egalitarianism. Consider the influential narratives that historize citizenship in evolutive “stages” that progressively expand the scope of rights claims (e.g., first civil-political rights, then social-economic, then cultural and environmental, etc.). In these narratives, free speech is counted among the first-generation, negative civil rights that define the very ideal of citizenship.²¹ Here, expressive freedoms are conceived as part of a “status” that should be fairly guaranteed regardless of what happens in voluntary transactions, in the realm of “contracts” and “markets.”²² John Rawls certainly built on this view when he included free speech among the “equal basic liberties” that are to be distributed according to the first principle of justice.²³ In this sense, the ideal of freedom of expression can be said to capture a set of goods that are fundamental to the egalitarian ethos of citizenship, such as the capacity to have a say on public issues, that our ideas should have a reasonable opportunity in convincing others, that we all should be equally able to monitor public officials, that each citizen need good information to be able to deliberate, and so on. Understood in this manner, free speech evokes much of what *isegoria* (equality of speech) seem to have meant in classical Athens.²⁴ Thus, from a distributive point of view, free speech would share a lot with the right to vote

²⁰ Alexy, *A Theory of Constitutional Rights*, chap. 4, §IV.3. For an overview of this issue, see Liborio L. Hierro, “Los derechos económico-sociales y el principio de igualdad en la teoría de los derechos de Robert Alexy,” *Doxa*, no. 30 (2007): 249–71.

²¹ Karel Vasak, “A 30-Year Struggle; the Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights,” *The UNESCO Courier* 30, no. 11 (1977): 28–32. A criticism of these historical narratives can be found in Gerardo Pisarello, *Los derechos sociales y sus garantías: elementos para una reconstrucción* (Trotta, 2007), 19–36.

²² Marshall, “Citizenship and Social Class,” 8, 21. Interestingly for our purposes, Marshall thought the evolution of citizenship as reversing Henry Maine’s influential historical narrative of modern law as the passage “from status to contract.” According to Marshall, “There are many precedents today for the subordination of contract to status,” *ibid.*, 41.

²³ John Rawls, *A Theory of Justice*, Revised ed. (Harvard University Press, 1999), §39. See below, Chapter 3.

²⁴ For the role of *isegoria* in Athenian democracy, see R. K. Sinclair, *Democracy and Participation in Athens* (Cambridge University Press, 1991), 13–15, 32–33. For a recent overview of its influence in the Western canon, see Teresa M. Bejan, “Two Concepts of Freedom (of Speech),” *Proceedings of the American Philosophical Society* 163, no. 2 (2019): 95–107. I discuss Bejan’s account below, §6.4.2. For a vindication of *isegoria* as an egalitarian attribute that separates ancient ideals of citizenship from market-dependent modern ideals in regards to free speech, see Ellen Meiksins Wood, *Citizens to Lords: A Social History of Western Political Thought from Antiquity to the Middle Ages* (Verso, 2008), 39–41.

or the right to a fair trial: every citizen must be able to have the same amount, or else the core of citizenship is at risk.

Yet, on the other hand, the institutional guarantee of expressive freedoms and their actual mechanisms of distribution make them a candidate for the second group of rights, following a sufficientarian criterion like welfare benefits and other so-called social or economic rights. Public institutions only ensure that I enjoy a minimal, non-waivable share of free speech, but my exercise of this right (e.g., my actual capacity to have a say on public matters) relies a lot on other private resources that have nothing to do with my status as a citizen. Such disparities are not necessarily due to wealth differences—during the discussion on “structural domination” (§5.2) I will examine other plausible sources of inequality, even when robust legal and economic guarantees of free speech are in place (e.g., how others recognize us as speakers, how we perceive ourselves and others when communicating, etc.). However, in what follows, I focus only on one of the sources of inequality in the exercise of free speech that is mostly related with the control of communication resources, today and historically: purchasing power (e.g., of printing presses, of journalistic labor, of prime-time TV slots, of radio frequencies, of top positions in search engine results, of physical or digital spaces of interaction, and so on).

The influx of wealth inequality in the enjoyment of basic civic-political rights has been understood by many researchers as a threat to the political process, as an intrusion of the market-rationale into democratic citizenship.²⁵ In other words, if our reading of citizenship as an egalitarian status holds, the civic community is undermined whenever the socioeconomic circumstances allow some citizens to boost their free speech at the expense of others thanks to their wealth (e.g., making it louder, to sound more authoritative, more attention-grabbing, hoarding scarce communication resources...).²⁶ To put it in a more classical, Aristotelian fashion, the civic ideal is compromised

²⁵ For a historical account of capitalist development as an invasion of democratic citizenship, see Ellen Meiksins Wood, *Democracy against Capitalism: Renewing Historical Materialism* (Cambridge University Press, 2000), chaps. 1 and 7. It is noteworthy that some other critics argue that the egalitarian ethos of citizenship is also threatened whenever the enjoyment of second-generation, socioeconomic rights is conditional on participating in the labor market or other merits, thus creating a subgroup of partly disenfranchised citizens (e.g., women without retirement benefits because domestic labor does not pay social security contributions, generations whose working lives developed in circumstances of high structural unemployment, social groups pushed to the underground economy, etc.). On this criticisms, see e.g., Carol Pateman, “The Patriarchal Welfare State,” in *Democracy and the Welfare State*, ed. Amy Gutmann (Princeton University Press, 1988), 231–60; Guy Standing, *A Precariat Charter: From Denizens to Citizens* (Bloomsbury, 2014), 1–32; David Casassas, ed., *Revertir el guión. Trabajos, derechos y libertad* (La Catarata, 2016).

²⁶ See e.g., Alexander Meiklejohn, *Political Freedom. The Constitutional Powers of the People* (Oxford University Press, 1965); Cass R. Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1993); Edwin C. Baker, *Media, Markets, and Democracy* (Cambridge University Press, 2001); Robert W. McChesney, *Rich Media, Poor Democracy: Communication Politics In Dubious Times* (The New Press, 2015); Julio César Guanche, *¿Quiénes somos todos? Libertad, igualdad y fraternidad en Cuba* (Ediciones Dyskolo, 2023), 196–207.

whenever comparative advantages in communication and information asymmetries inhibit the reciprocal shaping of personality and of the shared world that is expected of citizens.²⁷ In a less perfectionist view, if money can buy comparative advantages in public communications, then the democratic right to an equal share of public power—or even more modestly, of a fair equality of opportunity in accessing that power—is under threat.²⁸

II.2. *The political-economic awareness of the republican tradition*

For some readers, the political-economic awareness about communication, free speech, and citizenship will sound like a traditional Marxist take on rights. It might be understood as echoing, for example, Rosa Luxemburg's concerns that:

Every right of suffrage, like any political right in general, is not to be measured by some sort of abstract scheme of “justice,” or in terms of any other bourgeois-democratic phrases, but by the social and economic relationships for which it is designed.²⁹

It may sound, in other words, like a Marxist take “that provides no reasons for protecting human rights. And indeed, it even gives reasons against doing so,” as Steven Lukes bluntly put it.³⁰ Or, with Louis Althusser, as a view of citizenship that should move us to blame the “Humanism of the Great Forefathers” as an ideological cloak of unjust social relationships, as a veil of formal egalitarianism hiding material inequalities.³¹ Does the political-economic view of rights that I endorse necessarily lead to the rejection of citizenship as a merely “bourgeois” category that thwarts true emancipation?

²⁷ On the value of *isegoria* as an institution allowing for Aristotelian civic friendship, see Antoni Domènech, “... y fraternidad,” *Isegoría* 7 (1993): 65–72.

²⁸ Joshua Cohen, “The Economic Basis of Deliberative Democracy,” *Social Philosophy and Policy* 6, no. 2 (1989): 25–50; Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000), 351–85. See also my reading of Rawls below, §3.1.3, §3.4.3. For a general argument on limiting the sphere of society in which money can buy advantages, and the idea of “rights” as delimiting an area of “blocked exchanges,” see Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983). I must note, however, that Walzer's view of expressive rights is devoid of the political-economic awareness I am endorsing: “Freedom of speech, press, religion, assembly: none of these require money payments; none of them are available at auction; they are simply guaranteed to every citizen. It's often said that the exercise of these freedoms costs money, but that's not strictly speaking the case (...) Quick access to large audiences is expensive, but that is another matter, not of freedom itself but of influence and power” (Ibid., 101).

²⁹ Rosa Luxemburg, “The Russian Revolution” (1918), in *The Rosa Luxemburg Reader*, ed. Peter Hudis and Kevin B. Anderson (Monthly Review Press, 2004), 302.

³⁰ Steven Lukes, “Can a Marxist Believe in Human Rights?,” *PRAXIS International* 4 (1981): 344. He mostly referred to orthodox readings of Karl Marx, “On the Jewish Question” (1843), *Marx and Engels Collected Works* (Lawrence & Wishart, 2010), vol. III: 146–174.

³¹ Louis Althusser, “Ideology and Ideological State Apparatuses” (1961), in *Lenin and Philosophy and Other Essays*, trans. Ben Brewster (Monthly Review Press, 1971), 154.

Surely, this was not the road taken by Luxemburg's Marxism and many other socialists, who insisted on the importance of democratic rights for successful class struggle.³² Moreover, it is worth stressing that the rudiments of the view I am presenting are much older than capitalist markets or the critical political economy of communication of Marxist provenance. My reframing of expressive freedoms against the free speech libertarian framework is, strictly speaking, a return to earlier views (albeit it serves to stress the long-term aspects of much modern criticism of "bourgeois society"). The historical pedigree of what I have called "political-economic awareness" is closely related to Western canonical views on citizenship—with its adherents and not just with its critics. Concretely, it coheres very well with historical republicanism and its view of the material preconditions of liberty.³³ (I believe contemporary neorepublican concerns follow these traditional insights to some extent, as will be examined later, in §5.3.1).

My view of communication and free speech, in other words, is intended to recover what J. G. A. Pocock identified in his seminal work on republicanism as the "political and social awareness" of this tradition that guided "all that sociology of liberty which had developed from Aristotle through Machiavelli and Harrington."³⁴ Roughly, this was the secularist view that the stability of the state and the liberty of its citizens were not rooted in idealistic reflections about norms in other-worldly realms, but in the socioeconomic, contingent and historical circumstances upon which the republic was established. Models of institutions, put differently, must prove themselves useful in an everchanging and conflicting world. In John Milton's realist methodological dictum: "To sequester out of the world into *Atlantick* and *Eutopian* polities,

³² For a more complete view of how Luxemburg combined a critical political-economic awareness against "bourgeois" ideals while defending republican citizenship, see David Guerrero and Andrea Pérez-Fernández, "Rosa Luxemburg as a Republican Agitator: Shaping Social Democracy in Imperial Germany," in *Rosa Luxemburg: Perception and Periphery*, ed. Frank Jacob (Büchner, 2024), 207–239. On free speech in Marx, see my David Guerrero, "Tres velles idees per comprendre la llibertat d'expressió avui: El Marx de la 'Gasetta Renana' (1842–1843)," *Revista Nous Horitzons* 218 (2018): 52–61. On classical and cold-war Marxist critiques and defenses of rights, David Guerrero and Julio Martínez-Cava, "Between Tyranny and Self-Interest: Why Neo-Republicanism Disregards Natural Rights," *Theoria* 69, no. 171 (2022): 148–51, 154–55. See also Julio Martínez-Cava, "Enemigo a las puertas. La libertad política en el socialismo británico," *Daímon*, no. 81 (2020): 159–75.

³³ Sandel, *Democracy's Discontent*, 123–200; Antoni Domènech and Daniel Raventós, "Property and Republican Freedom: An Institutional Approach to Basic Income," *Basic Income Studies* 2, no. 2 (2007): 1–8; Daniel Raventós, *Basic Income: The Material Conditions of Freedom* (Pluto Press, 2007), 47–75; Casassas and De Wispelaere, "Republicanism and the Political Economy of Democracy."

³⁴ J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, 1975), viii, 466; see also 85, 454 on the republican "sociology of civic ethics." David Casassas has developed a parallel view of a "republican sociology" in his *La ciudad en llamas. La vigencia del republicanismo comercial en Adam Smith* (Montesinos, 2010), 175–82. In this vein, see also "Aristotle's sociology of Greek politics" in G. E. M. de Ste. Croix, *The Class Struggle in the Ancient Greek World: From the Archaic Age to the Arab Conquests* (Cornell University Press, 1989), 69–80.

which never can be drawn into use, will not mend our condition; but to ordain wisely as in this world of evil.”³⁵

However, there is no perfect continuity between classical republican ideas about citizenship and modern understandings of it. It is well known that classical citizenship was a very exclusive legal status, restricted to male property holders born in the right place. Ownership, control, or free access to resources to sustain one’s own life were thought to be a precondition for participation in the civic community of equals: a way of having stakes in the community, of not being dependent and servile of others, of ensuring the capacity of bearing arms to defend oneself and the community, of being able to rationally evaluate one’s interests in the light of the reasons and interests of others, of having free time to participate in public deliberations, and so on.³⁶ Classical ideals of citizenship, including expressive freedoms, could afford to be politically and ethically demanding only by being limited to a reduced group of propertied males—those who already fulfilled its political-economic preconditions. And how did this republican “political and social awareness” of the distributive prerequisites of classical citizenship face ancient and modern democratic movements, particularly their demands for an increasingly inclusive citizenship? For heuristic purposes, I distinguish two answers: (1) republican rejection of inclusive citizenship and (2) republican endorsement of a political-economically inclusive citizenship.

1. *Republican rejection of inclusive citizenship.* Most of the time, the classical view made a very powerful argument against extending citizenship, or at least against doing it without proper “balances” (e.g., a senate for the well-off, weighted voting rights, indirect suffrage, constitutional courts, “passive” citizenship...).³⁷ This argument has been a republican cornerstone of conservatism since Antiquity. Lessons of corrupt plebeian magistracies and electoral fraud from Roman history pervaded the writings of later republicans.³⁸ This was a theme taken up by Niccolò Machiavelli, for example. He had argued that good laws, such as guaranteeing that “each can speak his opinion (...) so that the people can then choose the best after each

³⁵ John Milton, *Areopagitica* (1644), in *Complete Prose Works* (Yale University Press, 1954), vol. II: 526. He was here in opposition to the utopian tradition of Francis Bacon and Thomas More. I interpret the opening verses of this chapter as another iteration of this view.

³⁶ Pocock, *The Machiavellian Moment*, 66–74; Antoni Domènech, *El eclipse de la fraternidad: una revisión republicana de la tradición socialista* (Crítica, 2004), 45–72. For an account of Western imaginaries on property-owning, their political ambivalence, and an attempt to recover them for a progressive vision of sociality and community, see Jedediah Britton-Purdy, *The Meaning of Property: Freedom, Community, and the Legal Imagination* (Yale University Press, 2011).

³⁷ See e.g., Habermas, *The Structural Transformation*, 136–139; Carl J. Richard, *The Founders and the Classics: Greece, Rome, and the American Enlightenment* (Harvard University Press, 1994), 123–68; María Julia Bertomeu, “Las raíces republicanas del mundo moderno: en torno a Kant,” in *Republicanism y democracia*, ed. María Julia Bertomeu, Antoni Domènech, and Andrés de Francisco (Miño y Dávila, 2005), 133–39; Camila Vergara, *Systemic Corruption: Constitutional Ideas for an Anti-Oligarchic Republic* (Princeton University Press, 2020), 43–101.

³⁸ Vergara, *Systemic Corruption*, 48–50.

one has been heard” may not be suitable for all circumstances. Therefore, in situations where the people is not able to look after the public interest, equal voice, he said, “becomes the worst for only the powerful propose laws, not for the common freedom but for their own power.” In this process, Machiavelli concluded, “the people came to be either deceived or forced to decide its own ruin.”³⁹ The lesson was that merely formal laws to regulate expressive liberty do not guarantee good, freedom-enhancing results. The socioeconomic structure of society may turn things the other way around.

For an illustrative example of how this view worked in actual politics, take the argument encountered by seventeenth-century radicals and democrats within the parliamentary army during the English Civil Wars. They were told “that those who shall choose the lawmakers shall be men freed from dependence upon others.”⁴⁰ In the classical republican worldview, admitting dependents (e.g., women, servants, apprentices and the propertyless) into citizenship created deep political problems. The chief among them was the risk of the unequal distribution of property and private power spilling over the equal standing that is essential to the proper functioning of a civic community. See, for instance, how conservative army officers argued against giving an “equal voice” to “master and servant”:

there may be a more equitable division and distribution than that he that hath nothing should have an equal voice (...) I remember there were many workings and revolutions, as we have heard, in the Roman Senate; and there was never a confusion that did appear (...) till the state came to know this kind of distribution of election [i.e., equal voice]. *That is how the people's voices were bought and sold* (...) and thence it came that he that was the richest man, and [a man] of some considerable power among the soldiers, and one they resolved on made himself a perpetual dictator.⁴¹

The same lesson was drawn by the eighteenth-century Scottish thinker Adam Ferguson (remarks such as these made him, precisely, one of the founders of sociology and political economy). “In every society,” Ferguson writes, “there is a casual subordination, independent of its formal establishment, and frequently adverse to its constitution.” More concretely, he argued that “this casual subordination” possibly arises “from the distribution of property, or from some other circumstance that bestows unequal degrees of influence.”⁴² And with this, he assessed Roman history:

³⁹ Niccolò Machiavelli, *Discourses on Livy*, trans. Harvey Claflin Mansfield and Nathan Tarcov (Chicago: University of Chicago Press, 1996), I.18.

⁴⁰ Henry Ireton, “General Council of the Army” (29 October 1647), printed in A. S. P. Woodhouse, ed., *Puritanism and Liberty: Being the Army Debates (1647-9) from the Clarke Manuscripts with Supplementary Documents* (The University of Chicago Press, 1951), 82.

⁴¹ Nathaniel Rich, “General Council of the Army,” 63–64. My italics.

⁴² Adam Ferguson, *An Essay on the History of Civil Society*, ed. Fania Oz-Salzberger (Cambridge University Press [1767], 1995), 129. Same idea at 97.

The plebeian order at Rome having been long considered as of an inferior condition, and excluded from the higher offices of magistracy, had sufficient force, as a body, to get this invidious distinction removed; but the individual still acting under the impressions of a subordinate rank, gave in every competition his suffrage to a patrician, whose protection he had experienced, and whose personal authority he felt.⁴³

It was the “acting under the impressions of a subordinate rank” of the plebeians that impeded them from seeing their own interests and those of the public. “By this means,” Ferguson adds, “the ascendancy of the patrician families was, for a certain period, as regular as it could be made by the avowed maxims of aristocracy.” Plebeian electoral rights, a device to express their opinion, were turned against themselves—the “populace became a faction, and their alliance was the surest road to dominion,” for they ended up choosing tyrants.⁴⁴ This is also the background historical lesson, for instance, behind the better known political-economic reflection by the American founder James Madison in *The Federalist* no. 10 on the correlation between faction and property holding (or lack thereof).⁴⁵

2. *Republican endorsement of inclusive democracy.* However, the classical political-economic intuition of republicanism—in Thomas Jefferson’s condensed words, that “[d]ependence begets subservience and venality”—did not always lead to elitist conclusions.⁴⁶ This is the main reason why the history of democracy, ancient or modern, should not be understood as merely involving demands for formal recognition of civil rights. On the contrary, it should be conceived of as giving rise to problems of political economy; that is, issues concerning ownership, control, or access to the resources that all citizens are supposed to have.⁴⁷ Ferguson knew this as well: “Some having thought,” he wrote, “that the unequal distribution of wealth is unjust,” they “required a new division of property, as the foundation of freedom.” This “scheme” was the one “suited to democratical government.”⁴⁸

⁴³ Ibid., 130.

⁴⁴ Ibid., 130.

⁴⁵ Alexander Hamilton et al., *The Federalist Papers* (Oxford University Press, 2008), 48–55.

⁴⁶ Thomas Jefferson, *Notes on the State of Virginia* (1785), in *The Works of Thomas Jefferson*, ed. Paul Leicester Ford (G.P. Putnam’s Sons, 1904), vol. IV: 85.

⁴⁷ Pocock, *The Machiavellian Moment*, 401–22; Wood, *Democracy against Capitalism*, 181–203; Domènech, *El eclipse*, 74–122; Eric MacGilvray, *The Invention of Market Freedom* (Cambridge University Press, 2011), 26–42, 159–66; Alex Gourevitch, *From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century* (Cambridge University Press, 2015), 31–41; Casassas and De Wispelaere, “Republicanism and the Political Economy of Democracy”; Yannick Bosc, “L’économie politique populaire de Robespierre,” in *Économie, républicanisme et république*, ed. Michel Bellet and Philippe Solal (Classiques Garnier, 2019), 137–58. Incidentally, this is one of reasons why the rediscovery of the republican tradition calls into question the stagist narratives of citizenship mentioned above. Against these views, the history of republicanism shows that the extension of liberty and of civil-political “negative” rights was often escorted by socioeconomic “positive” entitlements.

⁴⁸ Ferguson, *An Essay on the History of Civil Society*, 78.

In other words, calling for the extension of civil and political rights (i.e., the redistribution of political power) involves changes in how the civic community allocates certain resources (i.e., the redistribution of economic power), be it in the form of agrarian laws, salaries for public participation, public funding of education, cancelation of debts, expropriation of threatening accumulations of property, sharing of the social product, and so on. Connecting with the earlier quote, the “people’s voices” will not be “bought and sold” when no member of the people is dependent on the will of others. Struggling to realize such socioeconomic setting was as worthy as struggling to limit citizenship to the already independent property holders.

In this sense, the vindication of “ancient” ideals was put to the service of “modern” political agendas by stressing the egalitarian socioeconomic demands of civic freedom—the extension of citizenship necessarily meant the redistribution of wealth.⁴⁹ Consider how Karl Kautsky, one of the leading ideologues of late nineteenth-century German Social Democracy, envisioned the future socialist society as a new “Athenian aristocracy”—universal leisure sustained with collectively owned machines and means of production instead of slaves.⁵⁰ This was no break with older traditions that linked civic liberty with control of resources, but their continuation under new circumstances.⁵¹ Addressing the ideas of “middle-class economists” and the customary republican motto of “property and liberty,” nineteenth-century Spanish workers made this point in perfection:

You are very right when you say that without property there is no freedom. This we know from experience. Certainly, we did not need much study to understand this, and even to prove it. (...)

The bourgeoisie has the right to deny us work (...) they have, then, the right to threaten our existence. The dwelling in which we live does not belong to us. When we are not able to pay, the bourgeois has the right to throw us out on the street (...) All our needs, our welfare, are at the mercy of the middle class. (...)

Therefore, we are their slaves, no matter how much the [legal] codes consider us free citizens. Yes, without property there is no possible liberty. That is why we claim our property, the fruits of our labor. (...) We want: (...) all who produce, all workers, to be property holders. Those who produce nothing will possess nothing.

⁴⁹ Jean-Fabien Spitz, “Droit et vertu chez Mably,” *Corpus* 14/15 (1990): 73–86; Jean-Fabien Spitz, “Le rôle de l’égalitarisme néo-classique dans l’apologie précoce des sociétés libérales,” *Droits* 33, no. 1 (2001): 107.

⁵⁰ Karl Kautsky, *The Class Struggle (Das Erfurter Programm)*, trans. William E. Bohn (Norton, 1971), 148–58.

⁵¹ On socialism as a continuation of earlier views on liberty and property, see Antoni Domènech, “Socialismo: ¿de dónde vino? ¿Qué quiso? ¿Qué logró? ¿Qué puede seguir queriendo y logrando?,” in *¿Tiene porvenir el socialismo?*, ed. Mario Bunge and Carlos Gabetta (Gedisa, 2015), 71–124; Annelien De Dijn, *Freedom: An Unruly History* (Harvard University Press, 2018), 312–20; Edgar Manjarín, “Marx y la tradición iusnaturalista en un mundo industrializado,” *Daimon*, no. 81 (2020): 145–60. See also Ben Lewis, “Introduction,” in Karl Kautsky, *Karl Kautsky on Democracy and Republicanism*, ed. Ben Lewis (Brill, 2019), 1–42.

Thus, all workers will be property-holders and, consequently, free (...) Liberty and property must be for all, without exception or privileges. This, far from being the destruction of property is the universalization of it.⁵²

III. THE FREE SPEECH LIBERTARIAN FRAMEWORK: EXPRESSIVE LIBERTIES WITHOUT POLITICAL ECONOMY

III.1. The modern decline of republican citizenship

Still, there is a third option. The lessons above may move us to reject republicanism either as an elitist practice or as too demanding a civic project not suitable for modern circumstances. This is what some forms of liberalism seemed to do by abandoning the political and social awareness that pervaded traditional Western reflections on liberty. The growing inclusivity of citizenship, especially after the eighteenth-century, was often accepted at the expense of stripping it of its political economy.⁵³ As the franchise became larger and as the chances of an agrarian economy of free small proprietors faded away, the old republican ideal came to be seen, even by moderate reformers, as unrealistic, too taxing for the state or for individuals, to the point of being dangerously radical.⁵⁴ In the famous words of the eighteenth-century utilitarian William Paley, “by making that essential to civil freedom which is unattainable in experience, [older ideals] inflame expectations that can never be gratified, and disturb the public content with complaints.”⁵⁵

⁵² “Propiedad y libertad”, *La Revista Social*, September 26, 1873, reprinted in José Luis Catalinas and Javier Echenagusía, eds., *La Primera República: reformismo y revolución social* (Alberto Corazón Editor, 1973), 172–73.

⁵³ For different episodes of modern thinkers questioning or rejecting the demanding requirements of republican citizenship and freedom, especially in democratic contexts where these involved the redistribution of wealth and power, see e.g. Pocock, *Virtue, Commerce, and History*, esp. 143–152; Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997), 47–49; Domènech, *El eclipse*, 91–122; Jonathan Israel, *A Revolution of the Mind: Radical Enlightenment and the Intellectual Origins of Modern Democracy* (Princeton University Press, 2010), 37–91; MacGilvray, *The Invention of Market Freedom*, 150–59. For an outline of these transformations more focused on the modern rejection of older ideas of freedom associated with democratic self-government, see De Dijn, *Freedom*, Introduction and chaps. 4–6 (on socioeconomic equality, e.g., 194–197).

⁵⁴ Mark Philp, “English Republicanism in the 1790s,” *Journal of Political Philosophy* 6, no. 3 (1998): 235–62 (esp. 254–56 on republican discourse being associated with demands of economic egalitarianism after the French Revolution).

⁵⁵ Paley, *The Principles of Moral and Political Philosophy* (1785), quoted in Pettit, *Republicanism*, 47. For a different but connected reading, focused on associating liberty with democratic participation rather than on independence from the will of others, see Quentin Skinner, *Liberty Before Liberalism* (Cambridge University Press, 1998), 79–87. For a critique of this neorepublican interpretation of the late eighteenth-century demise of republican freedom, see Eric Ghosh, “From Republican to Liberal Liberty,” *History of Political Thought* 29, no. 1 (2008): 132–67.

This need not lead to the denial of universalistic claims of citizenship, but simply to tempering its political-economic burdens by restricting what is considered “essential” for a citizen. In a move that became a canonical episode of Western political theory, “modern” ideas of citizenship, democracy, and freedom displaced the wisdom of the “ancients.”⁵⁶ Citizenship, in the modern sense, was to be a civil status that could be extended easily, for it had no preconditions other than mere legal recognition: virtually anyone subject to the law could be considered a “citizen,” no matter how poor or dependent on others they were. Alternatively, it could be thought that the relevant preconditions already obtained in the modern world, thanks to technological improvements, economic abundance, and moral civilizational achievements.⁵⁷ (As I will discuss later, this thought sparked free speech libertarian utopias at different moments of history). Due to this view, for instance, the enjoyment of the right to vote or freedom of expression could be seen as distinct goals, wholly independent from the distribution of resources, as norms unconcerned with sociology or political economy. With interesting exceptions and due to processes that will be examined later, this view of the liberties of a citizen became paradigmatic in the second half of the twentieth century (§2.1.2, §2.2, §2.3). In the case of expressive freedoms, the Russian American writer Ayn Rand captured this perspective most clearly:

Freedom of speech means: freedom from, suppression, interference or punitive action by the government—and nothing else. It does not pertain to a man’s relations with private individuals, only to his relations with the government (...) No private agency can silence a man (...) Only a government holds that power. The same is true of censorship. (...) But the statists are struggling to spread the idea that a “right” includes its material implementation—that the right of “free speech” includes a right to demand the financial support of others.⁵⁸

Rand presents here an extreme position of what I want to show—I will get to discuss more nuanced examples later (such as Milton Friedman, Richard Epstein or Friedrich Hayek). For the moment, take her view as epitomizing an influential trend in scholarly works and in public discourse. Similarly, consider the 1953 United Nations report on freedom of the press, which situated the whole range of political positions in an ideological spectrum, in which one extreme was “state control and indoctrination” and the other

⁵⁶ Wilfried Nippel, *Ancient and Modern Democracy: Two Concepts of Liberty?*, trans. Keith Tribe (Cambridge University Press, 2015), chap. 7.

⁵⁷ John Dunn, “The Claim to Freedom of Conscience: Freedom of Speech, Freedom of Thought, Freedom of Worship?,” in *The History of Political Theory and Other Essays* (Cambridge University Press, 1995), 116–18.

⁵⁸ Ayn Rand, “Freedom of Speech” (2 December 1962), in *The Ayn Rand Column: A Collection of Her Weekly Newspaper Articles, Written for the Los Angeles Times, with Additional, Little-Known Essays* (Second Renaissance Books, 1991), 93–94.

“unrestricted access to the marketplace of ideas.”⁵⁹ In this view, while the civic community of equals is still a valued modern democratic ideal, it is only to be measured from the formal or procedural point of view of “equality before the law,” and multiple inequalities are accepted from the point of view of the resources required by the actual exercise of rights and freedom. Their only real threat is public authorities: no awareness of relationships of dependence within civil society, no clues about how the exercise of liberty interacts with the empirical world. It is citizenship and rights, in other words, devoid of the classical institutional and political-economic awareness, emptied of the “sociology of liberty” that Pocock identified in the civic tradition in which these concepts emerged.

III.2. The interpretive conjuncture of expressive liberties

Hence, the third building block of this thesis is that much of the political-economic awareness that shaped earlier reflections on the public sphere is disregarded by the contemporary common sense on expressive liberty. Thus, the task of vindicating the imbrication of citizenship and political economy, just as this thesis does, is today a task of reframing expressive freedoms.

I will call the dominant way of understanding freedom of speech and other expressive rights in modern Western societies the “free speech libertarian framework.” By this label I want to capture a widespread narrative that singles out the minimization of state interference as the main driving force behind the values associated with the modern public sphere (freedom of speech, freedom of thought, religious toleration, and so on). It gives a name to the fact that the right to freedom of expression is commonly considered as the archetype of subjective negative rights—as envisioning a parcel of individual life absolutely free from public nosiness and government interference. Other scholars have coined analogous terms, though with different accents and for distinct purposes. Just to name two that have been relevant in my own research, think of Samuel Nelson’s “First Amendment framework” or Suzanne Whitten’s “non-interference paradigm.”⁶⁰

A fitting manner to stress the pervasiveness of the free speech libertarian framework is by understanding it as a case of what Jordi Mundó has called

⁵⁹ Salvador P. López, “Freedom of Information: a report on contemporary problems and developments, with recommendations for practical action,” *Economic and Social Council official records*, 16th session, supplement no. 12, May 6, 1953, 11, quoted in Fredrick S. Siebert, Theodore Peterson, and Wilbur Schramm, *Four Theories of the Press* (University of Illinois Press, 1963), 69.

⁶⁰ Samuel P. Nelson, *Beyond the First Amendment* (The Johns Hopkins University Press, 2005), 16–29; Suzanne Whitten, *Critical Civility: A Republican Theory of Free Speech* (Palgrave Macmillan, 2022), 17–50.

“interpretive conjunctures.”⁶¹ These are intellectual circumstances in which scholars from different academic fields meet in a perspective that becomes an interdisciplinary shared assumption. Because assumptions of this kind gather diverse, often conflicting sources of support, they are harder to question and are easily turned into the starting point of further research. It shares a lot with what others have called a “social imaginary”—an unstructured vision of how things are and should be that implicitly defines the salient features of a process or institution, shaping in turn the limits of what is plausible or acceptable.⁶² A remarkable fact of the interpretive conjuncture that brings us here is that it does not merely congregate scholars coming from different disciplines, such as historians, legal and political philosophers, media theorists, cultural critics, or lawyers. The view that free speech is (or has been) essentially a negative freedom often brings together intellectuals with conflicting political positions (e.g., for or against media regulation, for or against political correction).

Let me start by portraying free speech libertarianism as a normative position with an especially clear and consistent example. “To the liberal,” Milton Friedman wrote, “the appropriate means [of government] are free discussion and voluntary co-operation, which implies that any form of coercion is inappropriate.”⁶³ Many of the expressive freedoms usually ascribed to the modern public sphere or civil society tend to be framed in the same manner. Freedoms of thought, of belief, of speech, of the press...—all the constitutive elements of the democratic public sphere that sustain “free discussion”—are seen as belonging to a space without coercion and in consequence independent of any political power. In Friedman’s view, free discussion is something that arises naturally and voluntarily. No compulsion or encouragement is needed, as if free speech could be imagined in the abstract, seen as a pre-social stock of freedom that should be merely preserved. It is in this way that any attempt of public interference with, or regulation of, the bases of free discussion—no matter how democratically supported—is seen as an assault on the pre-political or natural foundations of society, a needless appearance of compulsion in a fundamentally uncoerced sphere of society. Thus, according to Friedman, public regulations of television and radio frequencies in force in the United States during the 1960s were cases of “implicit censorship and violation of free speech.”⁶⁴

But Friedman, as I said, is just a rather clear and consistent example. Ayn Rand, just quoted in the earlier subsection, is another one. Yet another, much

⁶¹ Jordi Mundó, “La constitución fiduciaria de la libertad política. (Por qué son importantes las coyunturas interpretativas en la filosofía política),” *Isegoría* 57 (2017): 433–54. See also, Jordi Mundó, “Locke’s Property in Historical Perspective: Natural Law and the Shaping of Modern Political Common Sense,” *Analele Universitatii Din Craiova, Seria Filozofie* 40 (2017): 19.

⁶² Britton-Purdy, *The Meaning of Property*, 11–12 (building on Charles Taylor’s ideas).

⁶³ Milton Friedman, *Capitalism and Freedom* (University of Chicago Press [1962], 2002), 22. Here “liberal” refers to “classical liberalism” rather than to left-of-center ideas in the US.

⁶⁴ *Ibid.*, 35.

more interesting one, is the legal scholar Richard Epstein.⁶⁵ However, what interests me here is that such a libertarian, purely negative conception of freedom of expression has been called the “conventional” and “traditional” view.⁶⁶ Free speech is “classically” and “commonly” understood in this way—it “is not thought to involve the state acting so much as the state not acting.”⁶⁷ One may assume a certain impartiality in these generalizations, for these quotes come from non-libertarian scholars. After all, this is the understanding of free speech apparently enshrined in most of Western contemporary positive law. Article 10 of the European Convention on Human Rights protects a freedom of expression “without interference by public authority,” while the First Amendment to the Constitution of the United States starts with the oft-quoted negative statement “Congress shall make no law...”

Does this mean that all or most scholars writing on freedom speech are dedicated libertarians, like Friedman or Rand? No. Rather, with different degrees of theoretical refinement and empirical sensibility, the free speech libertarian framework is shared and reproduced by many non-libertarian thinkers, if only for descriptive or explanatory purposes. In fact, the normatively divergent nature of its supports is what makes it easier for this framework to pass as “the intuitive starting point for most contemporary arguments about free speech.”⁶⁸

This is part of what makes it an “interpretive conjuncture”: the free speech libertarian framework gets strengthened thanks to the varied and conflicting range of sources that tacitly or openly support it. Think of a jurist making a literalist, speech-protective reading of the First Amendment who is met by a critical theorist arguing to limit or trade off that very conception of freedom of expression. A common ground gets reinforced no matter how entrenched their disagreement—that “free” speech is what remains intact after the limits of political interference have been settled. The same happens when a Cold War intellectual venerating a cross-centuries libertarian canon of free speech is confronted by a late cultural historian excavating “alternative” notions of free speech contrary to that canon. Again, a relevant common ground remains unquestioned and in fact gets strengthened thanks to their disagreement—the notion that the canonical thinkers of Western modernity relied on a largely negative conception of expressive freedom.

In such cases, although the free speech libertarian framework may be deeply questioned on normative grounds, a good deal of its explanatory worth goes unchallenged. When acting as a descriptive common ground, the reproduction of the free speech libertarian framework can be understood as

⁶⁵ Richard Epstein, “The Fundamentals of Freedom of Speech,” *Harvard Journal of Law & Public Policy* 10, no. 1 (1987): 53–60.

⁶⁶ Richard Moon, *The Constitutional Protection of Freedom of Expression* (University of Toronto Press, 2000), 7.

⁶⁷ Andrew T. Kenyon, “Positive Free Speech: A Democratic Freedom,” in *The Oxford Handbook of Freedom of Speech*, ed. Adrienne Stone and Frederick Schauer (Oxford University Press, 2021), 231.

⁶⁸ Nelson, *Beyond the First Amendment*, 31.

acting in three different manners. The framework often acts on a conceptual level: expressive rights are seen as essentially libertarian claims (i.e., mere negative liberties against state interference). In other cases, the free speech libertarian framework acts on the level of intellectual history: the modern Western canon is seen as having developed ideas of expressive rights in a libertarian sense. Other times, the framework proceeds on the level of institutional history: the evolution of the modern public sphere is seen as responding to a libertarian narrative (e.g., expressive freedoms developed when state interference was weakened).

Frederick Schauer is a good example to illustrate the first case, the free speech libertarian framework acting on a conceptual level. Schauer is one of the most nuanced critics of pure free speech libertarianism in the United States. However, he thought freedom of speech was still “best characterized as the absence of governmental interference.”⁶⁹ It was merely that, a

liberty to communicate, unencumbered by governmental control but not necessarily unencumbered by other forms of control and not necessarily entailing the *de facto* ability to communicate.⁷⁰

But it is no surprise that Schauer emphasized the conceptual value of what actually was a distinctly normative conception of free speech—as he himself recognized, noticeably one-sided in certain contexts, favoring the socially and economically powerful.⁷¹ What is truly interesting for the purposes of tracing the interpretive conjuncture of free speech in the twentieth century is the observation that supplements Schauer’s definition. Writing in the early 1980s, if Schauer could water down the strongly normative nature of his conceptual choice it was because “there seems to be a developing consensus, at least in academic political philosophy, that a ‘liberty’ is the ‘absence of interference, censorship, control, regulation, constraint etc.’”⁷²

On a descriptive level, the free speech libertarian framework also plays an important role in the history of expressive liberties associated with the emergence of the modern public sphere. Thus, the historical relevance of free

⁶⁹ Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982), 129.

⁷⁰ *Ibid.*, 129.

⁷¹ Frederick Schauer, “The Political Incidence of the Free Speech Principle,” *University of Colorado Law Review* 64 (1993): 935–58.

⁷² Schauer, *Free Speech*, 129. Compare this view from the early 1980s with his more recent approach to the First Amendment. From the point of view of this thesis, Schauer’s late views can be seen as a move from (libertarian) political principles towards social theory and political economy when it comes to think about freedom of speech: “In light of this failure of normative free speech theory to explain the existing shape of the First Amendment, it may be more promising to shift course and consider the possibility that the most logical explanation of the actual boundaries of the First Amendment might come less from an underlying theory of the First Amendment and more from the political, sociological, cultural, historical, psychological and economic milieu in which the First Amendment exists and out of which it has developed,” Frederick Schauer, “The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience,” *Harvard Law Review* 117, no. 6 (2004): 1787.

speech libertarianism, either in its intellectual or institutional dimension, is often accepted by its normative critics. This is also true for authors looking for past “alternative” conceptions of free speech. Although their research contributes to widening our picture of intellectual history, the search for alternative visions of the public sphere is often built against a monolithic canon depicted as libertarian. That is, even advocates of alternative conceptions of freedom in the public sphere assume the explanatory power of the libertarian framework in the past (see below, §1.3.3, §2.3.1). As I noted above, free speech libertarianism can be thought of as a main driving force of the modern public sphere in at least two different ways: in an intellectual sense or in an institutional sense.

On the one hand, free speech libertarianism is too often seen by its critics as an intellectual movement that permeated past normative reflections on freedom of the press, toleration, or freedom of thought. In this regard, contemporary anti-libertarian normative theories of the public sphere are usually opposed to a politically flawed or obsolete Western canon of expressive freedom—a canon which is in turn described in terms of a libertarian conception of freedom of expression. For instance, David Carter, a historian of Greek republicanism and rhetoric whose important work recovers ancient conceptions of free speech, contrasts his findings with “modern” freedom of expression: “[t]o us in the West, Freedom of Speech is considered a negative right, in other words a freedom *from* censorship.”⁷³ The idea that the modern canon of free speech was libertarian (or that it fundamentally advocated *laissez-faire* in the public sphere, or that it only conceived of expressive liberties in a purely negative manner) is systematically reproduced in much of the critical, anti-libertarian literature that inspires this thesis. An influential example of this approach may be found in the work of Nadia Urbinati. “The claim for freedom of opinion,” Urbinati says,

was born as a claim for the protection of individual freedom. In particular, it was born as a vindication of religious freedom or freedom of conscience from secular and cleric authority.⁷⁴

Seventeenth-century English authors are identified among the early champions of these rights, which were “for the sake of instituting a negative kind of liberty that would put limits on authority by declaring a portion of individual life to be exclusively under one’s private jurisdiction or will.”⁷⁵ Thus, her normative critique of free speech libertarianism is based on its previous acceptance as the main historically significant intellectual tradition

⁷³ D. M. Carter, “Citizen Attribute, Negative Right: A Conceptual Difference between Ancient and Modern Ideas of Freedom of Speech,” in *Free Speech in Classical Antiquity*, ed. Ineke Sluiter and Ralph Rosen (Brill, 2004), 198. Similarly, Arlene W. Saxonhouse, *Free Speech and Democracy in Ancient Athens* (Cambridge University Press, 2006), 22–23.

⁷⁴ Nadia Urbinati, *Democracy Disfigured* (Harvard University Press, 2014), 49.

⁷⁵ *Ibid.*, 49.

on freedom—civil rights were “a vindication for a government that had to be checked and controlled.”⁷⁶

The early historical work of Jürgen Habermas (to name another scholar significant for this thesis) based one of its major theoretical contributions on this understanding of the past. A conclusion of Habermas’ research was a long-term view of the normative purpose of the welfare state. Its task, he said, was to make possible, under new industrial conditions, the kind of deliberative promise of the older, bourgeois public sphere.⁷⁷ Thus, echoing Hegelian and Marxist concerns, he was critical of the bourgeois public sphere as a liberal fiction of merely formal equality, in which participation in the deliberative process of rational truth-seeking was formally open to all, though actually limited to autonomous property holders.⁷⁸ However, despite this criticism, his macro-narrative reproduced the same hypostasis or naturalization he wanted to criticize in the first place. For Habermas fundamentally defined the earlier bourgeois public sphere as an association of private men, in which the role of the state could be “merely negative in character”—which was “prototypical” of “civil freedoms,” with “defensive and exemptive measures.”⁷⁹ In a welfare state, in contrast, “what cannot longer be vouchsafed indirectly by means of exemption is now in need of being positively granted.”⁸⁰ In sum, what he criticized as a bourgeois, merely negative and ideological self-understanding of the conditions of rational deliberation, he ended up accepting as a sociological and historical truth, which served him to underpin his advocacy of a new, more positive role for the state. As I will show below, Habermas was here following the conventional view of the Western political tradition among mid-twentieth century sociologists of communication (§2.3.1).

On the other hand, one might challenge the existence of free speech libertarianism as an intellectual tradition while reproducing the free speech libertarian framework to comprehend social change in history. On this level, the libertarian framework posits that the modern public sphere was created out of a process of socio-institutional development characterized by the growing limitation of state power, by the progressive expansion of legally protected spheres of non-interference (e.g., free speech emerged when censorship ended, toleration when religious persecution declined...). The political liberalism of Rawls, which I will discuss in detail later, is of special interest with regard to this point (§3.4). For the moment, allow me to say that he

⁷⁶ Ibid., 50.

⁷⁷ Jürgen Habermas, *The Structural Transformation of the Public Sphere*, trans. Thomas Burger and Frederick Lawrence (Polity Press, 1989), §VI.23.

⁷⁸ Ibid., §IV.14 (on Marx and Hegel). But this concern shapes much of Habermas’ project, which is part of a critique of ideology. On the limited, property-based features of the ideal bourgeois public sphere, see e.g., *ibid.*, 33–35, 53–56, 82–84, 109–10.

⁷⁹ Ibid., 229. I have modified the English translation here. Burger and Lawrence’s version reads “merely injunction-like character” where the original German says “bloß negatorischen Charakter.” *Strukturwandel Der Öffentlichkeit* (Hermann Luchterhand, 1976), 270. I want to acknowledge on this point the Spanish version I have mostly worked with: *Historia y crítica de la opinión pública*, trans. Antoni Domènech (Gustavo Gili, 1981).

⁸⁰ Habermas, *The Structural Transformation*, 231.

challenged the merely negative conception of freedom of speech dominant in his time while emphasizing (correctly, in my view) the “comprehensive” and, therefore, anti-libertarian intuitions of previous liberalisms. However, his account of how the social conditions of political liberalism came into being in early modern Europe effectively underpins a libertarian narrative. For Rawls, expressive freedom and state interference are negatively correlated in the history of early modern Europe—the first expands when the latter shrinks. He dismisses free speech libertarianism as a premodern historical *intellectual* legacy, yet he assumes its historical *institutional* salience, so to speak. The rise of toleration and, consequently, the rise of the social conditions that make Rawls’ political liberalism feasible, are seen as the involuntary byproduct of religious conflict and the decline of state power over certain areas of the public sphere. As we will see, he was not alone in assuming this.

In this lies the pervasive nature of the free speech libertarian framework: you do not need to be a consistent libertarian to accept it as a background assumption. Its prevalence is not just a matter of narrow-minded, politically biased, or coherent libertarian scholarship. As I have pointed out and as I will show in more detail in the course of the thesis, even thoughtful detractors of negative liberty often build their critique upon the partial acceptance of the conceptual, historical, or explanatory value of the free speech libertarian framework.

IV. WAS THE FREE SPEECH CANON ACTUALLY LIBERTARIAN?

As I will explain in the next chapters, one of the cornerstones of the free speech libertarian framework is captured by the metaphor of the “marketplace of ideas.” According to the hegemonic and libertarian reading of it, this metaphor suggests that, just as in perfectly competitive markets bad products are driven out by good ones, in a free exchange of viewpoints bad and false ideas are outcompeted by good arguments and sound reasoning (§2.1). The libertarian corollary is that, just as in perfectly competitive markets, no state interference is warranted in the free exchange of ideas: let negative rights prevent political coercion, and the clash of arguments will yield socially and epistemically valuable results. If the power of truth is all that we need for free and fruitful discussion to flourish, why should free speech be anything else than non-interference? Why should the state or any form of organized political action play a role here?

This optimistic view of the flow of ideas and debate in the public sphere buttresses the free speech libertarian framework both normatively and as a hermeneutical approach in the history of ideas. As we shall see later, even contemporary authors who deride this optimism as empirically naïve accept that this was, in fact, a representative position of early modern canonical thinkers on expressive liberties. We will see how it is claimed that the likes of John Milton, John Locke, Thomas Jefferson, or Stuart Mill contributed to a sort of free speech “laissez faire,” that their trust in “rational discussion” and

“the power of truth” was built on an absolute distrust of public power (e.g., §1.3.3, §2.3.1). Either in the interest of exonerating the past (fabricating a cross-centuries fable to endorse libertarianism today) or for the sake of deprecating that same past (straw-manning modernity as a pool of gullible, often hypocritical ideas irrelevant for today), in both cases the free speech libertarian framework gets reinforced. Both sides build on a common ground, to wit: some may like it, some others not, but the fact is that the Western canon of expressive freedoms is ostensibly structured along libertarian intuitions on how the public sphere works.

Now, it is true that the lack of restraints in speech has historically been associated with the lack of restraints in commerce. In this sense, the “marketplace of ideas” metaphor may be said to enjoy certain historicity. Francisco de Vitoria’s *ius communicationis*, perhaps the most systematic natural-law argument for a universal human right to share ideas, was explicitly connected to a right to free trade.⁸¹ This is turned into a metaphorical connection in the famous German proverb originally popularized by Lutheran circles that “*Gedanken sind zollfrei*”—that thoughts are free from custom duties.⁸² Milton, like other seventeenth-century English radicals, asserted expressive freedoms against censorship and licensing systems by associating the latter with despotic monarchical regulations of trade; hence his retort that “Truth and understanding are not such wares as to be monopolized and traded by tickets and statutes, and standards.”⁸³ And this was not a purely rhetorical move. In England, what made the struggle for a free press the more urgent was the inefficient, monopolistic system of printing patents that Locke himself had the occasion to criticize.⁸⁴

It was in this sense that William Haller, responsible for one of the first modern scholarly editions of English seventeenth-century tolerationist pamphlets, titled some of his commentaries as “The Utopia of Free Speech and Free Trade” or “Toleration and Laissez Faire.”⁸⁵ But these imposing titles promised much more than they could actually give in terms of textual evidence. Despite all that we have to thank Haller (his edition is still useful today), the advantage of nearly a century of historical research gives us good reason to question his account. He contributed to establish, however, a very

⁸¹ Francisco de Vitoria, *De Indis Prior*, Part III, §2–3.

⁸² Johannes Agricola, *Sybenhundert Und Fünfftzig Teütscher Sprichwörter* (Hagenau, 1534), §155. I owe this point to Andrea Pérez; see Hannah Höch and Lu Märten, *Dos mujeres con gato: Escritos sobre las artes*, ed. Andrea Pérez-Fernández and Isabel García Adánez (Tres Hermanas, 2023), 97 n66.

⁸³ Milton, *CPWJM*, vol. II: 535. See also “our richest Merchandize, Truth,” 548. For a contextualization of analogous criticisms, see Alan Craig Houston, “‘A Way of Settlement’: The Levellers, Monopolies and the Public Interest,” *History of Political Thought* 14, no. 3 (1993): 381–420.

⁸⁴ See the writings on press licensing collected in John Locke, *John Locke: Literary and Historical Writings*, ed. J. R. Milton (Oxford University Press, 2018), 321–30. See especially, J. R. Milton’s “General Introduction,” 69–100.

⁸⁵ William Haller, ed., *Tracts on Liberty in the Puritan Revolution, 1638–1647* (Columbia University Press, 1934), vol. I: 64–75, 92–94.

influential interpretive trend—as we will see later, dominant in mid-century scholarship and still alive even today. As Haller put it, the seventeenth-century English arguments for toleration were a “premonition of the doctrine of laissez faire,” that is: “Let government merely maintain public peace, and leave every man to the guidance of his own judgment in all things possible. Then all things will flourish in the commonwealth.”⁸⁶

Against this trend, this thesis posits that the historical narrative linking libertarian or laissez-faire views of markets with libertarian views of the public sphere deserves critical investigation. I want to stress that I am not discovering anything new here. Yet despite the specialized work of many historians who do not fall for the fable of a “free speech libertarian tradition,” or that even expressly work to counter it, the narrative remains a powerful premise in many fields of the humanities and the social sciences, and not least in public discourse.

IV.1. *The case of toleration and libertarian epistemic optimism*

An overview of some of the most canonical epistemic justifications of free speech that usually stir the libertarian imagination suggests that these arguments were rooted in political-economic reflections about the preconditions of freedom. Put differently, in these authors liberty was as important as the politically adjustable setting in which it was to be applied. This is what is overlooked in the libertarian reading of most of these epistemic justifications of expressive freedom. Like Mill’s thoughts on liberty at the commencement, they are restricted: contingent on particular “civilizational” conditions that enabled free inquiry. Let me start with Milton’s celebrated epistemic defense of free speech in *Areopagitica*:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?⁸⁷

Notice the qualified defense of the otherwise marvelous power of sound reasoning: “so Truth be in the field,” in “a free and open encounter.” Milton insists on this point. The contest of ideas is not meant to be *any* fight, but a fair and equal one in which error does not use the political advantages it usually has. “[T]o lay ambushments, to keep a narrow bridge of licensing where the challenger should pass,” Milton says, “though it be valour enough in souldiership, is but weakness and cowardice in the wars of Truth.”⁸⁸ He even stresses the other-regarding, gallant attitude of the fighter-discussants.

⁸⁶ Ibid., 94.

⁸⁷ Milton, *Areopagitica*, in *CPWJM*, vol. II: 561.

⁸⁸ Ibid., 562–3

The advocate of sound reasoning “calls out his adversary into the plain, offers him the advantage of wind and sun.”⁸⁹ One of Milton’s sources, the pamphlet writer and merchant Henry Robinson, had made this point distinctly clear: discussion “must be fought out upon even ground, on equal terms, neither side must expect to have greater liberty of speech, writing, Printing, or whatsoever else, than the other.”⁹⁰ This meant exactly what it suggests: a discussion “by fair means, that all reasons and inducements being alleged with equal liberty and freedom on both sides.”⁹¹ Truth is indeed powerful, we may say, but only under suitable conditions of fairness.

In the same vein, Locke’s well-known iteration of this *locus classicus* is a conditional: “For Truth would do well enough, *if* she were once left to shift for herself.”⁹² And, as Milton, he also insisted on how frequently “Errors indeed prevail by the assistance of foreign and borrowed Succors.”⁹³ Jefferson, to name another typical figure in the free speech libertarian canon, also made the point conditionally. He wrote that “truth is great and will prevail if left to herself,” and he also was unambiguous that this is the case “unless by human interposition [truth is] disarmed of her natural weapons, free argument and debate.”⁹⁴ “It is error alone which needs support of government,” he said in a later text describing his religious ideal—that of a plurality of small churches counteracting each other through “free inquiry,” “good sense” and “reason.”⁹⁵ But for “several sects [to] perform the office of a *Censor morum* over each other,” for “fair play” among them to obtain, as he put it, a certain political economy of religion was needed—as I will show below, one without wealthy churches and powerful priests.⁹⁶

Mill did exactly the same in *On Liberty*, using the fair combat metaphor. We may hold on to the power of truth conditionally: “if the lists are kept open.”⁹⁷ And, as the others, recollecting historical experiences of persecution, he even got to scorn the naïve approach with which future commentators would associate Mill’s own arguments:

indeed, the dictum that truth always triumphs over persecution, is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes. History teems with instances of truth put down by persecution. If not suppressed forever, it may be thrown back for centuries (...) Persecution has always succeeded, save where the heretics were too strong a party to be effectually persecuted. (...) It is a piece of idle

⁸⁹ Ibid., 563.

⁹⁰ Henry Robinson, *Liberty of Conscience: Or The Sole Means to Obtaine Peace and Truth* (London, 1643), 17. I owe this quote to Ernest Sirluck, “Introduction,” in *CPWJM*, vol. II: 84.

⁹¹ Robinson, *Liberty of Conscience*, 19.

⁹² Locke, *A Letter Concerning Toleration* (1689), in *A Letter Concerning Toleration and Other Writings*, ed. Mark Goldie (Liberty Fund, 2010), 45. My italics.

⁹³ Ibid., 45.

⁹⁴ Jefferson, “A Bill for Establishing Religious Freedom” (1777), in *TWTJ*, vol. II: 441.

⁹⁵ Jefferson, *Notes on the State of Virginia*, in *TWTJ*, vol. IV: 79–80.

⁹⁶ Ibid., 81.

⁹⁷ Mill, *On Liberty*, in *CWJSM*, vol. XVIII: 232.

sentimentality that truth, merely as truth, has any inherent power denied to error, of prevailing against the dungeon and the stake. Men are not more zealous for truth than they often are for error, and a sufficient application of legal or even of social penalties will generally succeed in stopping the propagation of either.⁹⁸

In summary, epistemic optimism never meant epistemic naivety, at least in these authors. Their awareness of how the actual distribution of power conditions the realization of expressive freedoms, and how it may determine the outcome of discussion, tamed their otherwise hopeful views of our cognition and its aggregated effects.

In addition, this is the reading suggested by taking into consideration the broader views of these authors on the public sphere. For them, as we saw with Mill at the beginning, the workability of the principles of liberty was rooted in the civilizational stage of society. What if a polity did not meet the prerequisites for free and open discussion to flourish? What if, connecting this point to the classical republican views I examined in the last section, relationships of dependence make expressive freedoms futile? These were the kind of questions faced by early modern epistemic optimists, for they wrote for political communities where dependence was the norm, where the despotic use of public power (with which we moderns are mostly concerned) was only one among other equally influential, pervasive, and freedom-undermining sources of private power. As the liberal political scientist Stephen Holmes has put it: for early modern champions of liberty “[c]ivil society, indeed, is society ‘civilized’ by the state,” which meant a “state-orchestrated *redistribution of security*.”⁹⁹

For the likes of Milton and Locke, churches, especially wealthy, inquisitorial, institutionally and historically powerful ones such as the Catholic Church, were a source of private domination. For them, clerical influence was framed as distinct from public sovereignty—although persecuting churches often made use of public power to dominate others, this was seen more as a co-optation of the state by a private faction.¹⁰⁰ According

⁹⁸ Ibid., 239–39.

⁹⁹ Stephen Holmes, “Liberal Constraints on Private Power?: Reflections on the Origins and Rationale of Access Regulation,” in *Democracy and the Mass Media*, ed. Judith Lichtenberg (Cambridge University Press, 1990), 22. Italics in the original.

¹⁰⁰ For contextualization of Locke’s thought within, respectively, English anticlericalism, continental anti-Catholicism, and Erastianism (i.e., the view that civil power must have a complete supremacy over religious institutions, at least in non-spiritual matters), see Richard Ashcraft, “Anticlericalism and Authority in Lockean Political Thought,” in *The Margins of Orthodoxy*, ed. Roger D. Lund (Cambridge University Press, 1995), 73–96; John Marshall, *John Locke, Toleration and Early Enlightenment Culture* (Cambridge University Press, 2008), 680–694; Eric Nelson, *The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought* (Harvard University Press, 2011), 116–137. See my own reading in “‘Razones para tolerar a los papistas igual que a otros’. La Iglesia Católica y el nuevo

to Milton's defense of a free press, "popery" and "open superstition" should not be tolerated because they undermined all "civil supremacies."¹⁰¹ In the view of many early modern advocates of toleration, the Catholic Church not only threatened freedom at the level of individuals (e.g., by persecuting heretics), but also impeded the civil guarantee of freedom by challenging or capturing public power (e.g., excommunicating and calling for the deposition of rulers, conspiring against unfavorable governments, infiltrating civil authority, controlling too much landed property, etc.).

The problem of religious toleration and expressive liberty was then intertwined with the problem of factionalism—another classical republican theme.¹⁰² This is the background of Locke's frequent comparisons of churches with any other civil or commercial association.¹⁰³ Milton interestingly used an economic metaphor as well, in his case to criticize the Presbyterian attempts to create an intolerant national church: they "had almost brought Religion to a kind of trading monopoly."¹⁰⁴ Thus, the commercial analogy had important tolerationist implications, for it supported the idea that churches, no matter how heretic or strange their beliefs and internal affairs, were as legitimate as any other private group. But it also led to the correlate qualification of the principle of toleration: just like with commercial corporations, too influential churches deserved vigilance to keep their power under check. In Locke's words, this was the view that just as it can happen with "most men, at least factions of men"

when they have power sufficient, make use of it, right or wrong, for
their own advantage, and the establishment of themselves in

manuscrito de John Locke," *Sin Permiso* 17 (2020): 219–28. The case of Milton is a bit more complicated due to his opposition to Erastian principles and religious establishment during the Protectorate; on this, see Philip Connell, *Secular Chains: Poetry and the Politics of Religion from Milton to Pope* (Oxford University Press, 2016), chap. 1. See also the competing interpretations in Michael Komorowski, "'On the New Forcers of Conscience' and Milton's Erastianism," *Milton Studies* 55, no. 1 (2014): 237–68; Tobias Gregory, "Did Milton Have an Erastian Phase?," *Milton Quarterly* 49, no. 3 (2015): 159–66. Regardless of Milton's Erastianism (of whether he was in favor of a politically controlled national church), his anticlericalism—and the specific form it took as anti-Catholicism—should not be dismissed from his views on toleration. On this point, Sirluck, "General Introduction," in *CPWJM*, vol. II: 178–181; Andrew Hadfield, "Milton and Catholicism," in *Milton and Toleration*, ed. Sharon Achinstein and Elizabeth M. Sauer (Oxford University Press, 2007), 186–201; Victoria Silver, "'A Taken Scandal Not a Given': Milton's Equitable Grounds of Toleration," in *Milton and Toleration*, ed. Sharon Achinstein and Elizabeth M. Sauer (Oxford University Press, 2007), 144–70. For a narrative putting both authors together in a similar sense as defended above, see Mark Goldie, "Priestcraft and the Birth of Whiggism," in *Political Discourse in Early Modern Britain*, ed. N. T. Phillipson and Quentin Skinner (Cambridge University Press, 1993), 209–31.

¹⁰¹ Milton, *Areopagitica*, in *CPWJM*, vol. II: 565

¹⁰² On a typical republican source on the risk of faction see the historical analysis in John M. Najemy, *Machiavelli's Broken World* (Oxford University Press, 2022), chaps. 6 and 7. For a broader analysis of this question, see Domènech, *El eclipse*, chap. 2.

¹⁰³ E.g., Locke, *An Essay Concerning Toleration* (1667), 72; *A Letter Concerning Toleration*, 16, 54, 56–57.

¹⁰⁴ Milton, *Eikonoklastes* (1649), in *CPWJM*, vol. III: 348–349.

authority, few men forbearing to grasp at dominion that have power to seize and hold it.¹⁰⁵

The history of Catholicism provided empirical evidence of this possibility and thus a prudential case not to tolerate it. This idea points to the purely political, non-religious reasons behind the Catholic exclusion from toleration, which Locke acknowledges as appropriate for any other religions: “it is not the difference of their opinion in religion, or of their ceremonies in worship; but their dangerous & factious tenets in reference to the state.”¹⁰⁶ In the earlier decade Milton had made the exact same point about Catholics. “Their religion the more considered, the less can be acknowledged a religion,” he wrote, “but a Roman principality rather, endeavoring to keep up her old universal dominion under a new name and mere shadow of a catholic religion.” This, in turn, explained that “if they ought not to be tolerated, it is for just reason of state more than of religion.” And, just as Locke, Milton extended this concern as well to persecutory branches of Protestantism that wanted to use civil power to further spiritual goals: “they who force, though professing to be protestants, deserve as little to be tolerated themselves, being no less guilty of popery in the most popish point.”¹⁰⁷

Let me emphasize once more how early modern anticlericalism was founded on a historical political economy of religion, in which the Catholic Church exemplified the risk of faction par excellence: of private power taking over the state and undermining the preconditions of freedom.¹⁰⁸ One of the most remarkable threads binding together these authors’ political economy of religious liberty was the work of Paolo Sarpi, a Venetian statesman of the early seventeenth century renowned for his criticism of papal jurisdiction in defense of Venice’s sovereignty. Sarpi was one of the heroes of later European republicanism. Milton was especially fond of him—he was, just to put an example, a major source for the ecclesiological opinions in *Areopagitica*.¹⁰⁹ We know that Locke also read Sarpi and might have taken notes.¹¹⁰ Sarpi’s *History of the Council of Trent* and *History of Benefices* were read across Europe in diverse translations, focusing much future critique of Catholic power on its political-economic roots. As David Wootton puts it, Sarpi

¹⁰⁵ Locke, *An Essay Concerning Toleration*, 118.

¹⁰⁶ Locke, “Reasons for tolerating papists equally with others,” 1115. I am quoting from the complete transcription of this recently discovered text in J. C. Walmsley and Felix Waldmann, “John Locke and the Toleration of Catholics: A New Manuscript,” *The Historical Journal* 62, no. 4 (2019): 1093–1115.

¹⁰⁷ Milton, *A Treatise of Civil Power* (1659), in *CPWJM*, vol. VII: 254.

¹⁰⁸ My views on republicanism and early modern secularism are very indebted to Antoni Domènech, “Cristianismo y libertad republicana: Un poco de historia sacra y un poco de historia profana,” *La Balsa de la Medusa* 51–52 (1999): 3–47.

¹⁰⁹ Milton, *Areopagitica*, *CPWJM*, vol. II: 500–510 (see esp. Sirluck’s footnotes).

¹¹⁰ J. R. Milton and Philip Milton, “General Introduction,” in *An Essay Concerning Toleration: And Other Writings on Law and Politics, 1667–1683*, by John Locke (Oxford University Press, 2006), 146. On the political use of Sarpi’s historical works by Locke’s contemporaries, see Eloise Davies, “The English Sarpi and the Glorious Revolution,” *Bruniana e campanelliana* 29, no. 1 (2023): 169–79.

“certainly held that it was the division of property within the Church which had determined the ‘maxims and manners’ of Catholic Christianity.”¹¹¹

Another name often ascribed to the canon of laissez-faire in religious freedom is Adam Smith (yet someone whose political-economical awareness will not be in doubt). He was a reader of Sarpi as well. Smith owned a six-volume Italian edition of Sarpi’s works, and the *Council of Trent* in English and Italian.¹¹² The interpretive focus of Smith’s approach to religion has often been based, in a remarkably libertarian manner, on his argument in the *Wealth of Nations* that a competitive market of “small sects” would neutralize each other’s religious excesses—a position, as we just saw, reproduced almost verbatim by Jefferson in the next decade. However, what is often forgotten is that Smith’s economic rationale for the free competition of small sects was supplemented by a scathing criticism of the Catholic Church. In the tradition of Sarpi, Machiavelli, Milton, and Locke, Smith compared the Roman Church to an exceedingly powerful private corporation that threatened public sovereignty: “all other things being supposed equal,” he said, “the richer the church” then “the less able must the state be to defend itself.”¹¹³ It is also often forgotten that the context of this whole passage is Smith’s discussion of education and the role that public authorities may have in guaranteeing it. As in Jefferson, we may say that the competition between small sects nurturing fair and rational discussion is not an unprompted outcome, but one enabled by minimal provision of education and limits on undue accumulations of private power in the hands of the clergy.¹¹⁴

It should not be surprising that Jefferson also owned Sarpi’s *Council of Trent* in Italian and English, which helps to explain his recurring bad opinion of “priests,” often putting them in his correspondence along “kings” and “nobles”—that is, as the three branches of old-regime ambition built on

¹¹¹ David Wootton, *Paolo Sarpi: Between Renaissance and Enlightenment* (Cambridge University Press, 2002), 114–15; see also 48–55, 78–81. “Theology was only of interest to Sarpi in so far as it masked abuses in the accumulation of power and wealth,” *ibid.*, 113.

¹¹² Jordan J. Ballor, “A Survey of Adam Smith’s Theological Sources,” in *Theology, Morality and Adam Smith*, ed. Jordan J. Ballor and Cornelis Van Der Kooi (Routledge, 2022), 51.

¹¹³ See Gary M. Anderson, “Mr. Smith and the Preachers: The Economics of Religion in the *Wealth of Nations*,” *Journal of Political Economy* 96, no. 5 (1988): 1066–88. The relevant section is Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. R. H. Campbell, Andrew S. Skinner, and W. B. Todd, Glasgow Edition (Oxford University Press, 1978), bk. V, chap. I, §f–g. It may be added that, after Machiavelli, in these sections Smith quotes Hume’s views on church history at length, including the admonition that the “interested diligence of the clergy is what every wise legislator will study to prevent.” In the sections quoted by Smith and in many other occasions, Hume heavily relied on Sarpi’s research (cited as “Father Paul” or “Padre Paolo”). See e.g., David Hume, *The History of England from the Invasion of Julius Caesar to the Revolution in 1688*, ed. William B. Todd (Liberty Fund [1754–1761], 1983), vol. III, chap. 29; vol. I, chap. 2. I want to thank David Casassas for suggesting me to study the Smith–Hume connection on the economics of religion.

¹¹⁴ Not by chance, this is a position very coherent with Voltaire’s strongly anti-clerical views on toleration, one of the most plausible sources of the small-sect competition argument but conveniently excluded from most accounts of the “libertarian tradition.” See Voltaire, “On the Presbyterians,” in *Letters Concerning the English Nation*, ed. Nicholas Cronk (Oxford University Press, 1994), 30.

keeping the people ignorant and actively impeding liberty.¹¹⁵ Jefferson was thus cultivating a longstanding tradition of political-economic prudence when he told John Adams (another reader of Sarpi) that if priests had not been powerful counterrevolutionary agents in Virginia it was due to their lack of economic interest in influencing the people—the contrary occurred, Jefferson observed, in Catholic Latin America.¹¹⁶ As he wrote to Alexander von Humboldt about New Spain:

History, I believe, furnishes no example of a priest-ridden people maintaining a free civil government. This marks the lowest grade of ignorance, of which their civil as well as religious leaders will always avail for their own purposes.¹¹⁷

In his home state of Virginia, jointly with agrarian reform and education, the third pillar of the revolutionary process was for Jefferson “the law for religious freedom, which put down the aristocracy of the clergy, and restored to the citizen the freedom of the mind.”¹¹⁸ Religious freedom, as for Locke and Milton, was realized unambiguously against the vested interests of a private corporate party: priests.

Let me finish with one of Jefferson’s associates, James Madison—one of the main contributors to the First Amendment and the separation of church and state in the early American republic.¹¹⁹ Writing in the first decades of the nineteenth-century, we may notice that, for Madison, separating church and state was not merely a negative program but, as in earlier writers, a program predicated on imposing civil supremacy on worldly matters. This was the only way to ensure the public guarantee of liberty. In a remark very appropriate still today, Madison warned that the “The danger of silent accumulations & encroachments by Ecclesiastical Bodies have not sufficiently engaged attention in the US.”¹²⁰ He was troubled by what we may justly call the political economy of toleration:

¹¹⁵ On Sarpi’s books, see James Gilreath and Douglas L. Wilson, eds., *Thomas Jefferson’s Library: A Catalog with the Entries in His Own Order* (Library of Congress, 1989), chap. 5. Of course, Jefferson was deeply opposed to tithes and any public support of churches, which was a radical position on religion by the standards of the time (*TWTJ*, vol. II: 439–440). On “kings, priests & nobles,” see e.g., *TWTJ*, vol. V: 154, 228. On contemporary American reactions to Jefferson’s views, see Fred C. Luebke, “The Origins of Thomas Jefferson’s Anti-Clericalism,” *Church History* 32, no. 3 (1963): 344–56.

¹¹⁶ “To John Adams” (1813), *TWTJ*, vol. XI: 345. On clerical power as undermining revolutionary prospects in Latin America, see *TWTJ*, vol. XI: 215, 358; XII: 64.

¹¹⁷ Jefferson, “To Baron von Humboldt” (1813), in *TWTJ* vol. XI: 352.

¹¹⁸ “To John Adams,” *TWTJ*, vol. XI: 347.

¹¹⁹ Irving Brant, “Madison: On the Separation of Church and State,” *The William and Mary Quarterly* 8, no. 1 (1951): 3–24.

¹²⁰ James Madison, “Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments” (c. 1820–1830), 554, which is part of his so-called “Detached Memoranda.” I provide page numbers from their transcription in Elizabeth Fleet, “Madison’s ‘Detached Memoranda,’” *The William and Mary Quarterly* 3, no. 4 (1946): 534–68.

besides the danger of a direct mixture of Religion & civil Government, there is an evil which ought to be guarded against in the indefinite accumulation of property from the capacity of holding it in perpetuity by ecclesiastical corporations. The power of all corporations, ought to be limited in this respect. The growing wealth acquired by them never fails to be a source of abuses. (...) The excessive wealth of ecclesiastical Corporations and the misuse of it in many Countries of Europe has long been a topic of complaint. In some of them the Church has amassed half perhaps the property of the nation (...) how enormous were the treasures of religious societies, and how gross the corruptions engendered by them.¹²¹

The danger was especially pressing in the United States, Madison said, due to the frequent grants of public land in the unstable real estate markets of the growing republic, in which the value of a small allowance could end up being much higher in less than one generation. Thus, he recommended the American people to watch “against every evil lurking under plausible disguises, and growing up from small beginnings. *Obsta principiis* [resist the beginnings].” And to support this claim he added a reference with which we are already familiar: “see the Treatise of Father Paul on beneficiary matters.”¹²²

IV.2. *The libertarian interpretive trap: liberty with exceptions*

So much for the merely negative view of expressive rights advocated by early moderns, in which the state had nothing to do other than restrict its own power. On the contrary, before society was civil, public power still had much to do. To put it in a polemical slogan, if anything close to “laissez faire” was important at all for these writers, this should be understood as a goal to be achieved by deep social transformations, not as a theoretical assumption or as a circumstance already obtaining—not as if one could simply act on a “negative” conception of freedom, removing all obstacles so the ideal is to be achieved. In the early modern world, letting “government merely maintain public peace, and every man to the guidance of his own judgment in all things possible,” as Haller had it, could not possibly have involved a merely negative idea of liberty. Hence the inadequacy of “laissez faire” as a hermeneutical tool to frame early modern accounts of expressive freedom.¹²³ Establishing the preconditions of free discussion required particular political actions. Giving truth and reason free rein was a horizon whose realization necessarily called

¹²¹ Ibid., 556–557.

¹²² Ibid., 558. I believe he may be referring to Fra Paolo Sarpi’s *History of Benefices*. Fleet, the editor of Madison’s text, suggests the *History of the Council of Trent*, a book listed in the theological catalogue of the University of Virginia that he and Jefferson exchanged (ibid., 558, n51).

¹²³ To do justice to Haller, the regulatory ideal invoked by “laissez faire” was slightly different in the 1930s, when he wrote, than after the Second World War and the 1970s, when “laissez faire” was recovered by right-wing economists, especially in its connection with expressive liberties. On these changes, see Chapter 2.

for much more than “laissez faire” itself, something else than “leaving things as they are” or getting rid of government obstacles. For many authors optimistically advocating for the “power of truth,” all these things required, of course, the end of state despotism, but also a much deeper transformation of social relationships—for which the use of coercive state power was in turn necessary. In a study on Locke, John Dunn captured this prudential, context-dependent focus of early modern thinkers by pointing out that “freedom of expression cannot be a self-defining and self-subsistent political and social good, let alone a wholly untrammelled individual right, independently of the consequences of the ways in which it comes to be exercised.”¹²⁴

However, note how the free speech libertarian framework invites us just to think expressive liberties in the exact opposite way, disregarding context, neglecting past exclusions as exceptional; how it leads to undertheorizing the reasons why past advocates of expressive freedom did not give their principles the unrestricted scope characteristic of contemporary political theory. It is very telling, in this sense, how later readers reckoned with the anti-Catholic “limits” of the Lockean and Miltonic approaches to religious freedom examined above. For example, interpreting the provisos against superstition and popery in Milton’s *Areopagitica*, Walter Lippmann spoke of a “weasel clause” that most advocates of liberty introduced in their arguments, proving that they only “were finite men pleading a special cause.”¹²⁵ That is, Milton’s fierce anti-Catholicism, Lippmann tells us, “depended far less upon his notion of the value of liberty than upon his conception of God and human nature and the England of his time.”¹²⁶ In short, it was due to partiality and narrow-mindedness, not his ideal of freedom, that Milton excluded Catholics from toleration. Similarly, a major study on expressive freedom in the 1910s observed that Locke “is not free from the prejudices of his time,” for the “exceptions” of his theory of toleration “contradict his own principle.”¹²⁷ Lord Acton, to name another nineteenth-century source significant for the interwar protagonists of this thesis, antagonized both Locke and Milton’s “partial condemnation of intolerance” with earlier religious congregations “who grasped with vigour and sincerity the principle that it is only by abridging the authority of States that the liberty of Churches can be assured.”¹²⁸ Milton’s late-nineteenth century biographer also highlighted the “exceptions” to toleration, adding that he “had little care for them in comparison with the principle he meant them to limit.”¹²⁹

Fredrick Siebert—as I will show later, one of the thinkers responsible for consecrating free speech libertarianism as a historical tradition—also made

¹²⁴ John Dunn, “Measuring Locke’s Shadow,” in *Two Treatises of Government and A Letter Concerning Toleration*, ed. Ian Shapiro (Yale University Press, 2003), 274.

¹²⁵ Walter Lippmann, *Liberty and the News*, ed. Paul Rozen (Transaction Publishers [1920], 1995), 26–27.

¹²⁶ *Ibid.*, 28–29.

¹²⁷ J. B. Bury, *A History of Freedom of Thought* (Cambridge University Press, 1913), 103.

¹²⁸ J. E. E. D. Acton, *The History of Freedom and Other Essays*, ed. John Neville Figgis and Reginald Vree Laurence (Macmillan, 1907), 52.

¹²⁹ David Masson, *Life of Milton* (Macmillan, 1873), vol. III: 288.

this move in a very influential handbook (§1.3.3). For Siebert, the lesson of *Areopagitica* is of course that “Government should keep out of the battle and not weigh the odds in favor of one side or the other,” because there is a “self-righting process” in the battle of ideas.¹³⁰ Yet when Siebert collates his libertarian reading with the ostensibly contradictory fact that Milton excluded Catholics from toleration and free speech, we are told that he “avoided any general principles on which these limitations might be based.” Thus, moralizing and depoliticizing Milton’s argument, Siebert suggests that, more simply, Catholics “did not live up to his standards of honesty.”¹³¹ Siebert’s still useful mid-century book on the history of press freedom, though more nuanced, betrayed the same assumptions. This time it was the more radical William Walwyn, the Leveller, who was not “yet prepared to champion either complete religious toleration or liberty of the press (...) not yet prepared to adopt complete freedom as an inescapable alternative.”¹³²

Later historians on the lookout for an early modern “libertarian” thread of free speech have opted for the same strategy to incorporate the copious historical evidence against that narrative. Thus, Jeffery Smith writes that in the seventeenth-century “the marketplace of ideas was thus depicted as reasonable and just, but few were prepared to comply with all its logical implications.”¹³³ In consequence, the exceptions to the main narrative are explained away as shortcomings of personal character: “Libertarians did not always exercise perfect self-control or flawless adherence to their principles.”¹³⁴ Benjamin Franklin, for instance, “endorsed liberty of the press as resolutely as any other freedom, but was not always prepared to say that the rights he expected for himself should be extended to a business competitor or a political adversary.”¹³⁵ This coheres with how much emphasis has been put on the Founders’ anti-statism when it comes to capture their ideas on free speech, and how often their more “positive” views have been neglected. However, for the founding generation, an “open” plural press was as important as one “free” from government restrictions; and fostering media plurality often required state resources, such as mail privileges for periodicals at the paid by the public.¹³⁶

¹³⁰ Siebert, Peterson, and Schramm, *Four Theories*, 45.

¹³¹ *Ibid.*, 45.

¹³² Fredrick S. Siebert, *Freedom of the Press in England, 1476-1776: The Rise and Decline of Government Control* (University of Illinois Press, 1952), 193.

¹³³ Jeffery A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* (Oxford University Press, 1988), 34.

¹³⁴ *Ibid.*, 12.

¹³⁵ *Ibid.*, 13. Note that Franklin’s trade was news and printing. The same argument, including Jefferson: they advocated for limits to free speech “strongly influenced by politics and personal attitudes,” *ibid.*, 165.

¹³⁶ Richard B. Kielbowicz, “The Press, Post Office, and Flow of News in the Early Republic,” *Journal of the Early Republic* 3, no. 3 (1983): 255–80; Robert W. Martin, “From the ‘free and Open’ Press to the ‘Press of Freedom’: Liberalism, Republicanism and Early American Press Liberty,” *History of Political Thought* 25, no. 4 (1994): 505–35; Victor Pickard, *Democracy without Journalism? Confronting the Misinformation Society* (Oxford University Press, 2020), 13–15.

In these interpretations, canonical writers are advocates of toleration or expressive liberty understood as non-interference, in a “libertarian” manner, “but.” These “buts,” in turn, are perceived as external, so to speak, to their theories of liberty: they are rooted in “exceptions,” historical or personal “prejudices,” in being unable “to comply” with the “logical implications” of their own arguments, in lack of “preparation.” Despite all these “buts,” in any case, we are told that they were pointing to a libertarian principle of complete freedom. This is a clear mark of the whiggish historiography that has permeated the fields of free speech and toleration.¹³⁷ By insisting on the intuition that expressive liberties *necessarily* evoke an anti-statist libertarian principle of non-interference, some intellectual historians end up in a situation not unlike early modern astronomers. Assuming that the universe was *necessarily* geocentric and celestial orbits perfect circles, Ptolemaic astronomers created models of growing complexity in an attempt to match their preconceived ideas with their empirical observations. The result was impractical astrophysical descriptions of a baroque complexity—full of “buts”—, with epicycles over epicycles and constant tinkering with the model; all of it with the purpose of sticking to received assumptions about what the universe *necessarily* looks like.

The question is, why should an alleged principle of non-interference be more hermeneutically salient than any of the “buts” (i.e., boundaries that circumscribe such principle, and the reasoning behind them)? If Milton, Locke, and the like indeed considered that government should *not* keep out of the battle of ideas under certain circumstances, why are we interpreting their political theory the other way round, just adding “exceptions”? Why is the criticism of government more significant for understanding past views of toleration than the qualified support of state action in order to fight other obstacles to expressive freedom? By displaying answers only in one direction, the free speech libertarian framework has contributed to distorting the past, vindicating only half of the story. As I will discuss later, alternative views of freedom, such as that recovered by neorepublicanism, may help in this necessary reframing of history (§4.2).

¹³⁷ On American “libertarianism” as fostering the same historiographical vices as English “whiggish” history, see Geoff Kemp and Jason McElligott, “General Introduction,” in *Censorship and the Press, 1580-1720. Volume I: 1557-1579*, ed. Geoff Kemp et al. (Pickering & Chatto, 2009), xxiv. On the methodological reflection behind this point, see Quentin Skinner, “Meaning and understanding in the history of ideas,” in *Visions of Politics, Vol. 1: Regarding Method* (Cambridge University Press, 2002), 57–89. I am very indebted to a reading of Milton that points out similar interpretive problems unrelated to free speech (e.g., the compatibility of his view of natural rights with his aristocratical views of republican virtue), by Christopher Hamel, “The Republicanism of John Milton: Natural Rights, Civic Virtue and the Dignity of Man,” *History of Political Thought* 34, no. 1 (2013): 35–65. Hamel has recently made analogous arguments regarding the history of expressive liberties, see his “Que nous apprend l’histoire intellectuelle sur la liberté d’expression?,” *Revue de métaphysique et de morale* 116, no. 4 (2022): 533–53.

IV.3. The libertarian normative trap: preconditions taken as given

But we are not in early modern Europe anymore, it may be said. Perhaps Milton and Jefferson's epistemic optimism required vigilance against inquisitorial priests and powerful old-regime dominators. Our circumstances, however, should be seen as fortunately different. We may thus start political philosophy, as Mill did, from a supposition of "civilization"—in our case, even from a surer, more inclusive and broader supposition than Mill's own, thanks to almost two centuries of additional historical experience. Rawls, as we shall see, did just this: let us theorize as if the suitable preconditions of freedom hold, as if all the moral and institutional lessons from modernity are learnt for good (§3.3.3; §3.4.1). This makes a much stronger case for free speech libertarianism: regardless of what happened in the past, the political economy of expressive liberties can be ignored today because it is irrelevant for our context; whatever may have been needed in the past, the preconditions of free discussion and modern civilization already obtain.

Relatedly, it could be said that many of the issues that will be brought up during this thesis could be solved through adequate technological improvements. If the major problem posed by stressing how free speech is rooted in a political economy of communication revolves around the issue of scarce media and infrastructures, then perhaps most of the obstacles could be overcome through suitable technical innovations. The internet was certainly seen in this way by some of its early users. Not by chance, the promises of the internet gave new life to many of the libertarian tropes considered in this research.

For a noteworthy strand of cyberlibertarian activists and lobbyists writing in the 1990s, the internet was the best evidence of an autonomous public sphere unreachable by political coercion, a confirmation that self-regulating, spontaneous communities based on free discussion and equal footing among discussants were possible. The cyberspace was in this view a proof that social conversation leading to truth and political agreement was something that could be created thanks to the absence of government interferences. Early modern political discourse (interpreted along free speech libertarian lines) was the perfect fit for such a new state-of-nature situation made possible by communication technologies. Thus, John Perry Barlow, a leading activist and ideologue during these years, wrote that the cyberspace is not "a public construction project. (...) It is an act of nature and it grows itself through our collective actions." "Governments," he continued "have no sovereignty where we gather" since "we are forming our own Social Contract."¹³⁸ In the cyberspace, "freedom, like water, will flow around or over those that stand in its way." It was a place where "truth will be self-evident" thanks to freedom in communication. In this new place, free of any political coercion, "direct

¹³⁸ John Perry Barlow, "A Declaration of the Independence of Cyberspace," *Electronic Frontier Foundation*, 1996.

communication” is possible, which “should breed understanding and tolerance.”¹³⁹

Of course, the tiniest familiarity with the material foundations of the internet turns the early cyberlibertarian views into a romantic statement of political and technological nonsense.¹⁴⁰ Even Barlow himself later showed a sharper awareness of private power on the internet. As he said recently: “Anybody that made it through the 90s and (aughts) without having their libertarianism taking a pretty good hit wasn’t paying attention,” adding that “[w]e deregulated every g--d--- thing, and it came back at us in this way that we may never recover.”¹⁴¹

However, in the context of this project, Barlow’s late revision of his utopianism is as telling as his earlier views. His 1990s vision of the cyberspace tells us something about the powerful pervasiveness of the free speech libertarian framework in the United States, on both a normative and an explanatory-historical level. In a movement with which we will become very familiar, Barlow vindicated the free speech canon in a libertarian direction to assert the lack of authority that governments had over the internet: “the dreams of Jefferson,” “Mill,” and “Madison”—“These dreams must now be born anew in us.”¹⁴² We may say that, with respect to expressive liberties, the cheap and global promises of internet communication were seen as a futuristic revival of a preindustrial past: allowing for small communities of peers, enabling independence from modern administrative states, all against the backdrop of equal freedom. It is for this reason that Jeffersonian agrarianism and metaphors of frontier life were a common source of inspiration among cyberlibertarians.¹⁴³ But, as this section has suggested, this libertarian image of the past must be questioned as much as its vision of the future. Past advocates of expressive freedom were concerned with many other things than state overreach—including Jefferson, Madison, and their ilk. In fact, their arguments for liberty were aware of private threats that often required the use of political power to be counteracted. And, as the rest of the thesis will argue at different points, advocates of expressive liberties will do well to be skeptical that preconditions simply obtain or are secure (see esp. §3.4.3; §4.2.1; §5.2; §6.1.2; §6.3).

¹³⁹ John Perry Barlow, “To Be at Liberty,” *EFFector Online* 5, no. 12 (1993).

¹⁴⁰ Ben Tarnoff, *Internet for the People: The Fight for Our Digital Future* (Verso, 2022), chaps. 1 and 2.

¹⁴¹ Jacob Silverman, “Meet the Man Whose Utopian Vision for the Internet Conquered, and Then Warped, Silicon Valley,” *The Washington Post*, March 20, 2015.

¹⁴² Barlow, “A Declaration of the Independence of Cyberspace.”

¹⁴³ Richard Barbrook and Andy Cameron, “The Californian Ideology,” *Science as Culture* 6, no. 1 (1996): 44–72; Alfred C. Yen, “Western Frontier or Feudal Society: Metaphors and Perceptions of Cyberspace,” *Berkeley Technology Law Journal* 17, no. 4 (2002): 1207–63.

V. NOTE ON THE STATE: INTERFERENCE AND FREEDOM

During the thesis, I make the claim that the “state” has been thought of as, and actually has been, a prerequisite of expressive freedoms. This means that the establishment and guarantee of liberty did not emerge out of a void of institutional coercion, but thanks to a certain organization of it. I will often refer to this as state or public “interferences,” in which I include various forms of administrative power, the rule of law, public control and allocation of resources, public investment, the use of force through public institutions, court decisions, rules enforced by local communities, and so on. Therefore, my use of “interference” should be interpreted as capturing a kind of unavoidable fact of political society. Although we may collectively decide how to arrange interferences in most cases, there will always be *some* interference with our social existence. In this view, getting rid of all interference is not something empirically feasible—as certain readings of the ideal of freedom as “non-interference” could suggest.

Thus, removing a specific interference with our expressive freedom (e.g., a media law setting a cap to broadcasting license ownership) is only removing a particular stratum of interference. In the view I endorse, what we get by revoking a media law is not “non-interference,” but only that the regulation of this field of social interaction (free speech in broadcasting, in my example) now falls back on another layer of interferences (say, property law). And even if we could get rid of all strata of interference established by means of public power—in practice, abolishing the rule of law as we know it—we would still encounter interferences of some sort. For instance, those enabled by the given distribution of power and resources in a society (in my example: expressive freedom in broadcasting will be in the hands of those who already control the necessary technical means or have the force to do so). The same holds for my frequent use of “anti-regulatory,” which I use as a well-established term of art to identify libertarian policy views. Thus, strictly speaking, from the point of view of this project, “anti-regulatory” should be taken to mean “re-regulatory.” (i.e. substituting some regulations for others). This thesis, then, frames the conversation on expressive freedom within the restricted but open-ended question of which kind of interferences are more suitable in each case; a response, in turn, subject to other normative and socio-theoretical views we may hold. This is a framework, I insist, very open-ended, but that rejects the feasibility of “libertarianism” if by this is meant the minimization of “interference” or the promotion of “laissez faire.”

As such, my use of “state” and “interference” aims in many cases to be more explanatory and descriptive than normative. It outlines a basic understanding of the fact that civil and political freedom cannot occur within an institutional void and that, on the contrary, the adequate design of institutions (the suitable organization of the coercive power that backs such institutions) is a precondition of freedom. This view—which is anything but new, as I have shown above—has a great explanatory force when it comes to understand the historical and contemporary role of state power in the

guarantee of freedom.¹⁴⁴ However, it is unfortunately far from prevalent in today's social and political theory, nor in today's public discourse. This is especially true, as I have mentioned earlier, of expressive and intellectual freedoms, phenomena that are prone to be idealized and abstracted from their basic institutional context, perhaps due to their significant immaterial, inner-life and psychological features (which are at least more salient than in, say, economic freedom). Albeit it intends to be descriptive in the first place, this approach to the active role of state interference in the constitution of liberty serves to ground, in Part II, republican normative arguments that sketch justifications and criticisms of particular institutions.

However, I must also say that worshipping the state as we know it is far from my intentions. When in more conceptual remarks such as this I refer to the "state," I am not necessarily referring to the historical and actually existing modern administrative bodies that monopolize violence that usually come to mind. By "state" I am referring to the more basic idea of politically organized coercion and rulemaking with aspirations of legitimacy and sovereignty within a certain group of people, to the elementary networks of authority that bind together a community. In this broader sense, the Freetown of Christiana, the revolutionary Paris Commune of 1848, or the collective institutions of a gated community of private landowners can be considered for my purposes "state" (just to mention, respectively, anarchist, Marxist, or libertarian political bodies often said to be different than the conventional modern nation-state).

When it comes to studying how expressive liberties require political interferences, these entities are all a "polity," a "*res publica*," or a "commonwealth," to use more traditional terms. For this reason, although I follow Philip Pettit very closely in many things—including his view of the role that "state interference" plays in the structure of freedom—I wish to distance myself from his unfortunate metaphor of the modern state as "gravity" or the "laws of physics."¹⁴⁵ I think this can only be true of a very broad and weak notion of the state simply meaning a "polity," which includes *any* form of organized political power. But considering, as Pettit intimates, the historical and existing institutions we often call "states" (with their centralized

¹⁴⁴ Just to mention three approaches from the early twentieth century that, coming from different scholarly traditions, developed similar accounts. See the state as a "hindrance of hindrances" in Bernard Bosanquet, *The Philosophical Theory of the State*, 4th ed. (Macmillan [1923], 1958), chap. 8. Or take the today forgotten historical-normative account of religious toleration by Francesco Ruffini: as a juridical reality focused on setting the preconditions of religious liberty, often against claims of ecclesiastical freedom; see his *Religious Liberty*, trans. J. Parker Heyes (Williams & Norgate, 1912), chaps. 1–2, 21. A similar approach to state history can be found in Otto Hintze, "The Preconditions of Representative Government in the Context of World History," (c. 1925) in *The Historical Essays of Otto Hintze*, ed. Felix Gilbert (Oxford University Press, 1975), 302–54.

¹⁴⁵ Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2012), 161–62. In other words, my reflections on freedom as constituted by interferences are intended to be independent of Pettit's view of the inescapability of the modern state; see his *The State* (Princeton University Press, 2023). This book came out too late to integrate it in the body of the thesis.

power, bureaucratic hierarchical structures, internal constitutional restraints, etc.) as a “historical necessity,” is an unwarranted fetter on our political imagination. For it needlessly naturalizes Pettit’s otherwise legitimate realism or anti-utopianism. Incidentally, it also contributes to obscure the fact that much of his neorepublican reflection on freedom is pertinent to forms of social existence other than the modern nation-state.¹⁴⁶

I would also like to add that the somewhat state-centric reflections that explain much of this project are informed by the political-economic cycle in which its author grew up. This was the “neoliberal” rolling back of state capacity and its failure to give satisfactory answers to the problems of globalized late capitalism, epitomized in the timid response of Western governments to the Great Recession in 2008 and the 2010s enthusiasm for fiscal austerity (further reducing the administrative capacity of democratic public institutions). However, there have been important changes in mainstream views of state power by the time the intuitions behind my project were fleshed out in this thesis—the first years of the 2020s. Think of the global electoral victories of right-wing populist parties that question basic pillars of the rule of law, the COVID-19 pandemic, the proximity of war to Western Europe due to the Russian invasion of Ukraine and the open war in Gaza, and the raising awareness and aggravation of climate change. These are only some of the issues that contribute to explain contemporary so-called “neo-statism.” All of them have had obvious consequences for how the legitimacy of state interference in the public sphere is perceived: from the resurgence of Keynesian militarism and industrial policy to controls of prices and supply chains, including public investment in research and health care, or suppression of civil rights in state of emergency.¹⁴⁷

Most remarkably for this thesis, many of these developments have produced a shift in the commonsense of many Western policymakers and citizens about the role that public institutions must play in the regulation of flows of information. Compared to the 1990s, arguably the peak of internet optimism and laissez-faire intuitions about communications, in the 2020s many now think that the costs of not regulating digital platforms, hate speech, fake news, and other forms of epistemic distortion in the public sphere are much bigger than the risks always involved in letting public authorities to have a say in these issues. Undue influence in elections through social media power, the fast sharing of conspiracies that deny anthropogenic global warming or threaten public health in the midst of a pandemic, the fears of foreign enemy propaganda camouflaged as user-made content, or the spread of ethnic-religious hate speech disguised as war commentary are all variables that militate today against excluding state power from the public sphere; they are

¹⁴⁶ In this sense, see for instance the accusation that Pettit incurs in “methodological nationalism,” in David Watkins, “Institutionalizing Freedom as Non-Domination: Democracy and the Role of the State,” *Polity* 47, no. 4 (2015): 508–34.

¹⁴⁷ Describing the renewal of a statist consensus, see e.g. Paolo Gerbaudo, *The Great Recoil: Politics after Populism and Pandemic* (Verso Books, 2021), chap. 1; Yakov Feygin and Nils Gilman, “The Designer Economy,” *Noēma*, January 19, 2023.

all detrimental to the free speech libertarian framework. In sum, in the last few years, the view that state interference is constitutive of a well-functioning public sphere has taken hold in many influential policy circles, at least compared to earlier decades.

The point is that all these trends, which certainly speak in favor of the main interpretive and descriptive arguments of this project, do not necessarily nurture its normative aims—strengthening and universalizing the exercise of expressive freedom. Originally, the goal of “reframing” free speech (i.e., of counteracting libertarian intuitions) had itself both a clear descriptive and normative interest. By merely putting the focus on preconditions, on the restricted nature of the public sphere, and on the unavoidable role of state power in the guarantee of freedom, one was able to shed light on what I consider important free speech deficits that are not attributable to state overreach, but rather to its opposite: lack of democratic state capacity. Today, although I think this general hypothesis is more persuasive on a descriptive level—able to make sense of a growing institutional focus in many areas of free speech research and policy (I have been part of a trend, too)—it could be perceived as less appealing from a normative point of view. After all, the point of “reframing” a political topic is highly contextual, for it is contingent on what the pragmatic and rhetoric circumstances determine to be the hegemonic framing. I believe there are reasons to think that such circumstances are changing in the last decade and that we are moving, for good and ill, to a context in which free speech libertarianism (in any of its variants) is each day less relevant.

Hence, the readers should notice that during the thesis the value of normative arguments is not merely pondered in the abstract, but bearing in mind their plausible effects in the particular rhetorical circumstances in which I was writing. The upshot that a political argument may have in different discursive contexts is a volatile variable often excluded from political theory (for good reasons, since it does not affect the soundness or truth of arguments). However, this pragmatic dimension of normative arguments (say, how well they connect accepted moral intuitions with previously disregarded facts) is extremely important in the realm of actual politics—and, I think, in consequence, this dimension is meaningful for the impact that political theorists may make in society. By paying attention to this aspect of political thought, what my task of “reframing” free speech loses in terms of universalism and atemporality, I think it gains in handiness, in terms of competence in dismantling a specific dominant commonsense I consider epistemically flawed. In this sense, if I had started writing this thesis now, I would have placed a greater emphasis on the dangers inherent in the growth of state power. This is not because in the 2010s state censorship was less of a risk than today, but because I believe that the pragmatic and rhetorical circumstances of public discourse on free speech are shifting from libertarianism to a wider acceptance of state power. In this new context, highlighting the more specific democratic purposes of public power will become more relevant to prevent repressive and technocratic tendencies.

Interestingly, some of the most long-lived protagonists of this thesis were able to experience such a back-and-forth swing of state power legitimacy. A careful reading of their arguments shows that they were attentive as well to the rhetorical aspects of their political context. Nineteenth-century laissez-faire constitutionalism and its celebration of negative liberty against all state interference became obsolete in the face of the challenges posed by industrial capitalism. Thus, the cross-ideological demise of laissez faire in the early decades of the 1900s, as we will see, pervaded many areas of the social sciences and humanities, developing notions of freedom-promoting public power which this project seeks to problematize and recover. These thinkers, in other words, were also “reframing” liberty at the turn of the century. But, as I will argue, the thicker ideas on freedom (including on free speech) that flourished in the first decades of the twentieth century became progressively thin in the second half of the century, if not completely lost. There was a huge gap between, on the one hand, interwar views of modern constitutionalism as an explicit reaction against unbridled industrial capitalism and laissez faire economics and, on the other, the Cold War distrust of the administrative state. A suitable anecdote capturing this distance can be found in Talcott Parsons’ influential translation of Max Weber’s *Economy and Society*. What Weber had called, during the interwar years, “*Rechtsstaat*” (a constitutional rule of law in which rights are “realized in the state, not against” it), Parsons simply rendered it in English, in 1947, as “laissez faire state.”¹⁴⁸ I think this speaks volumes of a difficult cross-cultural translation, but also of a rich institutional awareness about what freedom requires that was lost only in three decades.

In any case, readers genuinely concerned about the risks that public power poses to liberty would do well to give a fair chance to the arguments presented here. As I pointed out above, it is truly hard for me to imagine a social world without public power in some sense, that is, without forms of collective decision making. And even if, in the name of freedom, one would be in favor of weakening the state as far as possible, it is clear to me that in order to get there, one must coexist with public power in the meantime. Considerations about rolling back the state and the rolling back itself are processes that take place within the institutional infrastructure already provided by existing public

¹⁴⁸ See e.g., Max Weber, *The Theory of Social and Economic Organization*, ed. Talcott Parsons (Oxford University Press, 1947), 151. Compare with *Max Weber Gesamtausgabe* (Mohr Siebeck, 2013), vol. I/23: 209. I will offer page numbers to the standard scholarly edition of Weber’s works, but I have read, and owe a lot to, the Spanish version: *Economía y Sociedad*, ed. Francisco Gil Villegas, Revised (Fondo de Cultura Económica, 2014). Notice, at any rate, three things. First, Weber emphasized that an “absolute laissez faire” was an empirical chimera, only possible in theory. Second, in this sense he associated “laissez faire” to a “pure” or “absolute” form of *Rechtsstaat*. Third, in any case, Weber was explicit that what characterized such “laissez faire” ideal type was a particular kind of rules-based regulatory order, rather than an absence of it, or leaving things as they are—much in line with most liberal reactions of his time against nineteenth-century laissez-faire constitutionalism. See *MWG*, vol. I/23: 209, 234, 373. On the idea of *Rechtsstaat* values as “realized in the state,” I follow Martin Kryger, “Rule of Law (and *Rechtsstaat*),” in *International Encyclopedia of the Social & Behavioral Sciences*, ed. James D. Wright, 2nd ed., 2015, vol. XX: 780-787.

bodies. Thus, greater protection against abuses of state power requires not “less” state, but “better” state. In some cases, this will mean “more” state in specific areas, at least in the sense of improving resources for democratic decision-making and non-arbitrary reduction of administrative capacity. In today’s context, a weaker state seems a sure path to the co-optation of public institutions by powerful private corporations that will use them for their own ends—this was, precisely, the situation that early modern thinkers examined above had to face. This is, I think, the ironic corollary of taking the libertarian fear of state overreach to its extreme; a necessary fear that I hope this thesis contributes to qualify.

VI. OVERVIEW OF THE PROJECT

What I have called the free speech libertarian framework should be studied as a historical product itself. This will be the goal of Part I: historizing and discussing its rise in the United States during the first two thirds of the twentieth century.

Chapter 1 will show that free speech libertarianism is a product of the interwar period in the United States. Its advocates formulated their positions in late 1910s and early 1920s as a reaction to US government repression of leftists and pacifists in the wake of the First World War and the Russian Revolution. They engaged, as I will show, in an active instrumentalization of history. Thus, they claimed to defend what they thought early modern champions of toleration had argued for: merely negative expressive rights against state despotism. Expressive liberty must mean freedom from all government interference to let citizens determine truth for themselves and have rational deliberations—a strong negative right to free speech being the only way to unleash the epistemic power of free discussion. In short, their fight was Milton’s fight in *Areopagitica* (or so they believed and said). The ideas of interwar free speech libertarians contributed to consolidate what would become the mainstream narrative on expressive liberties during the next decades in many different fields of the English-speaking social sciences, from constitutional law to the emerging sociology of communication. This narrative stressed in different ways that expressive liberties were purely negative rights. Yet, as I have pointed out above, this was not necessarily meant in a normative sense. More powerfully, free speech libertarianism became the standard position at a descriptive level as well. Conceptually, historically or legally expressive liberties were thought to be rights held against state power.

However, interwar free speech libertarians had also the chance to witness the massive changes in communication technology and economics that Western societies experienced during these years. In only a few decades, the civilizational and political-economic assumptions that sustained much of their optimism about the power of truth started to disintegrate. In their view, the emerging mass media markets of the 1930s, 40s, and 50s, and the powerful

private actors in them, generated sources of domination other than state despotism—new enemies of freedom that indeed required public power to be tamed. This meant that their exacerbated libertarianism of the late 1910s against government repression, their claim of being fighting *the* historically libertarian, canonical struggle for toleration, were rendered obsolete in light of the media markets of the post-WWII period.

As Chapter 2 argues, many of them realized this; and a thorough reading of their work shows that, just as their early modern predecessors, interwar free speech libertarians were not as naïve as it may seem at first sight. Jointly with their “libertarian” ideas, most of our interwar protagonists advanced a criticism of industrial civilization, which led them to positions of economic interventionism, advocating for an active role of public power in ensuring competition. Yet their earlier epistemic defenses of expressive liberties, mostly negative in their emphasis, had already taken hold in American mid-century thought. The contribution of the interwar years, in other words, was unevenly integrated in the mainstream of the legal and social sciences—an integration in which some of them actively participated, as we will see. In a sense, we may say that the ideas of interwar free speech libertarians suffered the same fate as those of their early modern heroes. Their necessary critique of the excesses of state power became canonized after WWII. However, their entrance into the Western canon of liberty was at the expense of the political-economic awareness that had originally embedded the interwar reflections on expressive freedoms in a criticism of their particular civilizational setting: the incipient industrial capitalism in the field of mass communications.

Thus, from the point of view of expressive freedoms, the mid-century American consensus was contradictory or, as some of its participants put it, “paradoxical.” On the one hand, the main postwar policy circles, inheriting the interwar experiences of progressivism and the New Deal, rejected the feasibility and desirability of “laissez faire” as a regulative ideal of economic relationships. Under the conditions of industrial capitalism, it was said, the state must act to ensure fairness in competition, and even individual liberty—the traditional purely “negative” conceptions of freedom, in this sense, required much questioning. On the other hand, these very ideals that were rejected still had some traction in the field of expressive liberties. Here, “laissez faire” was still desirable and feasible—hence the “negative” side of interwar free speech libertarianism was integrated in First Amendment jurisprudence. As the postwar constitutional and policy consensus waned in the 1970s, advocates of disassembling the postwar administrative state looked at free speech jurisprudence with wistful eyes. Free speech, as one commentator put it, was “the only area where laissez faire was still respectable.”¹⁴⁹ If in the trade of ideas laissez faire was still adequate, why not extend it to the rest of the constitution?

¹⁴⁹ Aaron Director, “The Parity of the Economic Market Place,” *The Journal of Law & Economics* 7 (1964): 5.

I initiate Chapter 3, on John Rawls' political liberalism, by presenting his work as a critical commentary on the late 1970s emergence of an unleashed free speech libertarianism in the US Supreme Court—a trend rooted in a laissez-faire reading of the interwar protective jurisprudence that I studied in earlier chapters. Rawls offers a wonderful example of how mid-century political philosophy integrated some of the intuitions I associate with the free speech libertarian framework, particularly his view of the early modern origins of toleration. Yet, at the same time, his political liberalism can be construed as an explicit rejection of the shape that free speech libertarianism was taking in US constitutional law in the late 1970s—in which First Amendment rights were becoming a tool for rolling back the state, leaving the public sphere at the mercy of private power. Rawls, then, provides a Janus-faced piece of evidence in this project. For his work is, on the one hand, evidence of the long and pervasive shadow of free speech libertarianism, even within normative projects that are card-carrying anti-libertarian. Still, on the other hand, Rawls perfectly captured part of what is wrong with the libertarian framework: how it removed all publicness from the public sphere, how it left the political process at the mercy of powerful and wealthy private actors, and how, in the last instance, it was incompatible with the fair enjoyment of civil liberties in a constitutional democracy.

To counter the unleashed libertarianism of the 1980s, Rawls considered the role that civic republicanism could play in his reconstruction of political liberalism and justice as fairness. The republican tradition offered exactly what he was looking for: a richer analysis of how the political process should look like in a civic community of equals; a way of framing the public sphere so that the distributive demands of democratic citizenship are made explicit, allowing a more secure guarantee for what he called the “fair value” of political liberties. Taking up these late Rawlsian concerns, the goal of Part II of the thesis is to discuss an alternative to the free speech libertarian framework.

Chapter 4 examines the way in which some of these intuitions became consolidated in post-Rawlsian political philosophy, in the perspective or research program known as “neorepublicanism.” I describe the neorepublican conception of freedom as “non-domination” along three lines: its dispositional view of power; its awareness of how liberty is constituted against both public and private threats; and the constitutive role that non-arbitrary interferences by public institutions play in the establishment and protection of liberty. The chapter also serves me to give a more nuanced picture of the free speech libertarian framework—how it may escape, or respond, to the neorepublican criticism. Part of the goal, then, is to avoid straw-manning free speech libertarianism as far as possible. The outcome of this exercise, or so I hope, is to show that neorepublicanism offers a compelling explanatory frame for expressive liberties—one more complete, parsimonious, and institutionally realistic than the free speech libertarian framework.

In contrast, the lesson of Chapter 5 is that not everything that glitters is gold. In a recent text, Philip Pettit, a major voice of neorepublicanism in

contemporary political theory, has worked out how expressive liberties would look like in light of his previous work. The result is what he has called “protected speech” which, as I will show, involves a promising alternative to the free speech libertarian framework, capturing many of the normative and descriptive concerns of earlier chapters. However, I consider three blind spots that Pettit’s concept of “protected speech” leaves undertheorized. In short, I posit that someone’s set of speech choices may be undermined by lack of access to means of communication, by misrepresentation of the information they receive, or by distorted audience reception. These three categories are meant to capture, basically, cases in which the threat to expressive liberty (the undermining of someone’s set of speech choices) is not evidently attributable to the will and actions of a dominating agent. I argue, then, that the thick, neorepublican principle of protected speech may obtain, but that someone’s set of speech choices can be still threatened in significant ways. This leads me to discuss the role that “structural domination” plays in neorepublicanism and what we may call its internal critics—who are generally friendly to the conception of non-domination vis-à-vis other liberal and libertarian ideas of freedom, but who are nevertheless unhappy with the narrow, agent-centered approach to domination of mainstream neorepublicanism.

Chapter 6 takes the question of structural domination to the more particular context of today’s political economy of mass media. I explain how the three instances of structural threats to expressive freedoms examined in the earlier chapter may be produced by contemporary communication and media markets. I discuss, in turn, how neorepublicans may respond to the sources of unfreedom generated by these markets. Relying on the criticism developed in the previous chapter, I consider two different strategies. One consists in identifying market actors that actually wield power of dominion—on this front, neorepublicanism is more than prepared to confront the risks of media markets. However, as I will argue, this strategy is purely remedial: it has to wait for the dominating power to crystallize to deal with it—in some cases, however, it may be too late. Another response consists in predicting how structures may create positions of power. With enough evidence about these risks, there are neorepublican grounds to act against social structures that have not created dominators *yet*. I illustrate the limits of this second, more promising approach by discussing a peculiar attribute of contemporary media markets: the commodification of audiences and media dependence on advertising revenue. These issues take me to call into question one of the preferred ways in which neorepublicans claim that non-domination may be guaranteed within markets: by robustly protecting and resourcing “exit.” I will argue that exit options fall short when the market in question is sustained by the commodification of audiences (i.e., the hoarding and selling of their attention and data). Given that citizens’ attention-span is a fundamental, rival good for successful communication and that communication between citizens is a component of free, democratic self-government, I propose to consider attention in the public sphere as an unalienable common resource—subject to

democratic decision-making, and immune from the kind of privative appropriation that advertising markets incentivize.

If these chapters fulfill their purpose, I hope to convince the readers of the importance of reframing the study and advocacy of expressive liberties and to show them how an alternative approach may integrate into free speech discussions a range of concerns that are often thought of as secondary. Should I achieve this only partially or, at worst, not at all, I trust that the thesis will nevertheless serve the readers in various ways. Although the chapters are united by an overarching goal, each contains self-standing arguments. Be it in the history of ideas, the sociology of communication, or political theory, these separate contributions offer enough material to be discussed individually. I will consider myself satisfied if they help future researchers interested in the relationship between free speech and the everchanging empirical conditions in which it is expected to be practiced.

Part I

The free speech libertarian framework

CHAPTER 1

From Milton to Holmes

The making of free speech libertarianism

The libertarian theory (...) From Milton to Holmes it has stressed the superiority of the principle of individual freedom and judgment and the axiom that truth when allowed free rein will emerge victorious from any encounter. Its slogans have been the “self-righting process” and the “free market place of ideas.” It has been an integral part of the great march of democracy which has resulted in the stupendous advancement of the well-being of humanity. It has been the guiding principle of western civilization for more than two hundred years.

Fredrick Siebert¹

The purpose of this chapter is to explore one of the sources of the free speech libertarian framework. It will delve into the context in which free speech libertarianism turned from a merely normative view into a framework for historical and theoretical research on expressive liberties.

To do this, first, I contextualize the established legal conceptions of free speech in the United States at the turn of the century and then review the first cases in which the US Supreme Court considered the constitutionality of the Espionage and Sedition Acts (§1.1). Passed in 1917 with the active encouragement of Woodrow Wilson’s administration and strengthened in 1918, these laws entailed almost unprecedented levels of federal government interference with speech. In the Supreme Court, Justice Oliver Wendell Holmes initially upheld these legislative attempts conceived to counter sabotage and enemy propaganda in the context of the First World War. However, he seemingly changed his mind in the fall of 1919, in a later case. It was *Abrams v. United States*, in which Holmes, this time dissenting from the majority vote, formulated his influential epistemic defense of free speech with the economic metaphor of a “trade in ideas.”

I will discuss Holmes’ apparent change of view through the writings of Zechariah Chafee, a legal commentator of the time who is generally credited with turning the Court toward more speech-protective views. The epistemic value of free speech constituted for Chafee a “social interest,” which made the

¹ Fredrick Siebert, “The Libertarian Theory of the Press,” in Siebert, Peterson, and Schramm, *Four Theories*, 70.

First Amendment worthy of special constitutional treatment and almost absolute protection. The chapter examines Chafee’s first defense of the truth-seeking value of free speech in his criticism of the Espionage Act and how Holmes ended up adopting it, or a very similar version of it.

However, Chafee was not alone. During the summer of 1919 (the months before the *Abrams* dissent), Harold Laski, one of Holmes’ best and youngest friends, actively pushed the judge toward a more speech-protective position (§1.2). The best evidence of the intellectual relationship between Holmes and Laski during these months is the reading suggestions of Laski, which the judge followed to the letter. Many of these books dealt with the history of expressive liberties in relationship with state sovereignty or, as Laski put it, the classic “theologico-political” problem. Epistemic justifications of freedom were a common topic in much of the literature suggested by Laski, as well as in his own works—the truth-seeking functions of religious toleration or freedom of thought were conceived as arguments always directed at undermining arbitrary uses of government authority.

Finally, I look at the consequences of these conceptual developments of free speech for the history of expressive liberties (§1.3). I show how Chafee, Laski, and other progressive critics of the Wilsonian suppression of civil rights resorted to history to legitimize their claims. They understood their struggle as intimately related to historical struggles for toleration. In doing this, they instrumentalized and contributed to create the Western canon of expressive liberties. Opponents of Wilson and the Espionage Act emphasized the continuity between their then-radical views against state interference with free speech and much earlier epistemic defenses of religious liberty or freedom of thought. When celebrating Holmes’ call for a “trade in ideas” in the *Abrams* dissent, they embedded it in a much wider “tradition” of truth-seeking expressive freedom ranging from Socrates to John Milton and John Stuart Mill—and now Holmes himself. In the second half of the twentieth century, this contentious historical narrative became the standard account of free speech in the United States, and the past legacy of truth-seeking free speech outlined in the late 1910s was turned into a fully-fledged “libertarian tradition” by the 1950s. In this later view, the canonical past of expressive freedom was consistently regarded as a series of arguments for negative freedom against state interference—consequently losing, as I will explain in Chapter 2, much of the politico-economic awareness about the public sphere practiced by earlier thinkers, both early modern and from the early twentieth century.

1.1. FREE SPEECH IN THE UNITED STATES AT THE TURN OF THE TWENTIETH CENTURY

1.1.1. *Blackstonian free speech: ex-post punishment is constitutional*

Despite its obvious political relevance, freedom of speech did not bring about major constitutional conflicts in the United States during the nineteenth

century. To begin with, the first eight of the ten amendments that were part of the original Bill of Rights of 1791 were considered provisos against the powers of the federal government, not rights vis-à-vis each of the federated states.² It is noteworthy that the last major constitutional debate over the relationship between free speech and the federal government—sparked by the passage of the Alien and Sedition Acts of 1798—was an eighteenth-century story, among whose protagonists we still find most of the framers of the Constitution. As the US constitutional scholar Edward White has pointed out, “[a]fter most of the Alien and Sedition Acts were allowed to expire in 1801”, the federal government “enacted very little legislation restricting freedom of speech or the press for the remainder of the nineteenth century.”³

However, this did not mean that public power was not a threat to expressive liberties. Many of the nineteenth-century state- and federal-level statutes that we would today conceive of as objectionable violations of freedom of expression were not considered violations of the First Amendment by the courts. This was partially because constitutional provisos guaranteeing free speech were interpreted along the lines of the eminent eighteenth-century English jurist William Blackstone. In his view, expressive freedoms were only protections from previous restraint:

The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. (...) [T]o punish (as the law does at present) 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. Thus the will of individuals is still left free; the abuse only of that free will is the

² The Fourteenth Amendment (1868) was supposed to ensure the recently achieved emancipation of slaves against the southern states defeated in the Civil War. In doing this, the amendment prohibited states—not merely the federal government—to make laws against the rights and liberties of US citizens. However, it was not until the 1920s that the Fourteenth Amendment was interpreted as expanding other constitutional guarantees, such as expressive freedoms, against the power of the states and not just against the federal government. For earlier views of free speech as being protected also from the states (with or without the Fourteenth Amendment), see Michael Kent Curtis, *Free Speech, “The People’s Darling Privilege”*. *Struggles for Freedom of Expression in American History* (Duke University Press, 2000), 360–67.

³ G. Edward White, *Law in American History* (Oxford University Press, 2019), vol. III: 692–693. For a survey of exceptions and, most importantly, an explanation of how most courts systematically framed speech regulation cases as not raising any First Amendment constitutional issues despite the arguments of the defendants, see *Ibid.*, vol. II: 500–507.

object of legal punishment. (...) So true will it be found, that to
censure the licentiousness, is to maintain the liberty, of the press.⁴

Although Blackstone was a commentator of English law, the Blackstonian conception of free speech as mere absence of prior restraint was commonly ascribed to the framers of the Constitution, and "Early American court decisions tended to support that interpretation."⁵ That is, in the nineteenth century US courts were inclined to hold that the only constitutionally protected freedom of speech was merely freedom from *previous* restraint. Ex-post regulation or punishment of speech did not raise significant constitutional disputes—most of what today's commentators (and many nineteenth-century defendants) would see as infringements of fundamental expressive rights were not regarded as such by courts.⁶ Many of these speech-restricting measures were thought to be part of the normal functioning of the common law regarding libels, a matter of private law subject to case-by-case analysis and trial.

Then, from a strictly constitutional point of view, freedom of speech arrived at the turn of the century in a precarious situation. In the face of the power of the states, the First Amendment to the federal constitution was of little value—not to mention in the face of "private" censors, such as husbands and priests against birth control, neighbors sensitive to obscenity, employers, media owners or violent groups in the South.⁷ And where the First Amendment did have some value, that is, vis-à-vis the federal government, its Blackstonian comprehension did not frame punishment after the fact as an encroachment of free speech—opening the door to fines, imprisonment, deportation, suppression of publications, impediments to distribution through the public postal system, etc.

As it happened with the turn-of-the-century American economy, the American public sphere also saw increasing government interventions (see below, §2.2.2). But compared to the economy, the growing role of state

⁴ Sir William Blackstone, *Commentaries on the Laws of England in Four Books* (Philadelphia: J.B. Lippincott, 1753), bk. 4, chap. XI, §13.

⁵ White, *Law in American History*, vol. III: 693.

⁶ David M. Rabban, *Free Speech in Its Forgotten Years, 1870-1920* (Cambridge University Press, 1997), chap. 3.

⁷ On suppression of information about birth control, see Molly McGarry, "Spectral Sexualities: Nineteenth-Century Spiritualism, Moral Panics, and the Making of U.S. Obscenity Law.," *Journal of Women's History* 12, no. 2 (2000): 8–29; Janice Ruth Wood, *The Struggle for Free Speech in the United States, 1872-1915. Edward Bliss Foote, Edward Bond Foote, and Anti-Comstock Operations* (Routledge, 2008), 18–27; Rabban, *Forgotten Years*, 64–69. On pornography, see Walter Kendrick, *The Secret Museum: Pornography in Modern Culture* (Viking, 1987), 127–36; McGarry, "Spectral Sexualities"; Mary M. Cronin, "The Liberty to Argue Freely: Nineteenth-Century Obscenity Prosecutions and the Emergence of Modern Libertarian Free Speech Discourse," *Journalism and Communication Monographs* 8, no. 3 (2006): 163–219. On labor and free speech issues, Rabban, *Forgotten Years*, 77–128; Lawrence C. Soley, *Censorship, Inc: The Corporate Threat to Free Speech in the United States* (Monthly Review Press, 2002), 25–54; Laura Weinrib, *The Taming of Free Speech. America's Civil Liberties Compromise* (Harvard University Press, 2016), 25–40. On the Ku Klux Klan, see Curtis, *The People's Darling Privilege*, 372–83.

interference in the public sphere was not a response to, say, oligopolistic tendencies of media markets or big corporations taking advantage of technological innovation—that would only come some decades later. Rather, what triggered the spread of government interference with speech was the US involvement in the First World War. This event exposed more than any other the precarious situation of the constitutional protection of freedom of expression.

1.1.2. Justice Holmes and the Espionage Act of 1917

To protect the war effort against attempts of sabotage and propaganda, the Wilson administration passed the Espionage Act in 1917, which was broadened the following year by the Sedition Act to condemn any libelous language against the symbols and institutions of the United States.⁸ Thousands of pacifists and activists of all kinds were convicted under these laws. Although many of them were pardoned a few years later, the spread of patriotic sentiment stifled political opposition. It was soon joined by the so-called first “Red Scare,” a fear of communism and anarchism that only grew with the Allied intervention against the Red Army in the Russian Civil War. Rather conveniently for the political establishment of the time, many of the convicted pacifists under the new wartime laws were also anarchists, socialists, or members of trade unions.⁹ The turn-of-the-century expansion of monopolistic capitalism (§2.2.2) had produced an active labor movement, especially vigorous during these years. These conflicts reached a dramatic peak in 1919, with numerous strikes and anarchist bombings throughout the country. Working class mobilization against war, draft, government, or to hinder production of weapons turned into a perfect target for the newly passed Espionage and Sedition Acts.¹⁰

In the spring of 1919 the Supreme Court examined the first convictions under the new legislation. Its previous jurisprudence was not very beneficial for the defendants, for it displayed the doctrinal assumptions of nineteenth-century free speech examined above (§1.1.1): expressive liberty is compatible with ex-post punishment, especially under circumstances of war. However, the novelty in the first of those cases, *Schenck v. United States*, was that for the first time in more than century the court was taking seriously the arguments of the defendants. The justices were considering the chances of

⁸ Rabban, *Forgotten Years*, 248–98.

⁹ On wartime legislation used by the state and business interests against labor, see Weinrib, *The Taming*, 78–80, 85–93, 115–20.

¹⁰ Howard Zinn, *A People's History of the United States* (Longman, 1980), chap. 14; Carl Swidorski, “The Courts, the Labor Movement and the Struggle for Freedom of Expression and Association, 1919-1940,” *Labor History* 45, no. 1 (2004): 61–84. Justice Holmes was the target of one of the bombings, see Oliver W. Holmes and Frederick Pollock, *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932. Two Volumes in One Second Edition*, ed. Mark DeWolfe Howe (Cambridge: Belknap University Press, 1961), 15.

unconstitutionality on First Amendment grounds: had not Congress gone too far in limiting free speech under the Espionage Act? But they thought it did not, and they conveyed this position through a unanimous vote upholding the imprisonment of Charles Schenck, general secretary of the US Socialist Party. The Court held in *Schenck* that writing and mailing against the military draft could not be considered freedom of the press during war, since such a speech in that circumstance created a "clear and present danger" that Congress had the right to prevent—in a slogan that also made history, it was like falsely shouting fire in a crowded theater.¹¹

Following the same reasoning, the Court also endorsed the conviction of the defendants in the next two Espionage Act cases in 1919. They were Jacob Frohwerk (an activist charged of condemning the war in a German-language newspaper) and Eugene Debs (a prominent socialist and former candidate for US president, accused of seditious public speech).¹² As it had happened in *Schenck*, in both *Frohwerk* and *Debs* the Court unanimously upheld the Espionage and Sedition Acts, concluding that the defendants' First Amendment rights had not been infringed.

Justice Holmes had penned the Court's unanimous opinions in *Schenck*, *Frohwerk*, and *Debs*. That is, Holmes was the author of the decisions in which the Supreme Court endorsed the constitutionality of the Espionage and Sedition Acts for the first time. However, later in that year, in the winter of 1919, Holmes made a surprising move. In the next case concerning the Espionage Act, *Abrams v. United States*, he dissented from his colleagues. Instead of following the jurisprudence that he himself had established in *Schenck*, Holmes dissented, writing what would later become the famous marketplace-of-ideas argument. And he did it to defend the expressive rights of some "alien anarchists," as the majority vote branded them, whose speech clearly pointed to sabotage: the defendants had called for a general strike to stop the production of ammunition.¹³ But the evidence this time, or so it seemed to Holmes, was not enough to invoke the "clear and present danger" argument he had used to judge the earlier cases during spring.

His dissenting opinion was not very effective, though, only getting the support of another of his colleagues, Louis Brandeis. Despite its huge success decades later, neither Holmes' metaphoric reasoning (the defense of a "free trade in ideas") nor his epistemic understanding of the First Amendment (freedom of speech deserves protection because it contributes to the discovery of truth) were sufficient to absolve the defendants in *Abrams*. The Supreme Court ratified the imprisonment of the anti-war activists with a 7-2 vote.

The literature following Holmes' steps between his seemingly changing opinion from *Schenck* to *Abrams* is extensive. Much of it revolves around the question of whether Holmes adjusted his view about the Espionage Act in less than a year, or whether his adoption of an epistemic justification of free speech

¹¹ *Schenck v. United States*, 249 U.S. 47 (1919), 52.

¹² *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

¹³ *Abrams v. United States*, 250 U.S. 616 (1919), 623.

entailed a wholly new constitutional status for the First Amendment.¹⁴ Others have emphasized the continuity in Holmes' views: perhaps he was not as fond of free speech as is thought. According to this reading, what explains Holmes' dissent in *Abrams* is not a doctrinal development in his free speech theory, but the different evidence used by the prosecution on that occasion, or the arguments of the majority vote.¹⁵ Or perhaps Holmes had only upheld the Espionage Act in earlier cases to maintain the integrity and trustworthiness of the Court during wartime, despite his personal and juridical distaste for the Wilsonian attacks on civil rights.¹⁶

Scholarly approaches to this story are usually concerned with the "tests" used by courts in balancing free speech claims with their social consequences. This is because the changes in First Amendment jurisprudence during the first half of the twentieth are defined by these changing criteria about the negative effects of speech ("bad tendency," "clear and present danger," "imminent lawless action," and so on). Focusing on such a development shows how courts progressively adopted narrower criteria when assessing the practical outcomes of speech or writing, giving less and less room to judicial subjectivity—going from tests that relied on second-guessing the intentions of the speakers to later tests evaluating the circumstances of speech, or the imminent results produced by it. These changes, however, do not say much about the theories of free speech that encouraged or rationalized the adoption of new tests. In the specific case of Holmes, for instance, my concern is not why he decided to argue for the constitutionality of speech restrictions in *Schenck* in terms of "clear and present danger" instead of "bad tendency" (a test he had used in previous cases).

My focus will be rather on a parallel but distinct element, namely, the conceptions of free speech that animated such a change in the first place or, at least, the conception of free speech that was used to rationalize such a change once it had happened. This is a less interesting topic from a legal point of view, and with less explanatory force when it comes to track the important jurisprudential changes during these years. Yet the focus on free speech justifications sheds light on one of the main topics of this thesis: the emergence and spread of what I have called the free speech libertarian framework (§III.2). Concretely: how did it come into being and how did it consolidate influential interpretive assumptions about the history of the modern public sphere, the conceptual rudiments of freedom of expression, or the constitutional role of the First Amendment?

¹⁴ Fred D. Ragan, "Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919," *The Journal of American History* 58, no. 1 (1971): 24–45; Rabban, *Forgotten Years*, 279–84, 346–54. A recent overview of these debates can be found in R. Collins, *The Fundamental Holmes: A Free Speech Chronicle and Reader* (Cambridge University Press, 2010), 291–303.

¹⁵ Sheldon M. Novick, "The Unrevised Holmes and Freedom of Expression," *The Supreme Court Review* 1991 (1991): 303–90.

¹⁶ Thomas Healy, *The Great Dissent: How Oliver Wendell Holmes Changed His Mind and Changed the History of Free Speech in America* (Picador, 2014), chap. 9.

Whatever may have been going on in Holmes' head during 1919, it is clear that the earliest progressive reactions to his opinion in *Abrams* sought to canonize his market-of-ideas epistemic defense of free speech: "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."¹⁷ As I will show, the welcoming responses that the *Abrams* dissent produced among the progressives and left-wingers who had opposed the Espionage Act constitute one of the defining moments of free speech libertarianism. Holmes' justification for freedom of expression became much more than a piece of jurisprudence. In a couple of decades, it started to shape the future of expressive rights in the United States (and beyond) by offering a new theoretical background to comprehend the social and constitutional role of free speech. But Holmes's dissent, especially in the hands of his progressive readers, also contributed to transforming the perceived past of free speech. Many of those who applauded his epistemic defense of free speech rushed to historicize it, to extol its normative ancestry as the latest instance of a freethinking tradition against state interference.

1.1.3. Zechariah Chafee, epistemic free speech and the Supreme Court

If we had to single out one legal commentator responsible for the success of Holmes's epistemic defense of free speech, our attention would be drawn to Zechariah Chafee. Even before the first Espionage and Sedition Act cases reached the Supreme Court, Chafee had written a piece for *The New Republic*, arguably the most important progressive magazine of the period.¹⁸ In this short piece, which was a version of a longer article Chafee was planning to publish in the *Harvard Law Review*, the recently passed speech-restrictive additions to the Espionage Act were likened to the spirit of the old and expired Sedition Act of 1789. In the eyes of Chafee—voicing here the concerns of many others—Congress was relapsing into a shameful legacy of suppression that was foreign to the original meaning of the American Constitution.¹⁹ This was especially clear for Chafee since, contrary to a widespread interpretive assumption of his time, he also rejected the image of the Founders as orthodox Blackstonians on free speech.²⁰

¹⁷ *Abrams*, 630.

¹⁸ On the changing political positions of the magazine towards the US government, see David Seideman, *The New Republic: A Voice of Modern Liberalism* (Praeger, 1986), 47–59.

¹⁹ The speech-restrictive policies of the Wilson administration did not only raise concerns among the far left of the political spectrum (the main victims of the Espionage Act) and among left-wing progressives (lawyers such as Chafee, or philosophers such as John Dewey, for instance). It also gave rise to a small but usually disregarded conservative opposition that can be traced back to the late nineteenth century. On this point, see Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (University of California Press, 1991), 27–29.

²⁰ On Chafee's views on Blackstone and the Founders, see Donald L. Smith, *Zechariah Chafee, Jr., Defender of Liberty and Law* (Harvard University Press, 1986), 18–21.

More important for our purposes, in his *New Republic* article Chafee also specified, on a doctrinal level, “[t]he true meaning of freedom of speech”:

One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for, as [Walter] Bagehot points out, once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage. Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weight very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom.²¹

This distinctive paragraph and its truth-seeking conception of free speech were later privately described as “key” by its author.²² The passage made its way into the academic version of Chafee’s article the following year, and also into the book that he published in 1920.²³ Moreover, theory led to history. The epistemic function of expressive liberties—their “philosophical basis”—served Chafee in connecting his own constitutional agenda with the earlier history of Western political thought. In a footnote that would be repeated many times under different forms, he outlined a tradition of epistemic justifications of free speech: “Plato’s *Apology of Socrates*; Milton’s *Areopagitica*; the second chapter of Mill *On Liberty*; and Walter Bagehot’s essay, ‘The Metaphysical Basis of Toleration.’”²⁴

Chafee’s book, based on his wartime articles, “arguably the century’s most important on the subject,”²⁵ was reedited and expanded in 1941 under the title *Free speech in the United States*. It became a bestselling handbook on the First Amendment, educating generations of lawyers on the idea that freedom of expression fulfilled epistemic functions, which was now part of the “English-speaking tradition” of free speech.²⁶ The attainment of truth was for Chafee a precondition of good policy; this was the “social interest” behind expressive liberty. And having such a “social interest” in mind was vital when free speech claims had to be weighed against government actions, since it revealed that

²¹ Zechariah Chafee, “Freedom of Speech,” *The New Republic*, November 16, 1918, 67.

²² Rabban, *Forgotten Years*, 318.

²³ Respectively, Zechariah Chafee, “Freedom of Speech in War Time,” *Harvard Law Review* 32, no. 8 (1919): 956–57; Zechariah Chafee, *Freedom of Speech* (Harcourt, Brace and Howe, 1920), 34.

²⁴ Chafee, “Freedom of Speech in War Time,” 1919, 933; Chafee, *Freedom of Speech*, 1920, 377.

²⁵ John Wertheimer, “Freedom of Speech: Zechariah Chafee and Free-Speech History,” *Reviews in American History* 22, no. 2 (1994): 365. On the influence of this book and Chafee’s scholarship, see also Graber, *Transforming Free Speech*, 122.

²⁶ Zechariah Chafee, *Free Speech in the United States* (Harvard University Press, 1941), 31.

freedom of expression was something beyond a mere individual right protecting individual interests.²⁷ According to Chafee, the truth-seeking value of free speech turns this right into an indispensable element that defines the democratic procedure itself, consequently making any attempt of state interference in this area a matter of the strictest judicial review.

Despite the fact that Chafee reproduced verbatim the same epistemic justification of the First Amendment in each of these texts, the jurisprudential, political, and social contexts in which they were published had different implications. In his first 1918 article on *The New Republic*, the notion that First Amendment freedoms had a vital epistemic social function was, at best, a grand philosophical interpretation aimed at softening the hearts of judges and government officials. In that article, published even before the Supreme Court had the chance to discuss the constitutionality of the Espionage and Sedition Acts, the truth-seeking defense of free speech was a timeworn normative model, a classic ideal dusted off thanks to the frustration of progressive pundits in the face of the increasing persecuting dispositions within their own political field (notice that Wilson himself was part of the broad progressive camp).

But things were different the next year. Chafee's argument reappeared in the *Harvard Law Review* in June 1919, just a few months after the Supreme Court ruled on the first Espionage Act convictions. In this context, the truth-seeking defense of free speech was turned into live ammunition against real case law. In any case, Chafee was a mild opponent of the Court, since he reluctantly accepted the opinions in *Schenck* and *Frohwerk*, and applauded Holmes' idea of assessing speech according to the new and less arbitrary notion of "clear and present danger"—this was a "good test for future cases," Chafee wrote.²⁸ In fact, *Schenck* was even celebrated insofar as it could count as an "express repudiation of the Blackstonian doctrine."²⁹ In other words, although Chafee was wary of the Espionage and Sedition Acts and their recently upheld constitutionality, he praised Holmes' views, for they gave less room to judicial discretion. In writing the majority votes of *Schenck* and *Frohwerk*, Holmes was moving (albeit not wholly satisfactorily) to what

²⁷ Ibid., 31-34. Despite being against the current, Chafee heavily relied on recent scholarship to develop his position. He owed the combination of the epistemic function of free speech with the anti-Blackstonian account of the framers to Henry Scholfield, "Freedom of the Press in the United States," *Papers and Proceedings of the American Sociological Society* 9 (1914): 67–116. There are two other relevant sources to note. The first is the sociological jurisprudence of Roscoe Pound, who developed the idea that rights are creations of the sovereign power to protect social interests. Accordingly, such state-protected interests were subject to regulation, especially in the cases in which private interests endangered the common good. The second noteworthy source of Chafee's ideas is the philosophical pragmatism of John Dewey who, also influenced by Pound, framed expressive rights as fostering an epistemic social interest in deliberation which was fundamental for the democratic procedure. This point is developed in Graber, *Transforming Free Speech*, 67–75.

²⁸ Chafee, "Freedom of Speech in War Time," 969.

²⁹ Ibid., 941.

Chafee understood as a more speech-protective approach to the First Amendment.

In any case, Chafee criticized the Court (and Holmes, in particular) in his first *Harvard Law Review* article for not applying the same protective views in *Debs*, the third of the Espionage Act cases ruled on during March. According to Chafee, the speech of Eugene Debs did not pose a clear danger to the war effort, and if only Holmes had taken his own earlier opinions more seriously, the Supreme Court should have absolved the defendant. Chafee's argument on this point is very revealing: Holmes' error in *Debs* was due to his failure "to emphasize the social interest behind free speech."³⁰ Going further, the relevance that such "social interest" had for the discovery of truth was underscored with rather biting words, accusing Holmes of epistemic and moral relativism. For Chafee, Holmes' "liberalism seems held in abeyance by his belief in the relativity of values. It is not by giving way to force and the majority that truth has been won."³¹

Less than a year later, in April 1920, Chafee attacked again from the pages of the *Harvard Law Review*. This time his criticism was aimed at the *Abrams* case: "The whole proceeding, from start to finish, has been a disgrace to our law, and none the less a disgrace because our highest court felt powerless to wipe it out."³² But this time the harsh words were only directed at the lower court in New York and the later majority vote of the Supreme Court upholding the decision. Compared to his criticism of Holmes the year before, now Chafee only had beautiful words. Holmes' dissent in *Abrams*, and especially his metaphor of the "trade in ideas" justifying the truth-seeking functions of the First Amendment, was a "magnificent exposition of the philosophic basis of this article of our Constitution."³³

Chafee's change of attitude towards Holmes is fully understandable. It should be evident now how, by praising the judge's brand-new epistemic defense of free speech in the *Abrams* dissent, Chafee was praising but his own ideas. As it has been noted, *Abrams* is the case in which Holmes seemingly changed his mind: from writing three majority votes supporting the constitutionality of Congress punishing seditious speech (in *Schenck*, *Frohwerk*, and *Debs*) to a heroic speech-protective dissent extolling the epistemic worth of freedom of expression in the defense of radical leftists (in *Abrams*). The epistemic or truth-seeking value of free speech is what Chafee was specifically asking for when he reprehended Holmes' decision in *Debs*. As I will show in the next section, further historical evidence only reinforces this interpretation. During the summer of 1919, the months that separate *Debs* from *Abrams*, Holmes had read Chafee's reaction to the earlier Espionage Act

³⁰ Ibid., 968.

³¹ Ibid., 969.

³² Zechariah Chafee, "A Contemporary State Trial: The United States versus Jacob Abrams et al.," *Harvard Law Review* 33, no. 6 (1920): 774.

³³ Ibid., 770. The legal commentator had additional reasons to be happy about the *Abrams* dissent, since Holmes now fully shared Chafee's historical narrative against Blackstonian free speech (see §1.3).

cases in the *Harvard Law Review*, and they had even met in person to discuss it during the justice's holidays.

1.2. HAROLD LASKI, JUSTICE HOLMES AND THE HISTORY OF EPISTEMIC JUSTIFICATIONS OF FREE SPEECH

The man behind the curtains of the Chafee-Holmes connection was Harold J. Laski. During these years, he was a very young lecturer in Harvard and Yale and a rising star of political science, but many readers will know him better for becoming a prominent member of the British Labor Party and a leading socialist intellectual during the 1930s and 1940s. As the abundant and affectionate correspondence between the two of them shows, the 27-year-old Laski was one of the best friends of the 79-year-old Holmes.³⁴ Their well-documented intellectual relationship gives us ample clues as to Holmes' intellectual evolution on free speech up to his landmark dissent in *Abrams*.³⁵ As Laski's biographers said, Holmes' "dissent was almost verbatim Laski's own amalgam of J. S. Mill and Charles Darwin."³⁶ Perhaps they exaggerated, but the fact remains that it was Laski who commissioned Chafee's first political piece in the *New Republic* against the Espionage and Sedition Acts, and it was Laski who made Holmes read Chafee's 1919 criticism of *Debs* in the *Harvard Law Review*.³⁷ Finally, it was also Laski who arranged a meeting between both the justice and his critic in the summer holidays between *Debs* and *Abrams*.

Understandably unhappy with the imprisonment of Eugene Debs, a fellow socialist, Laski was transparent about his lobbying intentions for the meeting he was setting up between Chafee and Holmes. In a letter to Chaffe, Laski alerted him that "Holmes is coming to tea, and I want you to arrive in good time. For I have given him your article [in the *Harvard Law Review*, criticizing Holmes' arguments in *Debs*] and we must fight on it. I've read it twice, and I'll go to the stake for every word."³⁸ We must assume that Holmes himself was open to this kind of conversation. He had privately confessed to Laski that his decision in *Debs* stemmed from his position as judge, not from his

³⁴ Oliver W. Holmes and Harold Laski, *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski*, ed. Mark DeWolfe Howe, 2 vols. (Harvard University Press, 1953). Whenever necessary, I have completed it with unedited letters in the Harvard Law School Library, typewritten by Mark Howe and catalogued as "Research materials relating to the life of Oliver Wendell Holmes, Jr., 1858-1968. Major Correspondence, 1874-1935, 1874-1935" (henceforth *Howe Materials*).

³⁵ Rabban, *The Forgotten Years*, 352-355; Healy, *The Great Dissent*.

³⁶ Isaac Kramnick and Barry Sheerman, *Harold Laski: A Life on the Left* (Allen Lane, Penguin Press, 1993), 127.

³⁷ Rabban, *Forgotten Years*, 316-17.

³⁸ Quoted in Healy, *The Great Dissent*, 158. My brackets.

own convictions: “if I had been on the jury I should have been for acquittal.”³⁹ The issue was even more pressing since the actual fighting in Europe had stopped with the November armistice of 1918, as the editorials of *The New Republic* insisted.⁴⁰

1.2.1. “Laski, you are a bad boy to keep sending me pretty books”

During these months, Laski had been feeding Holmes a lot of literature on the history of free speech and toleration.⁴¹ Their letters and the personal reading records of Holmes—his so-called “Black Book”—allow us to reconstruct this intellectual relationship in great detail.⁴² “His knowledge is wonderful,” Holmes wrote of his youngest friend; “he has put me up to many books I should have missed.”⁴³ Laski’s suggestions emanated from his scholarly interests at the time: a critical view of state sovereignty through the history of toleration and freedom of thought; what he called the traditional “theological-political” problem.⁴⁴ Much of this liberal turn-of-the-century literature on the history of expressive freedoms was fond of teleological narratives. The core idea was that modern liberties grew progressively in the interstices left by the historical decline of state authority, a narrative paralleled by the Whiggish views of history shared by many educated Americans of the time, as shown by the popular “Western Civilization” general courses that universities started to implement during these decades.⁴⁵ This was also the kind of literature consumed by Chafee—the books in which he found inspiration for the cross-centuries “tradition” of epistemic free speech that connected Socrates with John Milton and Stuart Mill.⁴⁶

³⁹ Holmes was explicit: “I hated to have to write the Debs case and still more those of the other poor devils before us the same day and the week before.” What Laski received were fragments of an unsent letter Holmes had drafted, addressed to Herbert Croly, editor of the *New Republic* (*Holmes-Laski*, vol. I: 203). For an earlier expression of the same regret about *Debs*, see *Holmes-Laski*, vol. I: 190. Holmes expressed the same feelings to another friend, the English jurist Frederick Pollock (*Holmes-Pollock*, vol. II: 11, 15).

⁴⁰ E.g., *The New Republic*, November 9, 1918, 27.

⁴¹ Healy, *The Great Dissent*, chap. 13.

⁴² Oliver W. Holmes, *The Black Book: A List of Books Read by Justice Holmes, 1876-1914*, HLS MS 4075 (Harvard Law School Library). Note that the manuscript is not properly catalogued: Holmes kept record of his readings until 1935. The reading list of 1919 is on page 124, 1918 on page 125. Unless indicated otherwise, all statements about Holmes’ readings refer to this manuscript.

⁴³ *Holmes-Pollock*, vol. II: 42, 46.

⁴⁴ *Holmes-Laski*, vol. I: 7, 191.

⁴⁵ Gilbert Allardyce, “The Rise and Fall of the Western Civilization Course,” *The American Historical Review* 87, no. 3 (1982): esp. 705. I want to thank prof. Teresa Bejan for suggesting this point.

⁴⁶ See, e.g., the influential monograph by J. B. Bury: “We saw how Socrates indicated the social value of freedom of discussion. We saw how Milton observed that such freedom was

For my purposes, it is important to note that most of Laski's bibliographical recommendations went far beyond mere antiquarian interest. They all encouraged a certain political stance in the context of the criticisms of the Espionage Act. Many of them, in fact, explicitly elaborated on the epistemic interest behind expressive freedoms to justify them against government interference. For example, one of the books that Laski gave to Holmes during the spring of 1919 described the early modern political-religious struggle in England with rather revealing words: the substance of the conflict was over a "test of truth."⁴⁷ Thus, the enthusiastic reading suggestions that the young Laski gave to Holmes, many times in the manner of loaned books and gifts, were unequivocally connected with Chafee's constitutional agenda. Laski's proposals also pointed to Chafee's philosophical sources: "Please look at [Walter Bagehot's] *The Metaphysical Basis of Toleration*," Laski asked the judge in January; it is "the most sensible discussion of that business I know."⁴⁸ "Led by what you have said," Holmes replied to Laski in the last days of February, "I reread Mill on liberty."⁴⁹

Laski himself had contributed to this literature with his second monograph, *Authority and the Modern State* (also a reference for Chafee). The book was in fact dedicated to Holmes and Laski sent him a copy before its publication—he did this in March 1919, when the Court was deciding *Debs*.⁵⁰ Probably around April, Holmes duly annotated his reading list with Laski's gift.⁵¹ In this book, Laski pointed to state sovereignty as the root of much unfreedom in modern history and of course touched on the epistemic properties of liberty against government interference: "in the clash of ideas we shall find the means of truth. There is no other safeguard of progress."⁵² A few pages later he added

necessary for the advance of knowledge (...) social utility is the only test. (...) The reasoned justification of liberty of thought is due to J. S. Mill"; Bury, *A History of Freedom of Thought*, 235–36. For Chafee's acknowledgment of this debt and also citing Laski on this point, see Chafee, "Freedom of Speech in War Time," 933. Other examples of this literature are George L. Scherger, *The Evolution of Modern Liberty* (Longmans, Green and Co., 1904) or Charles T. Sprading, *Liberty and the Great Libertarians* (Golden Press, 1913). Holmes' reading list of 1918 has at least two additional clear examples of whiggish literature on expressive freedoms: A. A. Seaton, *The Theory of Toleration under the Later Stuarts* (Cambridge University Press, 1911); Acton, *The History of Freedom and Other Essays*. Thomas Healy states that these two books were Laski's suggestions (*The Great Dissent*, 39–41). An unpublished letter confirms that Seaton's book was borrowed from Laski (*Howe Materials*, Box 4, Folder 38, seq. 6), yet there is no clear evidence with Acton. Laski and Holmes had indeed been discussing the history of toleration in the summer of 1918, after Judge Learned Hand had raised the issue to Holmes (*Holmes-Laski*, vol. I: 158–63), and while Holmes explicitly refers to Acton's essays in their correspondence, I see no evidence that Laski lent or suggested this texts in the first place. Laski's recommendation makes sense with the more scholarly Seaton, but the most probable is that Holmes knew Acton's very popular *History of Freedom* independently from Laski.

⁴⁷ Charles H. McIlwain, ed., *The Political Works of James I* (Harvard University Press, 1918), xxxi. On this book, see *Holmes-Laski*, vol. I: 198–99.

⁴⁸ *Ibid.*, vol. I: 182.

⁴⁹ *Ibid.*, vol. I: 186–87.

⁵⁰ *Ibid.*, vol. I: 188–89.

⁵¹ *Ibid.*, vol. I: 194–95.

⁵² Harold Laski, *Authority in the Modern State* (Yale University Press, 1919), 279–80.

that “[t]he state, no less than the church, must learn that is not paramount in the realm of ideas. Few things are more fatal than the triumph of authority over truth.”⁵³ During these months, Laski’s occasional book reviews for *The New Republic* also pointed in this direction:

[the book shows] the incompatibility between democracy and war. Not merely the laws are silent amid the clash of arms; the babel of tongues must be hushed also. Men must be content, for the sake of survival, to suppress their personality before the Moloch of authority. They must neither question nor discuss lest the effort to conquer be impaired by disunity (...) The life of democracy is in discussion, and the child of discussion is variety. No one who has lived through the last four years will be inclined to doubt that the vastest evil of war is the destruction of ideas it entails.⁵⁴

These reflections capture much of the message contained in many of Laski’s reading suggestions. One example is *Jean Bodin: Auteur de la République*, a book that, instead of reproducing the common image of Bodin as an absolutist, branded him with the presentist label “*royaliste liberal*”—a term commonly associated with the moderate constitutionalism of the July Monarchy in France (1830-1848).⁵⁵ A notable feature of this academic monograph is that it reviewed the recent French edition of Bodin’s tolerationist texts, among whose central ideas we find the recurring argument that explains most of Laski’s recommendations to Holmes: that the free use of reason was a great antidote to arbitrary government power.⁵⁶ There is no better evidence of the book’s whiggish image of Bodin and the impression it made on Holmes than his own words of surprise: “The old cuss reminds me somewhat of [Edward] Coke.”⁵⁷ In the same line, consider the “excellent little book” Holmes read in

⁵³ Ibid., 318.

⁵⁴ Harold Laski, “The New State [Review of ‘Government and the War’ by Spenser Wilkinson],” *The New Republic*, March 8, 1919, 189.

⁵⁵ Roger Chauviré, *Jean Bodin: Auteur de la République* (Besnier, 1914). On Laski’s suggestion, see *Holmes-Pollock*, vol. II: 22.

⁵⁶ Chuviré, *Jean Bodin*, 144. The tolerationist text is the *Colloquium Heptaplomeres*, a manuscript attributed to Bodin that had only circulated privately until it was rediscovered and edited in the mid nineteenth century. Roger Chauviré, the author of the book that Holmes read, was the first French translator: Jean Bodin, *Colloque de Jean Bodin. Des secrets cachez des choses sublimes entre sept sçavans qui sont de différens sentimens*, ed. Roger Chauviré (Champion, 1914). On the history and content of Bodin’s *Colloquium*, see Delphine C. M. Doucet, “Questioning Authorities: Skepticism and Anti-Christian Arguments in the *Colloquium Heptaplomeres*,” *History of European Ideas* 39, no. 6 (2013): 755–75. On a different context, see also Guillem Sales Vilalta, “Scepticism against Intolerance? Moses Mendelssohn and Pierre Bayle’s ‘Dialogue’ on Spinoza in Mendelssohn’s *Philosophische Gespräche* (1755).” *Religions* 15, no. 1 (2023): 49.

⁵⁷ *Holmes-Pollock*, vol. II: 22. Edward Coke (1522-1644) was the most influential jurist of early modern England. His understanding of the common law, legal reasoning and the Magna

early August, the *History of English Democratic Ideas in the Seventeenth Century*.⁵⁸ Written by the British liberal MP George Gooch, the book was an appraisal of defenders of self-government, republicanism, and liberty of conscience—from the Reformation principles of “free inquiry” and “universal priesthood” to the Levellers, John Milton or James Harrington. The book touched on Laski’s interests so much that some years later he voluntarily updated the bibliography and added appendices for a new edition.⁵⁹

“Dear Laski. You are a bad boy to keep sending me pretty books, but they charm me all right.”⁶⁰ Almost every historical reading suggestion that Laski made to Holmes during the summer of 1919 pointed to the topics of toleration, freethinking, and the value of the public use of reason as a limit to arbitrary state authority. These were the values that Laski and other progressives thought at risk under Wilsonian repression (see also below, §1.3.1). Let me insist on this point with other examples. Paraphrasing Marsilius of Padua, one of the books claimed that “errors of opinion lie beyond the cognisance of any human judicature.”⁶¹ Another described the audacious ideas of rationalists of later times: for them, “free discussion (...) was a question of life and death, for they relied solely on argument, and without a fair hearing the strongest arguments are useless.”⁶² And yet another insisted that, according to the English admirers of the French Revolution such as Thomas Paine or William Godwin, “[o]nce awakened to its powers, the human reason is inevitably propelled along the road to perfection,” reminding nonetheless that “at present it is deflected in a thousand ways by the forces of society and the State.”⁶³ A

Carta were instrumental in the development of later constitutionalist, republican and liberal thought. Additionally, Coke is one the earliest and most famous defenders of freedom of speech as a formal right in England—as a basic rule enjoyed by members of Parliament against James I’s monarchical prerogative. On this see e.g., David Colclough, *Freedom of Speech in Early Stuart England* (Cambridge University Press, 2005), 170ff.

⁵⁸ Holmes-Pollock, vol. II: 22. G. P. Gooch, *The History of English Democratic Ideas in the Seventeenth Century* (Cambridge University Press, 1898). See also, Holmes to Laski, 19 August 1919 (*Howe Materials*, Box 7, Folder 27, seq. 10).

⁵⁹ G. P. Gooch, *English Democratic Ideas in the Seventeenth Century. Second Edition with Supplementary Notes and Appendices*, ed. Harold Laski (Cambridge University Press, 1927).

⁶⁰ Holmes to Laski, 17 July 1919 (*Howe Materials*, Box 7, Folder 27, seq. 5).

⁶¹ Reginald L. Poole, *Illustrations of the History of Medieval Thought in the Departments of Theology and Ecclesiastical Politics* (Williams and Norgate, 1884), 271–72. After reading Gooch’s *English Democratic Ideas*, Holmes explicitly linked its lessons with “my recollections of Marsilio of Padua” (Holmes to Laski, 19 August 1919, *Howe Materials*, Box 7, Folder 27, seq. 10).

⁶² Alfred W. Benn, *The History of English Rationalism in the Nineteenth Century* (Longmans, Green and Co., 1906), vol. I: 106. On this book and Poole’s *Illustrations*, see Holmes to Laski, 7 July 1919, and 21 July 1919 (*Howe Materials*, Box 7, Folder 27, seq. 4 and 10).

⁶³ P. A. Brown, *The French Revolution in English History* (Allen & Unwin, 1918), 46–47. We can infer at least another of the conclusions that Laski wanted Holmes to draw from this book thanks to Laski’s later writings. Quoting approvingly Brown’s account of the suppression of civil rights in eighteenth-century England, Laski uses it to make a point about popular juries:

work about the nineteenth century that even earned a review by Laski outlined the optimistic spirit of the age with William Wordsworth's verses in *The Recluse*: "Truth justifies herself, and as she dwells / With Hope, who would not follow where she leads?"⁶⁴

Among other books on Holmes' reading list during the summer between *Debs* and *Abrams*, it is worth mentioning two other suggestions by Laski: Sir Leslie Stephen's *Essays on Freethinking and Plainspeaking* and E. S. P. Haynes' *The Decline of Liberty in England*.⁶⁵ The first, written by a personal acquaintance of Holmes, can be read as a historically informed argument for limiting absolute skepticism. Recall at this point that Chafee's criticism of Holmes insisted on the latter's inability to recognize the epistemic "social interest" of free speech (§1.1.3). For Chafee, such a disregard for truth was ultimately an appeal to force and authority—an inference that Chafee made concrete by quoting a recent text in which Holmes had said "that truth was the majority vote of that nation that could lick all others."⁶⁶ My point is that Laski chose accurately his literary recommendations to the judge. Stephen's *Essays* was the most appropriate reading to convince a stubborn social Darwinist and pragmatist such as Holmes of the importance of the discovery of truth as a rationale for free speech. Holmes liked it: "What a good chap he was—and how he seems to have foreseen pragmatism and to have brought down his hammer on it."⁶⁷ Stephen was indeed severe on the sort of relativism that the justice had occasionally exhibited:

it is not by striking balances between these pains and pleasures that the total effect of the creed is to be measured but by the permanent influence on the mind of seeing things in their true light (...) To inculcate reticence at the present moment is simply to advise us to

"trial by jury has been, at one period or another, the object of most political systems as a safeguard against the bias of *a judiciary often at the mercy of executive power* (...) without the presence of the jury the results of those cases [against English radicals in 1794] would have been built simply on the equation of liberal opinion with high treason," in *A Grammar of Politics* (Allen & Unwin, 1925), 559. My italics. Notice that there is no jury in the US Supreme Court. On this book, Holmes to Laski, 17 July 1919 (*Howe Materials*, Box 7, Folder 27, seq. 5).

⁶⁴ F. S. Marvin, *The Century of Hope* (Clarendon Press, 1919), 59.

⁶⁵ Healy, *The Great Dissent*, 160–61.

⁶⁶ Chafee, "Freedom of Speech in War Time," 969. He was quoting Oliver W. Holmes, "Natural Law," *Harvard Law Review* 32, no. 1 (1918): 40. Interestingly, exactly the same idea that Chafee was holding against Holmes makes an appearance in Holmes' letters from a year before, in June 1918. Judge Learned Hand, a friend of Chafee who was responsible for recent speech-protective jurisprudence in lower courts, had pressed Holmes on the classic argument of epistemic uncertainty as a basis for toleration, to which Holmes answered in a bluntly social-Darwinist manner: "I used to define the truth as the majority vote of that nation that can lick all others. So we may define the present war as an inquiry concerning truth." The whole letter is reproduced in Gerald Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History," *Stanford Law Review* 27, no. 3 (1975): 756–757. Holmes discussed with Laski his meetings and correspondence about toleration with Learned Hand, a topic in which Laski respectfully sided with Hand (*Holmes-Laski*, vol. I: 159–61).

⁶⁷ Holmes to Laski, 23 September 1919 (*Howe Materials*, Box 7, Folder 27, seq. 15).

give one more chance to the development of some new form of superstition.⁶⁸

Hayne's *The Decline of Liberty*, in turn, was a rationalist warning against the rising freedom-threatening bureaucracies that the author associated with the "Prussian" model of state (which Haynes depicted as unconcerned with individual liberties and at the same time subservient to big capitalist corporations). Including chapters touching explicitly on freedom of discussion and religion, for Haynes the ills of the modern state and its damage to liberty were not due to that form of political organization per se; he was not a libertarian.⁶⁹ The "decline of liberty" he denounced was due to plutocratic minorities coopting government, judicial mishandling, subjection of the press to financial interests, and the public opinion's growing contempt for liberty caused by militarism and collectivism.⁷⁰ We know about Holmes' impression of the book thanks to a letter the judge sent to his friend, the English legal scholar Fredrick Pollock:

I partly sympathized with his [Haynes'] *animus*. The whole collectivist tendency seems to be toward underrating or forgetting the safeguards in bills of rights (...) that still are worth fighting for. I have had to deal with cases that made my blood boil and yet seemed to create no feeling in the public or even in most of my brethren. We have been comfortable so long that we are apt to take it for granted that everything will be all right without our taking any trouble. All of which is but a paraphrase of eternal vigilance is the price of freedom.⁷¹

This letter to Pollock was dated September 19, 1919, barely a month before the Supreme Court decision on *Abrams* in November 10. The next letter Holmes sent to his friend before *Abrams*, on October 26, advanced his views on that case: "I see various conflicts of opinion ahead, and even have prepared dissenting statements." And then Holmes immediately linked his next judging duties with the problems of collectivism and contempt for liberty that Haynes' book brought up in his last communication with Pollock: "I hope we have heard the last, or nearly the last, of the Espionage Act cases. Some of our

⁶⁸ Leslie Stephen, *Essays on Freethinking and Plainspeaking* (Longmans, Green and Co., 1904), 361; see also e.g. 330. On Holmes' Darwinism and skepticism, see Vincent Blasi, "Holmes and the Marketplace of Ideas," *The Supreme Court Review* 1 (2004): 1–46. On his relationship with pragmatism, see David S. Bogen, "The Free Speech Metamorphosis of Mr. Justice Holmes," *Hofstra Law Review* 118, no. 1919 (1982): 119–20.

⁶⁹ "The two conditions essential to the bare existence of individual liberty are (1) (as we have seen) a strong government, and (2) a high degree of enlightenment in public opinion. Public opinion must be in the habit of reasoning; it must be free from superstition," E. S. P. Haynes, *The Decline of Liberty in England* (London: G. Richards, 1916), 182. For the purposes of this research, it is noteworthy that Haynes complained during his book of how contemporaries misread Stuart Mill, emphasizing that "his essay on Liberty is in reality more of a protest against private than public interference with the individual," *ibid.*, 18.

⁷⁰ *Ibid.*, 216–18.

⁷¹ *Holmes-Pollock*, vol. II: 25.

subordinate Judges seem to me to have been hysterical during the war (...) I don't understand the Government pressing those cases."⁷²

1.2.2. Repression hits Holmes' progressive circle: the First Red Scare

The legal historian Brad Snyder has called attention to the intensity with which the political and judicial "hysteria" of the late 1910s struck some of the progressive friends of Justice Holmes.⁷³ Since the spring of 1919, a conservative Harvard alumni association was using its influence to cancel outspoken members of the Law School on free speech issues. These attacks were directed first against Felix Frankfurter.⁷⁴ The next target was Roscoe Pound, dean of the Law School since 1916, challenged for not being willing to fire Frankfurter for political reasons.⁷⁵ The Harvard alumni accused them of "Bolshevism" because of their public commitment with the speech rights of left-wing radicals. Laski, who had been updating Holmes about this process, asked for his public support. Justice Louis Brandeis (Holmes' colleague and the only free speech ally in the Supreme Court in the years to come) also urged the old judge to intervene in the Law School affairs. In both cases Holmes delivered, fruitfully using his name and influence to hinder the campaign against Frankfurter and Pound.⁷⁶

However, anti-communist hysteria only got worse after the so-called "Red Summer" of 1919 with numerous strikes, racial riots, and anarchist bombings all over the country (recall, this was the summer between *Debs* and *Abrams*). The next natural target of the Harvard conservatives was Laski himself, who had given public support to the Boston police strike in September. For conservatives, Laski's encouragement of the police strike was the icing on the cake of his declared socialist and anarcho-syndicalist inclinations. Laski's

⁷² Holmes-Pollock, vol. II: 28-29.

⁷³ Brad Snyder, *The House of Truth* (New York: Oxford University Press, 2017), 274-304. See also Rabban, *Forgotten Years*, 351-53.

⁷⁴ Frankfurter played a role in much of this behind-the-curtains free speech history: he was the one who introduced Laski to the social circles of Holmes and Brandeis, he was also a member of the *New Republic*, and one of the founders of the ACLU (American Civil Liberties Union) in 1920, then the most important platform against the civil rights violations of the Department of Justice. He would later become Supreme Court Justice. Much of the sufferings of Frankfurter, Brandeis and Laski during the red scare were accentuated by antisemitism. See e.g., Healy, *The Great Dissent*, 126-28; Kramnick and Sheerman, *Harold Laski*, 128-30.

⁷⁵ Pound had already earned the enmity of the antisemitic and conservative lawyering elites of New England when he supported the nomination of Brandeis to the Supreme Court, which was actively opposed by the Boston Bar and the Harvard community. On a theoretical level, Pound was the father of American legal realism. Despite his later views on concrete policy matters, Pound's work had a profound impact in how progressive- and New Deal-era reformers justified their agenda against the laissez-faire economics that pervaded higher courts. Against typically nineteenth-century ideas of property as a presocial, non-regulable, natural right, Pound and his followers emphasized the social nature of all rights and their correlation with empirical social interests. Chafee's innovative idea that First Amendment constitutional rights protect a "social interest," for instance, can be easily traced back to the works of Pound.

⁷⁶ Holmes-Laski, vol. I: 210, 212.

words were not very well received within the Harvard community, since the President of the University had encouraged students to volunteer for the police force, factually acting as strikebreakers—and many of them did.⁷⁷ Several major sponsors threatened the university to reduce their donations if Laski was not fired.⁷⁸ There were calls for Yale University Press to stop circulating his books.⁷⁹ Laski also became the target of the *Harvard Lampoon*, a student-run satiric magazine that mocked his intellectual connections with communism, including antisemitic bigotry. Biographers unanimously identify these months as a pivotal experience in explaining his return to the United Kingdom in 1920.⁸⁰

It was also in this context, in the months up to *Abrams*, that the US Department of Justice initiated the "Palmer Raids," a series of actions to capture and deport thousands of suspects of unpatriotic activities. These events, tainted with episodes of police abuse and violations of civil rights, were firmly opposed by many of Holmes' younger friends. In fact, some of them can be counted among the victims. The Bureau of Investigation (which later became the FBI), of course had a file compiling Laski's political and academic activity.⁸¹ Chafee and Frankfurter also were, according to the attorney general, "sympathizers of the alien Reds."⁸² Accordingly, both were under the surveillance of the Bureau, which, as we today know, actively undermined their reputation by helping their conservative enemies within the Harvard Law School.

Holmes often showed contempt for the civil rights activism of his younger friends, and even more contempt for the ideas of the radical leftists on trial—in Chafee's words, he had "an aristocratic mind, much out of patience with the radicalism which his judicial opinions placed under the protection of the Constitution."⁸³ However, as months passed, his very friends were the ones in trouble. "I fear we have less freedom of speech here than they have in England. Little as I believe in it as a theory I hope I would die for it"—these were among the words of support that Holmes sent Laski in the wake of the Boston police strike, written just a few weeks before *Abrams*.⁸⁴ Holmes, the man responsible for the Supreme Court sentences that upheld the constitutionality of the Espionage and Sedition Act was not so confident anymore. Anti-communist hysteria and patriotic "collectivism" pervaded the ranks of the Wilson administration, the judicature, and important sectors of the intellectual establishment.

⁷⁷ Snyder, *The House of Truth*, 288; Kramnick and Sheerman, *Harold Laski*, 132–33.

⁷⁸ Kramnick and Sheerman, *Harold Laski*, 130–40.

⁷⁹ Laski to Russell, December 4 1919, reprinted in Bertrand Russell, *The Autobiography of Bertrand Russell* (Routledge, 1998), 345.

⁸⁰ Kramnick and Sheerman, *Harold Laski*, 142; Michael Newman, *Harold Laski: A Political Biography* (Macmillan, 1993), 63; Healy, *The Great Dissent*, 231–33.

⁸¹ Kramnick and Sheerman, *Harold Laski*, 148–49.

⁸² Peter H. Irons, "'Fighting Fair': Zechariah Chafee, Jr., the Department of Justice, and the 'Trial at the Harvard Club,'" *Harvard Law Review* 94, no. 6 (1981): 1225.

⁸³ Chafee, *Free Speech in the United States*, 360.

⁸⁴ *Holmes-Laski*, vol. I: 217. Similarly, see *Holmes-Pollock*, vol. II: 29.

In the face of these censoring tendencies, many of Holmes' younger friends stressed the fallibility of human individuals and institutions. In doing this, we can think of them as challenging two groups: the overconfident and the skeptics. The first group (among whom we could count many Wilsonian fellow-progressives) failed to acknowledge the disturbing airs of infallibility implied in government censorship and in the wartime disregard for civil rights. The second group (Holmes included), albeit uncomfortable with increasing state power, turned a blind eye to free speech violations, accepting to trade off honest criticisms of government for political stability in wartime. Against these two views, the likes of Chafee, Laski and Frankfurter (but also others, such as Walter Lippmann, Jane Adams, John Dewey, Louis Brandeis, etc.) emphasized the vital role of truth in democratic politics, and from there they justified an extensive constitutional protection of expressive freedoms. Most of them were familiar with the Western tradition of political thought, and they knew that the epistemic grounds from which they decided to challenge government censorship had been the locus of old struggles for freedom of thought and religious toleration. The repudiation of infallible institutions and the assertion of truth-seeking freedom were for them among the building blocks in the history and practice of liberal politics. They were not defending something "new" or "radical," but rather a *locus classicus* of the Western canon of liberty. We can safely assume, as I will show in the next section, that this link between their present and past canonical episodes in the history of freedom was crystal-clear for many of them. In their eyes, the contemporary struggle for free speech had significant precedents in early modern debates about toleration or in the fight of Enlightened epistemic optimism against inquisitorial absolutism.

1.3. THE ABRAMS DISSENT, THE MARKETPLACE OF IDEAS, AND THE MAKING OF THE LIBERTARIAN TRADITION

With such a historical and philosophical consciousness in understanding their own political agenda, it is hardly surprising that, in the months before *Abrams*, Laski and Frankfurter asked Holmes to write an article for the *New Republic*, precisely on the topic of toleration.⁸⁵ However, the newly arrived Espionage Act case during the fall prevented the judge from working on his friends' assignment. Nevertheless, they got something much better: the *Abrams*

⁸⁵ Healy, *The Great Dissent*, 211–12. This fact was previously unacknowledged due to a confusion with other request Holmes rejected during these weeks (a lecture to the Phi Beta Kappa society) and because of at least two missing letters. It is only thanks to Thomas Healy's recent re-examination of the primary sources that we know that Laski and Frankfurter asked for an article to Holmes (ibid., 291–292). Healy's suggestion is even stronger, since part of the argumentative structure of the *Abrams* dissent (i.e., persecution seems logical, if someone truly believes they are right they will use force...) is identical to the main argument in Holmes' letter to Laski in October 26, in which Holmes precisely justifies not being able to fulfill his friends' request of an article. Compare *Abrams*, 630 with *Holmes-Laski*, vol. I: 217–18; a similar argument also in ibid, vol. I: 159–161.

dissent. As Holmes' wrote to Frankfurter the first of November, he had no spare time for the requested article, but had just written something "*quasi in furore*" for the Supreme Court "on kindred themes to your subject."⁸⁶ The *Abrams* dissent was this something. It was Holmes' new take on toleration, showing many of the influences and concerns to which he had been exposed during 1918 and 1919—including Judge Learned Hand's letters, Laski's rich bibliographical suggestions and their frequent written and oral discussions, Chafee's article and their personal meeting arranged by Laski, their help in making Holmes realize the absurdity of Espionage Act prosecutions and incarcerations when the war was almost over in Europe, and Holmes' growing dissatisfaction with how wartime patriotic "collectivism" put many of his dear friends at risk. Sparse in constitutional interpretation but rife with political thought, the short text of the *Abrams* dissent was going to shape the liberal and libertarian imagination on expressive freedom for the next decades, a much more influential legacy than any article in *The New Republic* could have hoped for.

In the tradition of Roman orators, the argument started by capturing the goodwill of his persecution-minded Wilsonian audience and Court colleagues, which served also as Holmes' reckoning with his earlier views:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises.⁸⁷

And then it continued with that historical lesson that was so important for those who, like Chafee and Laski, believed in the epistemic value of expressive freedoms. A lesson expressed with an economic metaphor:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe

⁸⁶ Holmes to Frankfurter, November 1, 1919, quoted by Healy, *The Great Dissent*, 211.

⁸⁷ *Abrams*, 630.

and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States, through many years, had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed.⁸⁸

The *Abrams* dissent constituted “the most protective construction of the First Amendment in the history of the U.S. Supreme Court.”⁸⁹ And, although it started in a dissenting opinion, the metaphor of a “free trade in ideas,” of ideas “competing in the market,” became a commonplace of later speech-protective jurisprudence.⁹⁰

1.3.1. The appeal to history: tradition shapes our struggle

Holmes’ progressive friends were quick to write to the judge and celebrate his dissent. The next issue of *The New Republic* reprinted the entire Supreme Court decision and included an editorial aptly titled “The Call to Toleration.” The *Abrams* dissent, according to the magazine, embodied the “traditional American ideal of toleration,” the one that “all patriotic citizens used to share.” In doing this, Holmes “re-states” the epistemic view “upon which the toleration as contrasted with persecution of expressed opinion has and always must rest.”⁹¹ Laski told Holmes that “we all feel that you have restated the case for liberalism.”⁹² Holmes’ dissent was “a landmark of courage in an era of hysteria.”⁹³

However, it was Roscoe Pound who expressed better than anyone the *historical* dimensions of Holmes’ argument as perceived in some progressive circles. Pound complimented Holmes. Notice, though, the very distinct manner in which he did it. The *Abrams* dissent was “a document of human liberty to keep up the succession from the *Apology* of Socrates, the

⁸⁸ Ibid., 630. On the notion that “time has upset many fighting faiths,” see §3.3.3 and §3.4.1

⁸⁹ Rabban, *Forgotten Years*, 355.

⁹⁰ The exact formulation “marketplace of ideas” became popular in later cases, particularly *United States v. Rumely*, 345 U.S. (1953), 56. For a wide collection of the relevant case law see Stanley Ingber, “The Marketplace of Ideas: A Legitimizing Myth,” *Duke Law Journal* 1 (1984): n. 2; Daniel E. Ho and Frederick Schauer, “Testing the Marketplace of Ideas,” *New York University Law Review* 90, no. 4 (2015): n. 3.

⁹¹ Herbert Croly, “The Call to Toleration,” *The New Republic*, November 26, 1919, 360–61. The piece was not signed, but we know its authorship because Laski mentions it to Holmes. Croly was a founder of *The New Republic* and a prominent intellectual of the progressive movement (*Holmes-Laski*, vol. I: 222).

⁹² *Holmes-Laski*, vol. I: 222.

⁹³ Ibid., vol. I: 231.

Areopagitica [of John Milton], and Mill on liberty."⁹⁴ Pound was echoing Chafee's early critical texts against the Espionage Act (and against Holmes himself!) and his articulation of a truth-seeking tradition of expressive freedoms (§1.1.3). Other celebratory letters followed this line. "Pound has stolen from me," Frankfurter told Holmes, "when he says your paragraphs will live as long as the *Areopagitica*."⁹⁵ It was an "education in the obvious."⁹⁶ Similarly, for the journalist Max Lerner, Holmes' dissent was "the greatest utterance on intellectual freedom by an American, ranking in the English tongue with Milton and Mill."⁹⁷

The historical narrative outlined by Chafee in his earlier texts against the Espionage Act had taken hold among his fellow progressives and critics of the US government in the late 1910s.⁹⁸ This narrative gave their then-radical views on expressive freedoms (i.e., free speech is something almost absolutely protected from government interference, even in wartime) the support of history, embedding it in the Western political tradition. This was important at the time, for what came to be known later as "free speech libertarianism" or "civic libertarianism" was, during these years, a minority position in the legal establishment. In the Supreme Court, only two out of nine justices supported something like it (Holmes and Brandeis), and it was still a dividing line within the progressive field itself—after all, it was *their* Wilson administration that was suppressing civil rights. In lower courts, the prospects of a speech-protective reading of the First Amendment were even worse: Justice Hand stood as the only notable exception.⁹⁹ And he was an exceptional judge who, in Chafee's opinion, "had to go, not to judicial precedents, but to Milton and Mill."¹⁰⁰

In such a context, the idea that the truth-seeking free speech in the *Abrams* dissent was, from Socrates to Mill, part of a wide and venerable tradition was an important source of legitimacy. In historical perspective, as one of them pointed out, the "American Republic" did not do much better than the "Republic of Athens" that condemned Socrates.¹⁰¹ For progressive advocates of civil rights, stressing out the historical roots of their own position was especially useful in the late 1910s and early 1920s, when free speech libertarianism was often deemed unpatriotic and seditious. As Chafee

⁹⁴ Quoted in Healy, *The Great Dissent*, 221.

⁹⁵ Oliver W. Holmes and Felix Frankfurter, *Holmes and Frankfurter: Their Correspondence, 1912-1934*, ed. Robert M. Mennel and Christine L. Compston (University Press of New England, 1996), 76.

⁹⁶ *Ibid.*, 75.

⁹⁷ Quoted in Graber, *Transforming Free Speech*, 108.

⁹⁸ For the educative and social context of Chafee and his wartime progressive appeal to history, see Jerold S. Auerbach, "The Patrician as Libertarian: Zechariah Chafee, Jr. and Freedom of Speech," *The New England Quarterly* 42, no. 4 (1969): 520–21.

⁹⁹ *Masses Publishing Co. v. Patten* 244 F. 535, S.D.N.Y. (1917). On this, see Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine"; Rabban, *Forgotten Years*, 261–66.

¹⁰⁰ Chafee, *Free Speech in the United States*, 437.

¹⁰¹ William Hard, "The Half Americans," *The New Republic*, December 10, 1919, 47–48.

protested in his book, “[i]t is surprising how in the last three years [1917-1920] it has been impossible for anyone to uphold the rights of a minority without subjecting himself to the accusation that he shared their opinions.”¹⁰² At a time when the justification of the US military intervention in Europe was mixed with narratives of global crusades for democracy and Western constitutional values, stressing out the continuity of free speech libertarianism with the Western canon became a formidable rhetorical tool.¹⁰³

“At this moment,” Walter Lippmann protested in the pages of the *New Republic*, “the man who (...) stands (...) in his doctrine of toleration where John Milton stood two and a half centuries ago, is certain, absolutely certain to be called a pacifist, pro-German, and Bolshevik. It cannot be helped.”¹⁰⁴ To make a similar argument about the postwar need of an “artificial uniformity of outlook,” Laski evoked “the Middle Ages, when there were no heretics save those who were occupied in being burnt.”¹⁰⁵ The defenders of conscientious objectors demanded “liberty of conscience” as part of “an Anglo-Saxon tradition for which our ancestors fought and died.”¹⁰⁶ And the prologue to the joint report that denounced the shady practices of the Department of Justice, written among others by Frankfurter, Chafee and Pound, ended with the unsurprising appeal to history: “It has always been the proud boast of America,” that “[f]ree men respect justice and follow truth,” and “a fallacy to suppose that, any more than in the past, any servant of the people can arrogate to himself unlimited authority.”¹⁰⁷

Their argument was powerful. Those who cared for free speech and civil rights during the war proclaimed themselves as the actual custodians of the Western liberal tradition. For these critical progressives, what jeopardized liberal values was Wilson’s America and Lloyd George’s Britain. It was the wartime suppression of civil rights in the allied countries that was reminiscent of old-regime persecution, Eastern despotism, patriotic collectivism, Prussian statism, and all those other ominous trends the allies claimed to be confronting in the European theater.¹⁰⁸ Hence the view that “[t]he crusaders of freedom are themselves compelled, for the purposes of their war of liberation, to adopt the very methods and principles against which they fight,” fostering “heresy-

¹⁰² Chafee, *Freedom of Speech*, 3.

¹⁰³ On Wilsonian imperialism, see Frank A. Ninkovich, *Modernity and Power: A History of the Domino Theory in the Twentieth Century* (University of Chicago Press, 1994), 37–68, esp. 60–63 on the idea, rooted in Walter Bagehot (recall, a source of Chafee’s view of free speech as an epistemic tool), of a “world opinion” that must be liberated, preserved and convinced.

¹⁰⁴ Walter Lippmann, “Unrest,” *The New Republic*, November 12, 1919, 317.

¹⁰⁵ Harold Laski, “The Temper of the Present Time,” *The New Republic*, February 18, 1920, 335.

¹⁰⁶ American Union Against Militarism (AUAM), 1917, quoted in Weinrib, *The Taming*, 61.

¹⁰⁷ R. G. Brown et al., *To the American People. Report upon the Illegal Practices of the United States Department of Justice* (National Popular Government League, 1920), 8.

¹⁰⁸ See, e.g. Walter Lippmann, *The Political Scene* (H. Holt and Company, 1919), 102–3; Henry W. Lawrence, “Justice to the Devil,” *The New Republic*, January 4, 1919. On this argument used by conservative critics of Wilson, see Graber, *Transforming Free Speech*, 24.

hunting tendencies."¹⁰⁹ The editorials of *The New Republic* insisted systematically on this point: US "conservative patrioteers" were waging a "holy war," substituting "the liberalism which was hitherto characteristic of American democracy" for an "obscurantism of spirit."¹¹⁰ Federal agents with the task of censorship were deemed "the new inquisitors," and compared to "witchfinders" in seventeenth-century England.¹¹¹

Against all this old-fashioned oppression stood the history lesson of the *Abrams* dissent. According to Chafee, this was "the tradition handed down to us by Roger Williams and Thomas Jefferson," that of "the strength of the argument" and "freedom of thought."¹¹² In the face of the "new manifestation of paternal authority (...) what old Sam Adams would say to that? Or Patrick Henry? Or Benjamin Franklin[?]," wrote another.¹¹³ Laski also insisted on this historicist attitude: "we are proud of our heritage," and reminded his readers that "in a time of panic it is history we are most apt to forget (...) It would be the guarantee of destruction to renounce our heritage."¹¹⁴

The critical progressive claim that their confrontation against the US government was part of *the* transhistorical struggle for toleration and expressive liberty did not go unanswered. One of the fiercest critics of the *Abrams* dissent, the legal scholar and military officer John Wigmore, recognized a whiggish spirit in Holmes' argument, and went on mocking the disproportionate retort to the past in the progressive defenses of free speech in wartime:

I firmly believe that in these days the tender champions of free speech are, like Don Quixote, fighting giants and ogres who have long since been laid in the dust. (...) The emotional conditions of religious and political intolerance and persecution out of which emerged a perception of the need for "free trade in ideas" have long since quieted down. It is an anachronism to imagine that they continue, and to argue as though we were still living in the days of [John] Huss and Galileo and [Hugh] Latimer.¹¹⁵

¹⁰⁹ Anon., "Censorship and the Peace Conference," *The New Republic*, November 16, 1918, 61–62.

¹¹⁰ Anon., "The Mob in High Places," *The New Republic*, December 7, 1918, 150–51.

¹¹¹ Respectively, Anon., "The Advocacy of Force and Violence," *The New Republic*, January 28, 1920, 253; Anon., "Red Hysteria," *The New Republic*, January 28, 1920, 249.

¹¹² Zechariah Chafee, "Legislation against Anarchy," *The New Republic*, June 23, 1919, 385. Similarly, Chafee, *Freedom of Speech*, 227.

¹¹³ Frank L. Cobb, "The Press and Public Opinion," *The New Republic*, December 31, 1919, 146.

¹¹⁴ Laski, "The Temper of the Present Time," 335, 338.

¹¹⁵ John H. Wigmore, "Abrams v U.S.: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time," *Illinois Law Review* 14, no. 8 (1920): 558–59.

1.3.2. The reversal of history: our struggle shapes tradition

The progressive appeal to the past to justify expressive freedoms indeed slipped into “anachronism,” but in a different sense than Wigmore’s critique above. In their celebration of the past, progressives ended up selecting and arranging textual evidence as if all those earlier advocates of toleration, freethinking or freedom of the press were truly sponsoring some sort of free speech libertarianism—in the sense of a fundamentally anti-statist claim or negative right, defining an area of social life completely free from government interference. Because Wilsonian state interference was, in their view, the main threat to the epistemic functions of expressive liberties at the time, their narrow normative concerns “skewed (...) history in a libertarian direction.”¹¹⁶

This was, as I have shown, also the thrust of Laski’s reading suggestions to Holmes in the months between *Debs* and the latter’s decisive change of mind in *Abrams*. And it was, too, present in Laski’s early academic monographs against unitary views of state sovereignty.¹¹⁷ As Ralph Miliband, one of his students in the early 1940s, put it:

Laski was a libertarian to the root of his being. No-one who attended his lectures on the history of political ideas at the London School of Economics could fail to see that to him the drama of history was the struggle for toleration, for the exercise of reason in human affairs, for the extension of individual freedom.¹¹⁸

The case of Chafee is the most illustrative example of how the appeal to history ended up promoting its distortion. In the next decades after *Abrams*, the writings of Chafee, now turned into handbooks, set the standard account of the constitutional evolution of free speech in the years of the First World War.¹¹⁹ And, as we have seen, Chafee’s critique of the Supreme Court and his constitutional views (recall from §1.1.3: calling attention to the epistemic social interest behind expressive liberties and, consequently, their status as rights specially protected against government interference) was supported by a distinct historical narrative. In this sense, it is worth noticing that his historical account of the First Amendment went against the grain of turn-of-the-century legal scholarship. Specifically, Chafee denied the common

¹¹⁶ Auerbach, “The Patrician as Libertarian,” 522.

¹¹⁷ Arthur A. Ekirch, “Harold J. Laski: The Liberal Manqué or Lost Libertarian?,” *The Journal of Libertarian Studies* 4, no. 2 (1980): 139–50.

¹¹⁸ Ralph Miliband, “Harold Laski’s Socialism,” *The Socialist Register* 31 (1995): 258. Miliband’s use of the term “libertarian” should not be confused with its later, conventional meaning in English-language political theory (i.e., as a general anti-statist stance based on individual negative rights in the manner of, say, Robert Nozick, Murray Rothbard or Ayn Rand). Although “libertarian” in Miliband’s words also puts an emphasis on negative expressive rights, it is not necessarily incompatible with more statist views in economic policy, or even a positive view of freedom. On free speech libertarianism with economic interventionism, see below §2.2. On the disputed meaning of “libertarian,” and the specific contribution of English socialists to this debate, see Martínez-Cava, “Enemigo a las puertas.”

¹¹⁹ Chafee, *Freedom of Speech*; Chafee, *Free Speech in the United States*.

assumption of his time that the framers of the US Constitution had a Blackstonian conception of free speech. This observation in legal history was instrumental to back his normative constitutional interpretation. Chafee was interested in undermining the view that the fathers of the First Amendment considered it only as a right against prior censorship, but not against speech regulation or punishment after the fact. He insisted that prominent members of the founding generation had opposed the Sedition Act of 1781 on these grounds, proving that their views on free speech were far more complex and more speech-protective than eighteenth-century English libel law as reflected in Blackstone's *Commentaries*. In the late 1910s and early 1920s, this was a way of demonstrating the legal and historical pedigree of those who, like Chafee, resisted the wartime suppression of civil rights and the Red Scare.

Remarkably, Chafee's historical account not only shaped later academic research (§1.3.3). His views were also present in subsequent free speech jurisprudence. It was Chafee's anti-Blackstonian interpretive point that Holmes reproduced in *Abrams* when he pointed out "I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion."¹²⁰ (And this was a rather relevant remark coming from him, since Holmes had been responsible for sponsoring Blackstonian free speech in an earlier Supreme Court case.)¹²¹ We see Chafee's historical narrative as well in the concurring opinion on the conviction of the communist Anita Whitney in 1927. Justice Brandeis, joined by Holmes, claimed that truth-seeking deliberation and the resulting special protection of free speech vis-à-vis state interference was an essential view of "[t]hose who won our independence."¹²² The justices then added the famous remark that "the remedy to be applied is more speech, not enforced silence," followed by a footnote referencing the work of Laski and Chafee.¹²³

¹²⁰ *Abrams*, 630.

¹²¹ Writing for the Court, Holmes had said, with an explicit reference to Blackstone, that the provisions of the First Amendment "prevent all such previous restraints," but not "the subsequent punishment of such as may be deemed contrary to the public welfare," *Patterson v. Colorado*, 205 U.S. (1907), 454. On this case, see Rabban, *Forgotten Years*, 130–35.

¹²² *Whitney v. California*, 274 U.S. (1927), 375, 377. On Brandeis' views during the period, see Rabban, *Forgotten Years*, 355–71. Chafee's views are also present in much later jurisprudence. See e.g., Justice Black's and Justice Douglas' dissenting opinions in *Beauharnais v. Illinois*, 343 U.S. (1952): "the First Amendment repudiated seditious libel for this country," 272; "The free trade in ideas which the Framers of the Constitution visualized," *ibid.*, 285. Also in the important majority vote, written by Brennan, in *New York Times Co. v. Sullivan* 376 U.S. (1964), 273–277. On the significance of this case in John Rawls' political philosophy, see below §3.1.1

¹²³ Although Holmes and Brandeis voted together in both cases, later scholars opposed the *Abrams* dissent to the *Whitney* concurrence; e.g., Pnina Lahav, "Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech," *Journal of Law Politics* 4, no. 3 (1988): 451–82; Sunstein, *Democracy and the Problem of Free Speech*, 23–29. Let me

Later revisionist historians, led by the work of Leonard Levy, challenged Chafee's view on the Founders as too reliant on his own constitutional program. Chafee and his followers "'anticipated the past' by succumbing to an impulse to re-create it so that its image may be seen in a manner consistent with our rhetorical tradition of freedom."¹²⁴ More recently, the criticism has been even harsher. David Rabban and Mark Graber have noted that Chafee's historical narrative made a leap jump from the founding era to the Espionage Act of 1917, neglecting nineteenth-century political and legal sources that could be used to advance a speech-protective understanding of the First Amendment. Chafee's scholarship, moreover, was a case of "creative misrepresentation of legal history," he "deliberately manipulated history and theory."¹²⁵ These historians have shown that what became the standard historical narrative of free speech in the United States was a rather manipulative description, instrumental to the constitutional agenda of progressive defenders of free speech in the early twentieth century.

But, as also noted earlier, Chafee did not remain in a negative criticism, neither did he remain in the eighteenth-century and the founding era. He needed something else than to bust the myth of the Blackstonian Founders. As I discussed earlier, Chafee had in mind a specific "philosophical basis" to justify free speech: it protects a social interest in the search for truth, which is an essential part of the democratic procedure and therefore deserves more protection against state interference than other rights (see §2.3.3 on a later practice of constitutional review reflecting this intuition). Other progressives shared these normative ambitions. The "social interest" of rights had its roots in contemporary sociological jurisprudence, and the epistemic dimensions of democracy were a commonplace of pragmatist social thought.¹²⁶ But Chafee looked for earlier predecessors of what he saw as a "continuing purpose" of "permanent significance."¹²⁷ With this in mind, he put together a cross-centuries dispersed legacy of epistemic justifications of expressive freedom in which contemporary American politics should mirror itself. As we have seen, this tradition, from Socrates to Milton and Mill, was outlined by Chafee in his

comment on Sunstein's view, because his work has been a major inspiration for this thesis. For Sunstein, the *Abrams* dissent, written by Holmes, would represent interest-group pluralism and a market-libertarian ideal of free speech. In contrast, the *Whitney* concurrence, penned by Brandeis, would emphasize public-spiritedness and a deliberative-republican ideal of free speech. In my view, though, Sunstein seems to be reading Holmes' metaphor of a "trade in ideas" rather anachronistically, by projecting the later libertarian reading of the metaphor as entailing a laissez-faire media or political market, disregarding fairness, equality, state-enforced competition and so on—that is, as I will show, as significantly far from Holmes' views and those of his progressive associates (see below §2.2).

¹²⁴ Leonard W. Levy, *Emergence of a Free Press* (Oxford University Press, 1985), xiv.

¹²⁵ Respectively, Rabban, *Forgotten Years*, 17; Graber, *Transforming Free Speech*, 2. Against this criticism of Chafee's scholarship, see Charles L. Barzun, "Politics or Principle? Zechariah Chafee and the Social Interest in Free Speech," *Legal History eJournal*, no. 2 (2007): 259–326.

¹²⁶ Graber, *Transforming Free Speech*, 67–75.

¹²⁷ Zechariah Chafee, "Liberty and Law," in *Freedom in the Modern World*, ed. Horace M. Kallen (Books for Libraries Press, 1928), 97.

first critique of the Espionage Act and in his review of Holmes' free speech opinions before *Abrams* (§1.1.3).

Put differently, before *Abrams*, the tradition of truth-seeking expressive freedoms was a weapon against Holmes. But when Chafee got to compile his wartime articles in his book of 1920, Holmes' recent dissent in *Abrams* became canonized as a part of a venerable "English-speaking" tradition of epistemic free speech. Before *Abrams*, Holmes was accused by Chafee of sustaining an epistemic relativism deferential to abuses of state power and incompatible with Western liberalism. Yet after *Abrams*, Holmes himself was the missing link in the Western canon. For Chafee, the landmark dissent was the connection between early modern struggles for toleration against absolutist persecution and the twentieth-century constitutional agenda against Wilsonian wartime hysteria. After *Abrams*, it was still from Socrates to Milton and Mill, but now also from Mill to Holmes.

1.3.3. *The invention of history: the market of ideas was always there*

Chafee's normative-historical views were initially in the minority, distrusted outside progressive circles that favored the protection of civil rights. His scholarship was deemed dangerous and politically biased by conservatives. However, his later professional achievements as a teacher and a lawyer made his account of expressive freedoms a success, even outside the field of constitutional theory.¹²⁸ Chafee went from being spied on by the Justice Department to becoming one of the most popular and influential First Amendment scholars (he was, for instance, the first Harvard lecturer to teach on television in the United States). His work went from being banned in libraries to being the standard mid-century First Amendment manual.¹²⁹ He also became during the interwar years a well-known lawyer of radical leftists, contributing to the foundation and first litigation strategies of the ACLU (American Civil Liberties Union).¹³⁰

The spread of Chafee's views ended up vulgarizing his historical account of free speech. As I have just pointed out, his account already indulged in teleology and retrojection. He reshaped the views of the eighteenth-century framers of the US constitution to support his own speech-protective epistemic reading of the First Amendment. And he purposely adjusted his wartime criticisms of the Espionage Act, Holmes, and the Supreme Court to portray the *Abrams* dissent as the intrepid demonstration of ideas that were allegedly there all along—albeit sentencing pacifists, anarchists and socialists, Holmes was silently refining a libertarian view on free speech, he was only "biding his

¹²⁸ John Wertheimer, "Freedom of Speech: Zechariah Chafee and Free-Speech History," esp. 368–71.

¹²⁹ On libraries banning Chafee, see Smith, *Zechariah Chafee, Jr.*, 36. On Chafee's TV lectures, *ibid.*, 268–70.

¹³⁰ Weinrib, *The Taming*. Rabban, *The Forgotten Years*, 302–16.

time,” as the 1920s Chafee put it.¹³¹ The popularization of Chafee’s Socrates-to-Holmes historical narrative of epistemic justifications of expressive liberties went even further in the next decades.

For the critical progressives of the 1910s and 1920s, we have just seen how history was a way of embedding Holmes’ innovative jurisprudence in *Abrams* in a wider tradition of epistemic arguments for expressive liberty, a way of showing that it was not as “radical” as it seemed to many contemporaries. In other words, history helped make sense of Holmes argument and show the epistemic and political meaning of his “trade in ideas” metaphor. However, as I will show below, the interpretive direction reversed completely in later decades. Holmes’ dissent and his “trade in ideas”—soon to be transformed into the “marketplace of ideas”—served to reveal the meaning of earlier history. *Abrams* was no longer an inspired rendition of older arguments. The Holmesian “trade in ideas” (a specifically free-market libertarian interpretation of it, see §2.1) was turned into the hermeneutic key of almost any past justification of expressive liberties that mentioned its epistemic functions. In light of recent work by Duncan Bell, the process I am examining should be understood as one episode within the wider transformations that liberalism suffered during the first half of the twentieth century, both as an object of historical research and as a source of political ideas.¹³²

The most significant source disseminating the idea that a libertarian or laissez-faire marketplace may reveal the meaning of older epistemic justifications of free speech is *Four Theories of the Press*.¹³³ Written in 1952, this is the best-selling University of Illinois Press book of all times, one of the most translated textbooks in the field of journalism, and the earliest and most influential handbook of normative theory of communication in the English-speaking academia and beyond.¹³⁴ In the chapter written by the legal historian Frederick Siebert, the epistemic defenses of free speech by John Milton, John Locke, Thomas Jefferson or John Stuart Mill are presented as part of the “libertarian theory.”¹³⁵ In a movement typical of Cold War handbooks, the normative reflections on the public sphere by these authors (their defense of religious toleration and other expressive freedoms) are presented as

¹³¹ Chafee, *Free Speech in the United States*, 86.

¹³² Duncan Bell, “What Is Liberalism?,” *Political Theory* 42, no. 6 (2014): 682–715. See esp. 700–701 on “religious toleration” becoming the ideological focus of progressive-era reconstructions of liberalism, thus expanding previous understandings of the tradition to early modern Europe.

¹³³ Siebert, Peterson, and Schramm, *Four Theories*.

¹³⁴ John Nerone, “Four Theories of the Press in Hindsight: Reflections on a Popular Model,” in *New Frontiers in International Communication Theory*, ed. Medhi Semati (Rowman and Littlefield, 2004), 21–32. For a review of the theoretical influence of *Four Theories* and Siebert’s scholarship until today while recognizing its limitations, see Clifford G. Christians et al., *Normative Theories of the Media* (University of Illinois Press, 2009).

¹³⁵ Siebert, Peterson, and Schramm, *Four Theories*, 39–72.

antithetical to state interference, conveniently opposed to an "authoritarian" and a "Soviet communist" theories of the press.¹³⁶

Siebert, who was also the author of one of the most comprehensive monographs on press freedom in seventeenth-century England at that time, relied on Chafee's work since his first publications.¹³⁷ In Siebert's work, the tradition of truth-seeking expressive freedoms originally recovered by Chafee became a fully-fledged "libertarian theory." Siebert gave the earlier historical narrative on epistemic free speech developed by progressives an even stronger anti-statist bent. "The essential characteristic" of the epistemic function of the media "was its freedom from government controls or domination."¹³⁸ Early modern and enlightened epistemic optimism was unambiguously understood to justify an area of social life absolutely free from state interference:

The framers of the constitution were children of the Enlightenment (...) Government was the chief foe of liberty (...) If the press were free, men would speak. True, they might lie, vilify, distort. But the wonderful invisible hand envisioned by Adam Smith and the self-righting process discerned by John Milton would set things right.¹³⁹

In this typically Cold War restoration of the Western political tradition, Holmes' metaphor of a "trade in ideas," which seemingly integrated free speech and capitalist markets, deserved a special place: "Man would seek truth amidst the welter of ideas which swarmed in the market place; and being rational, he would separate truth from falsehood, good from bad."¹⁴⁰ The marketplace of ideas and the self-correcting public sphere knit together a "libertarian theory" that went "from Milton to Holmes," being the "guiding principle of western civilization for more than two hundred years."¹⁴¹ However, as we will see later (§2.2; §2.3), this mid- and late-twentieth century understanding of free speech libertarianism should be understood as breaking with the qualified support of state interference that many of our interwar protagonists developed. Something critical for this thesis, a minimal political-economic understanding of the public sphere, was lost as the "libertarianism" of the likes of Laski and Chafee was appropriated by the "libertarianism" of

¹³⁶ On the Cold War interpretive biases of this influential handbook, see John Nerone, "Revisiting 'Four Theories of the Press,'" in *Last Rights*, ed. John Nerone (University of Illinois Press, 1995), 1–30. For an analysis of *Four Theories* in the context of the academic networks of the mid-century US, see Terhi Rantanen, "A 'Crisscrossing' Historical Analysis of *Four Theories of the Press*," *International Journal of Communication* 11 (2017): 3454–75.

¹³⁷ See, e.g., Fredrick S. Siebert, *The Rights and Privileges of the Press* (D. Appleton-Century Company, 1934), 10; Siebert, *Freedom of the Press in England*, 12–13; Siebert, Peterson, and Schramm, *Four Theories*, 149. Note also that the "social responsibility" model of the press in *Four Theories* was indebted to Chafee as well, since that was the normative position he adopted in his work for the Hutchins Commission (see below, §2.3.1; §2.3.2).

¹³⁸ Siebert, Peterson, and Schramm, *Four Theories*, 51.

¹³⁹ *Ibid.*, 76. Compare this view with my arguments in §IV.

¹⁴⁰ *Ibid.*, 77.

¹⁴¹ *Ibid.*, 70.

Siebert and other late-twentieth century “libertarian” thinkers far from the reformist spirit of the 1920s and 1930s.¹⁴²

The fact that many later critics in communication theory did not really challenge the broadly libertarian historical narrative is testimony to its pervasiveness. In the 1980s and 1990s, scholars still thought that *Four Theories* “remains the major source and point of reference.”¹⁴³ For example, in one of the latest attempts to update the partisan prejudices of Siebert’s Cold War typology, the relationship between negative liberty and early modern epistemic justifications for toleration and free speech remains essentially unquestioned. Thus, Siebert’s views are deeply criticized, pointing to their geopolitical bias, but it is accepted that according to the forerunners of the “libertarian” or “liberal-individualist tradition,” “the interests of all participants would be best served by a free media market (...) The enemy of liberty was government and the state, and no good could come from public intervention to secure some supposed public objective.”¹⁴⁴ Later Supreme Court opinions reproduce this reversal of historical interpretation in which Holmes’ metaphor is projected back to decipher the meaning of past texts. For example, dissenting against the regulation of racist pamphleteering, Justice Douglas evoked “[t]he free trade in ideas which the Framers of the Constitution visualized.”¹⁴⁵

Correspondingly, some of the much-needed historical research on alternative visions of the public sphere beyond free market laissez faire has accepted the “marketplace” analogy to explain the political thought of Milton and the Levellers on the public sphere.¹⁴⁶ The uncritical acceptance of this hermeneutic assumption is significant, even if most of these scholars have successfully recovered forgotten normative reflections about freedom of communication. This “interpretive conjuncture” (§III.2), this unquestioned common ground or set of background assumptions reinforced by scholars who disagree on their normative interests, is also reproduced in contemporary scholarship arguing for public sphere regulation or some sort of interference with media markets. The marketplace-of-ideas hermeneutic model also plays a role here.

For many advocates of negative liberty in the public sphere, the market metaphor serves laudatory purposes. This is the case of Siebert in his

¹⁴² On Murray Rothbard’s explicit intentions in the 1970s of changing the earlier “leftist” meaning of “libertarian,” see Martínez-Cava, “Enemigo a las puertas,” 165–66.

¹⁴³ Peter Humphreys, *Mass Media and Media Policy in Western Europe* (Manchester University Press, 1996), 7. He is quoting the standard Dennis McQuail, *Mass Communication Theory: An Introduction* (Sage, 1987), reedited still in 2020 (7th edition).

¹⁴⁴ Christians et al., *Normative Theories of the Media*, 23; on early moderns as “libertarians,” see also 47–52.

¹⁴⁵ Beauharnais, 285.

¹⁴⁶ Rainer Forst, *Toleration in Conflict: Past and Present* (Cambridge University Press, 2013), 179; Carl Patrick Burrowes, “Property, Power and Press Freedom: Emergence of the Fourth Estate, 1640–1789,” *Journalism and Communication Monographs* 13, no. 1 (2011): 1–66; Meiling Hazelton, “‘Mony Choaks’: The Quaker Critique of the Seventeenth-Century Public Sphere,” *Modern Philology* 98, no. 2 (2000): 251–70.

handbook: to consecrate a tradition of alleged forerunners of free speech libertarianism. On the other hand, for advocates of "alternative" views in the public sphere the market metaphor serves condemnatory purposes—often to create a homogenous straw man out of Western political thought, as I explained in the Introduction. Hence, critical texts that point out the faults of merely negative conceptions of expressive freedoms unquestionably accept the historical salience of free speech libertarianism, using the market-like rationale to describe the normative thought of William Walwyn, Milton, Locke, Jefferson, Mill and the like.¹⁴⁷ In other words, the distinctiveness of much of their historical reflections on the public sphere is mainly associated with hostility towards state interference, even by scholars who strongly oppose free speech libertarianism from a normative point of view and consequently justify certain forms of democratic intervention in communication markets or the public sphere (I will suggest the origins of this view below, §2.2.3; §2.3).

Thus, engulfing other competition-like epistemic metaphors of free speech, the marketplace of ideas serves as the nexus of a cross-centuries libertarian narrative about the nature and the origins of the modern public sphere. The unqualified use of the metaphor acts as a catch-all phrase, grouping together many different thinkers under a presumably equivalent normative position that highlights freedom as non-interference and speech *laissez faire*.¹⁴⁸ This narrative suggests that the guarantee of intellectual liberties in the public sphere has always been a matter of restricting public power; that fostering free public deliberation, in other words, is about limiting state interferences. Intellectual and expressive freedoms widened as government power shrank. (Yet we saw already, and will discuss again in the next chapters, that such a view deserves to be qualified, see §IV, §3.4). When the marketplace of ideas is used in presenting historical normative views without further qualifications, the metaphor acts as a rhetorical point d'appui that connects early epistemic defenses of freedom of expression with a contemporary libertarian understanding of freedom as non-interference.

In this line, it is not uncommon to read that Milton's writings incorporated a "*laissez-faire* challenge" to old-regime institutions and a "marketplace

¹⁴⁷ See e.g., Stanley Ingber, "The Marketplace of Ideas: A Legitimizing Myth," *Duke Law Journal* 1 (1984): 1–91; C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford University Press, 1989), 6ff.; David Cole, "First Amendment Antitrust: The End of *Laissez-Faire* in Campaign Finance," *Yale Law and Policy Review* 9, no. 2 (1991): 240; Victor Pickard, "'Whether the Giants Should Be Slain or Persuaded to Be Good': Revisiting the Hutchins Commission and the Role of Media in a Democratic Society," *Critical Studies in Media Communication* 27, no. 4 (2010): 393; X. R. Rodríguez-Polo and M. Martín-Algarra, "Los principios del sistema liberal de medios ante la crisis de la comunicación pública. Una aproximación crítica," *Revista de Comunicación Vivat Academia*, no. 117 (2011): 82; Alex Zakaras, "Expensive Speech, Illegitimate Power: Corporations and Free Expression," *Polity* 45, no. 4 (2013): 526.

¹⁴⁸ See e.g., Jeffery A. Smith, "Freedom of Expression and the Marketplace of Ideas Concept From Milton to Jefferson," *Journal of Communication Inquiry* 7, no. 1 (1981): 47–63.

principle.”¹⁴⁹ Other seventeenth-century radicals are understood under this frame too: “[b]oth the Levellers and Milton proposed the same marketplace of ideas.”¹⁵⁰ And, in the eighteenth century, Thomas Jefferson and James Madison are seen as the “most vocal American advocates of this religion marketplace view.”¹⁵¹ Stuart Mill believed, according to a glossator, that truth would emerge “[f]rom the free competition of ideas in the marketplace.”¹⁵² Ronald Dworkin, in turn, imputed as well to Mill a “complacent” argument about a “free marketplace of ideas.”¹⁵³ Others who hold ideas on free speech rather different from Dworkin also identify Mill with the “marketplace” argument, “foreshadowed in John Milton.”¹⁵⁴ Similarly, we are told that Francis Bacon “pleaded for the public use of reason, for the free flow of ideas and even for the market of ideas.”¹⁵⁵ Or that Baruch Spinoza “argued for freedom of expression on utilitarian grounds (...) Without an open marketplace of ideas, science, philosophy and other disciplines are stifled in their development”, a defense that “foreshadows the one that John Stuart Mill would offer two centuries later.”¹⁵⁶ For some critical commentators, Adam Smith and his economic ideas are to blame. If early modern epistemic defenses of free speech evoke laissez-faire arrangements for the contemporary reader, perhaps it is due to imageries of invisible hands and spontaneous orders inherited from the Scottish Enlightenment.¹⁵⁷ “Eventually,” argues the otherwise insightful work of Sam Lebovic after going over similar references, “this theory of free speech would be embraced by Oliver Wendell Holmes, and become foundational to liberal politics in the twentieth century.”¹⁵⁸

It may be argued that a charitable reading of these and other uses of the market-of-ideas metaphor in the history of political thought casts aside the most severe charges of teleology or presentism, at least in some concrete cases. Is not the use of the “marketplace of ideas” and similar expressions a mere poetic license by intellectual historians? In the decades after Holmes’

¹⁴⁹ Smith, *Printers and Press Freedom*, 34.

¹⁵⁰ David A. Copeland, *The Idea of a Free Press: The Enlightenment and Its Unruly Legacy* (Northwestern University Press, 2006), 81.

¹⁵¹ Nicholas P. Miller, *The Religious Roots of the First Amendment: Dissenting Protestants and the Separation of Church and State* (Oxford University Press, 2012), 115. For a broad critical review of other uses of the market metaphor to describe the religious context and thought of the founding era, see Chris Beneke, “The Free Market and the Founders’ Approach to Church-State Relations,” *Journal of Church and State* 52, no. 2 (2010): 323–52.

¹⁵² J. Salwyn Schapiro, “John Stuart Mill, Pioneer of Democratic Liberalism in England,” *Journal of the History of Ideas* 4, no. 2 (1943): 154.

¹⁵³ Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985), 337.

¹⁵⁴ Braddon-Mitchell and West, “What Is Free Speech?,” 440.

¹⁵⁵ Salvador Giner, *El porvenir de la religión. Fe, humanismo y razón* (Herder, 2016), 13.

¹⁵⁶ Steven Nadler, “Spinoza and Toleration,” in *The Modern Turn*, ed. M. Rohlf (The Catholic University of America Press, 2017), 83.

¹⁵⁷ E.g., Schauer, *Free Speech: A Philosophical Enquiry*, 16; Lee C. Bollinger, *The Tolerant Society* (Oxford University Press, 1988), 59; John Nerone, ed., *Last Rights. Revisiting Four Theories of the Press* (University of Illinois Press, 1995), 43–44.

¹⁵⁸ Sam Lebovic, *Free Speech and Unfree News* (Harvard University Press, 2016), 13; see also 1–12. Note, however, his important account of how this “theory” did not correspond with the practice of news markets, at 13–15, which is part of the general thrust of the book.

dissent in *Abrams*, for instance, the metaphor became popular not only in jurisprudence but also in journalism and advertising.¹⁵⁹ Of course, this may be the case in some of the quoted examples and many others. In fact, the use of metaphoric language to clarify a historical political position as, say, that of Milton on free speech, is not a problem by itself. But, as I will show in the next chapter, the problem is the strong anti-statist normative content implied in the semantic fields of "free market," "economic freedom," or "market competition" in the second half of the twentieth century—hence the libertarian interpretation of the public sphere associated with Holmes' dissent (§2.1). The point is that even if the use of the marketplace metaphor by a particular scholar was not intended to suggest laissez faire in the public sphere, the most likely reading will. Holmes' trade metaphor in *Abrams* and the Milton-Mill lineage of epistemic optimism were among the most relevant ideological pieces in the consolidation of free speech libertarianism during the twentieth century.

1.4. CONCLUSION: FROM FREE SPEECH AMBITION TO FREE SPEECH TRADITION

The Introduction discussed the ubiquity of free speech libertarianism today—how it acts as an unquestioned framework to conceptually and historically portray expressive liberties in the West as eminently negative rights. Despite the pervasiveness of free speech libertarianism today, the success of this approach is rather recent. The purpose of Chapter 1 has been to historize one of the main sources of this success: the career of the marketplace-of-ideas metaphor in the first decades of the twentieth century, and how it later became instrumental in the creation of a "libertarian" tradition of expressive freedoms.

What became known later as "free speech libertarianism" or "civic libertarianism" was a minoritarian position in the early 1900s. It had sectors of the progressive movement behind it, but it lacked relevant support in the courts, dominated by a Blackstonian conception of free speech. In this view, the First Amendment to the Constitution of the United States only forbids prior censorship, which would allow ex-post punishments and speech restrictions (§1.1.1). In the period between 1917 and 1919 things started to change when the Supreme Court considered for the first time whether Congress had gone too far in restricting free speech with the Espionage and Sedition Acts of 1917. Justice Holmes, writing for the Court, confirmed the constitutionality of the acts but dissented in later cases (§1.1.2). He modified his view in his dissent to *Abrams v. United States*, where he connected the epistemic justification of free speech with the metaphor of a "trade in ideas" and "competition in the market."

¹⁵⁹ John Durham Peters, "'The Marketplace of Ideas': A History of the Concept," in *Toward a Political Economy of Culture: Capitalism and Communication in the Twenty-First Century*, ed. Andrew Calabrese and Colin Sparks (Rowman and Littlefield, 2004), 65–82.

There is strong evidence that progressive pundits of the time had something to do with Holmes changing his mind, making him more open to a speech-protective interpretation of the First Amendment. I have discussed the views of Zechariah Chafee, an influential legal commentator who elaborated an epistemic conception of free speech in his earlier criticism of the Espionage Act (§1.1.3). Chafee was also a critic of Holmes' opinions in the Supreme Court that backed the wartime suppression of expressive liberties.

I have also studied the influence of the early Harold Laski on Holmes, especially through his reading suggestions to the judge in the months before his change of mind in *Abrams* (spring and summer of 1919). I argue that Laski's suggestions aimed at a common lesson. They insisted, from a normative or historical point of view, on the epistemic dimensions of religious toleration, free speech, or freedom of thought (§1.2.1). These readings reinforced, in other words, Chafee's own interpretation of the First Amendment and the views of Laski and other progressives critical of the Wilson Administration, especially those in the circle of the magazine *The New Republic*. During the First Red Scare, many of Holmes' progressive friends, especially Laski, ended up being victims of the wartime and postwar repression of civil liberties executed by the US Government. This, I claim, might also have played a role in Holmes' modification of his constitutional opinion on free speech by the fall of 1919 in the *Abrams* case (§1.2.2).

Holmes' dissent in *Abrams* and its speech-protective interpretation of the First Amendment were celebrated by his progressive friends as a landmark in the transhistorical struggle for toleration and expressive liberties. The epistemic argument Holmes used to justify protection against state interference—an argument Chafee and Laski had helped to recover—was systematically compared with the ideas of John Milton or Stuart Mill. By appealing to history, the critical progressive circle around *The New Republic* presented their then-radical views on free speech as the common-sense or traditional view on expressive freedom (§1.3.1). Their historical narrative, however, often slipped into teleology and retrojection—mirroring their own normative ambitions in past thinkers and ideas. This is most clear in the work of Chafee, which would become extremely popular in the next decades. Generations of US legal scholars, social scientists, and political theorists were trained with his handbooks, in which he presented a “tradition” of epistemic justifications of free speech that spanned from Socrates to Holmes' “trade in ideas” in the *Abrams* dissent (§1.3.2).

Then, for progressive critics of the US government in the 1910s and 1920s, history was a way of making sense of Holmes and his constitutional analysis, of consecrating his rather innovative jurisprudence in *Abrams*, of putting his “trade in ideas” on a longer view that connected the speech-protective ambitions of progressives with the founding era, with early modern religious conflicts, and even with Ancient Athens. In short, they used history to emphasize the civilizational significance behind Holmes' change of mind in *Abrams*, a change to which these progressives had directly contributed.

In the next decades, however, the interpretive direction reversed: the constitutional position represented by the *Abrams* dissent was turned into a hermeneutic tool to interpret much earlier intellectual history. Holmes' market metaphor was (and still is) used to decode older competition-like epistemic justifications of expressive freedoms. During the polarizing intellectual dynamics of the Cold War, political freedom became again a beacon of Western liberal values, and freedom of the press against state interference a basic differential trait in comparisons against the eastern bloc. A vulgarized version of Chafee's views on the First Amendment was easily put in the service of the cultural war. Holmes' "trade in ideas"—now "marketplace of ideas"—started to engulf past competition-like epistemic justifications of free speech: any past truth-seeking defense of expressive freedom could be construed as advancing a purely negative liberty against state interference, if not as part of a whole "libertarian tradition" (§1.3.3).

CHAPTER 2

Where laissez faire is still respectable

Free speech libertarianism and the loss of political economy

In time, when liberalism had lost its accidental association with free trade and laissez faire, through their abandonment in practice, it sadly justified itself as a necessary and useful spirit, as a kind of genial spook worth having around the place. (...) the liberal philosophy has an air of vague unworldliness.

Walter Lippmann¹

In this chapter, I examine one of the consequences of the free speech libertarian framework in the analysis of expressive liberties. It is what I call a lack of political-economic awareness or the separation of free speech from the analysis of its empirical preconditions.

In line with the last section of the earlier chapter, I begin by highlighting how the prevailing intellectual currents of the second half of the twentieth century entrenched a libertarian interpretation of Justice Holmes' famous metaphor of the "free trade in ideas" or, in its later formulation, the "marketplace of ideas" (§2.1). This economic metaphor for illustrating an epistemic justification of free speech found its resonance in the *zeitgeist* of the Cold War. The libertarian reading of Holmes' dissent in *Abrams* framed free speech as the epitome of individual liberty against Soviet communism, aligning it with a "traditional" model of free speech that supposedly married capitalist markets with democracy and intellectual freedom. Even critics of this model of purely negative expressive freedom ended up accepting that the *Abrams* dissent and its call for ideas competing in a market were part of it.

However, we must put distance between this "libertarianism" of the second half of the twentieth century and the earlier twentieth-century progressive "free speech libertarians" studied in the last chapter—the ones who, recall, in their opposition to the Wilsonian repression of civil liberties, not only canonized but contributed to produce Holmes' epistemic defense of free speech in *Abrams*. This is the objective of the second section: to recover the earlier libertarian's nuanced understanding of the political economy of the public sphere (§2.2). Against this view, the late-to-mid-century libertarian

¹ Walter Lippmann, *The Phantom Public* (Transaction Publishers [1925], 1993), 157, 160.

interpretation of Holmes “trade in ideas” detached the argument for free speech from reflection on its political-economic (i.e., historical social, institutional...) preconditions. This detachment of free speech and political economy marks a significant loss of the richness that characterized progressive-era libertarian arguments for free speech. The earlier criticism of industrial civilization and mass communications was forgotten in the later libertarian readings of arguments produced in the 1910s, 1920s, and 1930s. In those later readings the “marketplace of ideas” was assimilated to *laissez faire* markets—precisely the kind of markets that progressive-era thinkers derided as prone to promote private sources of domination and consequently dangerous to freedom.

In the third section, I give three different but interrelated accounts of how some free speech libertarians, despite their early political-economic critique of mass communications, contributed themselves to this process of thinning of expressive liberties, a process that I frame as a case of the separation of politics and economics in the analysis of free speech (§2.3).

2.1. THE MARKETPLACE OF IDEAS AS A LAISSEZ-FAIRE MARKET

As we have seen, the “marketplace of ideas” is a legal-political metaphor that gathers much evidence of the libertarian interpretive conjuncture of free speech identified in the Introduction. Thus, both the normative and historical-interpretive uses of the marketplace of ideas can tell us a lot about the unchallenged common ground in free speech theory and history. The purpose of this section is to survey different readings of this metaphor while pointing to some reasons that may explain the predominance of a libertarian understanding of it.

Today, the image of the “marketplace of ideas” is mostly used to justify expressive freedoms against state interference on epistemic grounds. Despite the many interpretations and uses of the metaphor, the free speech argument contained in epistemic justifications of free speech can be seen as having two parts: (1) a skeptical stance on knowledge, followed by (2) the assertion of a social mechanism with epistemically valuable outcomes.

The first step, a skeptical stance on knowledge, is a call for suspending any disposition to qualify speech. If there is no certainty about correct, suitable, or valuable speech, then there is no certainty either about speech subject to censorship. In the less skeptical reading of the metaphor, even when there is certainty about valuable or correct speech, the identification of the latter—the speech that must be subject to regulation or censorship—is said to be generally doubtful. That is, most uses of the marketplace of ideas start by denying the political community the capacity to previously judge the normative status of a statement (i.e., whether or not it deserves to be regulated, promoted, censored, and so on).

The second step of the metaphor, however, consists of a form of social epistemic optimism, a hopeful vision of human cognition in society. In its

most reduced sense, this optimism says that if freely communicating and cognitively capable individuals are presented with different propositions in the light of empirical reality, the truer or better proposition will prevail. The political consequence of such a promising view of social interaction is that any attempt to interfere with human communication is, at best, unnecessary and most probably, damaging. If we let truth struggle against falsehood—or compete against it in the “free trade” of ideas—, truth eventually wins.

This two-step argumentation behind the metaphor of the “marketplace of ideas” has a family resemblance to other competition-like metaphors commonly found in epistemic defenses of freedom of expression against the control of communication (e.g., “contest” of arguments, “battle” of ideas, “natural selection” of opinions, and so on). Of course, it must be noted that different metaphors emphasize different social mechanisms of political or epistemic perfection. As Larry Alexander put it, “the real problem with this justification is not in what it assumes about the nature of truth but in what it assumes is the best *procedure* for obtaining truth.”² In identifying different procedures, each metaphor points to different normative consequences. “Contest” may stress the need for an equal position among competing ideas, “natural selection” or “battle” may suggest a violent survival of the fittest, while “trade” could imply orderly antagonism between unequals, and so on. Put differently, the “source domain” (contest, natural selection, trade, military struggle...) employed to map the “target domain” (freedom of speech, religious toleration, public opinion...) highlights different features of how such a “target domain” should look like, why it should look like that, and how to get there.³

Compared to other competition-like metaphors, economic metaphors in epistemic defenses of freedom of speech have only become dominant in the last hundred years, especially after the Justice Holmes’ “free trade in ideas” in his *Abrams* dissent. And despite the diverse normative consequences implied by different metaphors, market competition became during the second half of the twentieth century an all-encompassing allegory for any truth-seeking justification of free speech, as I have just shown above (§1.3). Historical utterances regarding the “struggle,” “battle” or “natural selection” of ideas became absorbed by the market rationale.

But my point is that this was not *any* market rationale. A specific twentieth-century picture of markets became the dominant way to map the “free trade in ideas” and freedom of expression. In that picture, negative liberty against state interference is the maximization of market freedom or free trade. In this sense, historical justifications of free speech and toleration in which trade, market competition, or some notion of economic liberty were, in fact, the source domain to frame expressive freedoms also suffered from anachronistic interpretations. Seventeenth- and eighteenth-century ideas of economic

² Larry Alexander, *Is There a Right of Freedom of Expression?* (Cambridge University Press, 2005), 128. My italics.

³ On “domains” of a metaphor, see George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press, 2003), 243–76.

freedom that connected with regulative models for the public sphere, and even Holmes’ own metaphor in *Abrams*, were read through the lens of much later economic views.

2.1.1. Three readings of Holmes’ dissent in *Abrams*

When, in 1919, Holmes made use of the notion of a “free trade in ideas” to incarnate what I have identified as the second step of the metaphor (i.e., a broad social epistemic optimism about free speech), he was imprinting it with a distinct touch. The success of Holmes’ metaphor is notably determined by the source domain he chose to describe free discussion in the public sphere: economic competition. For it is one thing to simply say, as John of Salisbury did, “rationum collisione, veritas illucescat” (that truth will come out from the clash of reasons).⁴ And quite another is to specify, as Holmes did, the social mechanism by which truth outcompetes falsehood: “free trade,” or “competition of the market.”⁵

In this way, much of the normative content of Holmes’ words depends on what its users or readers understand by “market freedom,” the source domain of the metaphor. And, more specifically, their view of what threatens market freedom will determine their view of what threatens freedom of expression. Consequently, what matters at this point is not so much Holmes’ intentions.⁶ It is not of any concern to us at this point, say, whether Holmes was a proponent of *laissez-faire* economics, and then he applied that rationale to free speech (on this, see below §2.2.1). What is relevant for the purposes of this section is to show what “free trade” and “market competition” were likely to mean to his mid- and late-twentieth-century readers interested in justifying free speech—the legacy of the metaphor, rather than its intentions. For heuristic purposes, the different readings and uses of Holmes’ metaphor can be arranged into three categories: libertarian, regulatory, and critical.

According to the *libertarian reading*, the answer to the question “What threatens free trade and market competition?” unmistakably points to state interference. It is government that mainly puts market freedom at risk. It is in this sense that the metaphor became a powerful argument against any political interference in the expressive realm of the public sphere. In the eyes of the libertarian reader, the source domain “market” frames political authority as the utmost danger to freedom of speech, and free speech as a negative right. The most important recent example of this understanding and use of the metaphor still comes from the US Supreme Court. The majority opinion in

⁴ John of Salisbury, *Policraticus*, VII: chap. 8, quoted in Cary J. Nederman, “Toleration, Skepticism, and the ‘Clash of Ideas’: Principles of Liberty in the Writings of John of Salisbury,” in *Beyond the Persecuting Society*, ed. John Christian Laursen and Cary J. Nederman (University of Pennsylvania Press, 1998), 53–70.

⁵ *Abrams*, 630.

⁶ Which is nevertheless an important line of research pursued in Blasi, “Holmes and the Marketplace of Ideas.”

Citizens United, for example, invalidated campaign finance legislation in the name of an “‘open marketplace’ of ideas.”⁷

Under the *regulatory reading*, we can group scholars that have accepted the metaphor but have attempted to build a different normative content based on the market analogy.⁸ Instead of proposing an alternate source domain, their efforts focus on disputing the essential features of market freedom and economic competition. They do so, for instance, by questioning the ideological biases or the empirical relevance of laissez-faire models in economics, or the existence of cognitive biases in the creation of public opinion. For them, free speech could indeed be like a marketplace of ideas, only if “free market” and “free trade” mean economic transactions legally constituted by public law (e.g., preserving a minimum equal footing among economic agents, curtailing oligopolistic tendencies, remedying media market and socio-cognitive failures and so on). In doing this, they have advanced a rival understanding of the marketplace-of-ideas metaphor with a regulatory twist. As I will argue below, this reading plausibly connects with Holmes’ original intent, or at least with the earlier progressive reception of the *Abrams* dissent (§2.2). This reading is not completely alien to some of its uses in the US Supreme Court either. For example, after quoting Holmes in *Abrams*, Justice William Brennan wrote about “the corrosive influence of concentrated corporate wealth,” which made necessary “to protect the integrity of the marketplace of political ideas.”⁹ A different but related engagement with economic analogies in free speech theory uses tools of economic theory, such as cost-benefit analysis or information economics, to argue for concrete regulatory frames.¹⁰

The *critical reading* of the metaphor questions the suitability of economic analogies to grasp complex socio-cognitive processes of agreement emerging from the free flow of information. As in the regulatory reading, many critical readers of the marketplace of ideas point to the lack of equal opportunity.¹¹

⁷ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), 354.

⁸ E.g., Sunstein, *Democracy and the Problem of Free Speech*; Cole, “First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance”; Owen Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Routledge, 1996); Robert Post, “Reconciling Theory and Doctrine in First Amendment Jurisprudence,” *California Law Review* 89, no. January (2001): 2353–74; Charles Girard, “Le « libre marché des idées » et la régulation de la communication publique,” *Klesis: Revue philosophique* 21 (2011): 218–38.

⁹ *FEC v. Massachusetts Citizens for Life*, 479 U.S. (1986), 478. See also, e.g.: “It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private [broadcast] licensee,” *Red Lion v. FCC* 395 U.S. (1969), 390. In fact, a relevant portion of the majority vote in *Citizens United* was about dealing with the disputed legacy and meaning of what constitutes an open marketplace of ideas in previous case law.

¹⁰ For a recent overview of this approach, see Daniel Hemel, “Economic Perspectives on Free Speech,” in *The Oxford Handbook of Freedom of Speech*, ed. Adrienne Stone and Frederick F. Schauer (Oxford University Press, 2021), 119–36.

¹¹ Herbert Marcuse, “Repressive Tolerance,” in *A Critique of Pure Tolerance*, ed. Robert P. Wolff, Barrington Moore, and Herbert Marcuse (Beacon Press, 1966), 92ff; Catharine A Mackinnon, *Only Words* (Harvard University Press, 1993), 75ff.

However, critical readers extend their concerns to the market rhetoric itself, “almost as if we can no longer imagine a form of freedom that is not a freedom to participate in a market.”¹² And precisely because “free trade in ideas” and other derived expressions were turned into a staunch libertarian defense of inequalities in the public sphere, many critical readers propose to substitute the metaphor. That is, they suggest alternative source domains that point to other relevant features of free discussion in a democratic environment—a “town meeting” that stresses equal footing and rules of order, a “garden” in which ideas can grow differently depending on the “ecology” shaped by other ideas and by the “soil,” a “sports tournament” that highlights the sportsmanship and fair play required by rational discussion, etc.¹³

2.1.2. Cold War hegemony and the libertarian marketplace of ideas

However, variety in scholarship does not imply an equivalent sociological diversity of the uses and meanings of the metaphor. If our purpose is to reconstruct the dominant meaning of the marketplace-of-ideas rationale in the twentieth century and its implications in the history of political thought, then we must point to something else besides the variety of scholarly readings. There are good reasons to think that in the minds of most mid- and late-twentieth century readers, the market metaphor suggested a libertarian picture of freedom of speech: a negative conception of liberty and an argument against any state activism in the public sphere. In other words, most of the times “Holmes’ ‘free trade in ideas’ concept invokes a *laissez-faire* conception of the role of government in the regulation of speech.”¹⁴

We get a sense of the social weight of free speech libertarianism by noting that virtually all partial or full critics of the marketplace-of-ideas metaphor tend to build their own interpretation against the libertarian reading expressed above. Critical and regulatory readers assume, as this research does, that a libertarian commonsense pervades free speech scholarship and public debate, especially in the United States. “Americans are taught this view by about the fourth grade,” objected the feminist legal scholar Catherine Mackinnon, “and continue to absorb it through osmosis from everything around them for the rest of their lives.”¹⁵ By reading its opponents, then, we also get a good sense of the libertarian reach of the image fostered by the marketplace of ideas. Writing as early as 1948, the First Amendment scholar Alexander Meiklejohn

¹² Robert Sparrow and Robert E. Goodin, “The Competition of Ideas: Market or Garden?,” *Critical Review of International Social and Political Philosophy* 4, no. 2 (2001): 54.

¹³ Respectively: Meiklejohn, *Political Freedom*, 24–28; Sparrow and Goodin, “The Competition of Ideas: Market or Garden?”; Herzog, *Citizen Knowledge*, chap. 5.

¹⁴ David Cole, “Agon at Agora: Creative Misreadings in the First Amendment Tradition,” *Yale Law Journal* 95, no. 5 (1986): 886.

¹⁵ Mackinnon, *Only Words*, 76.

lamented his country's "dependence upon intellectual laissez-faire" to which "the beautiful words of Mr. Holmes have greatly contributed."¹⁶

A broader picture of the role that "markets" have played in the social sciences supports Mackinnon's and Meiklejohn's anxieties about the legacy of Holmes' metaphor. For example, Margaret Radin studied how, during the last third of the twentieth century, freedom of speech was one of the areas of social life typically subject to "market rhetoric" in the context of what she called "universal commodification"—the view according to which everything valued is a hypothetical commodity and in principle subject of free market exchange.¹⁷ Additionally, one of the most common sources of economic ideas in the fields of law and social theory during the last 70 years has been neoclassical economics, where absence of government interference is the standard of economic freedom and markets are idealized spaces lacking coercion.¹⁸ Of course, despite some shared methodological commitments, much of twentieth-century economics goes beyond neoclassical models. Notwithstanding the developments in economic theory in recent decades and its growing attentiveness to institutional and empirical aspects, "[t]he marketplace of ideas model (...) remains faithfully wedded to a neoclassical view that depends on a perfectly costless and efficient exchange of ideas."¹⁹

Another relevant example of libertarian market analogies applied to social epistemic processes can be found in the early "neoliberal" philosophy of science during the 1940s. Thinkers such as Michael Polanyi, Friedrich Hayek or Karl Popper developed their epistemic views of markets in opposition to "planned" science.²⁰ That is, against Marxist-inspired conceptions of science that defined research objectives according to social purposes (which, in turn,

¹⁶ Meiklejohn, *Political Freedom*, 74.

¹⁷ Margaret Radin, *Contested Commodities* (Harvard University Press, 1996), 1–15, 164–83.

¹⁸ For the case of social and political theory, see María Julia Bertomeu and Antoni Domènech, "El republicanismo y la crisis del rawlsismo metodológico (Nota sobre método y sustancia normativa en el debate republicano)," *Isegoría* 33 (2005): 51–75; Katrina Forrester, *In the Shadow of Justice* (Princeton University Press, 2019), chap. 7. For the case of law in the US, see Britton-Purdy et al., "Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis."

¹⁹ Joseph Blocher, "Institutions in the Marketplace of Ideas," *Duke Law Journal* 57, no. 4 (2008): 821.

²⁰ Their intellectual and political relationship with other names in this and the earlier chapter is not incidental. It is well-known that one of the foundational meetings of "neoliberalism" was the Colloque Walter Lippmann, in 1938, in which Polanyi and Hayek were present to discuss Lippmann's recently published work (on the his role in this history expressive liberties, see §1.3 and especially §2.2). In turn, the Mont Pèlerin Society gathered, since 1947, the formers (save Lippmann) with the likes Michael Polanyi, Milton Friedman and prominent Chicago School economists such as Frank Knight, Aaron Director or Ronald Coase. The work of the later two would contribute to reshape free speech libertarianism in an economically libertarian direction, far from its progressive-era origins (on their role, see the end of §2.3.3). John Rawls also was, on Friedman's invitation, a member of Mont Pèlerin Society from 1968 to 1971 (see Chapter 3).

were not always democratically defined).²¹ In any case, it is worth mentioning that these thinkers often presented their work as a necessary update of the liberal tradition after the collapse of nineteenth-century *laissez faire* and its “superstitious fear” of state interference.²² And, in this sense, their sometimes-conflicting stances on concrete policy issues did not entail a complete *laissez faire*. In contrast, they emphasized the role of legal frameworks in the preservation of freedom; a reasoning that they applied specifically to communicative infrastructures. One of the often-neglected places for state intervention accepted by Hayek was precisely “channels of information—some of which can never be adequately provided by private enterprise.”²³ Likewise, Karl Popper’s influential defense of political and intellectual freedoms kept relevant speech regulations on political propaganda and campaign finance that would raise the eyebrows of today’s libertarians.²⁴

However, on a different level, Polanyi, Hayek, and Popper repeatedly used idealized conceptions of economic competition and the price system to make epistemic arguments in favor of political liberalism. Their idea that formal liberties should protect intellectual progress from state interference was supplemented or backed by their economic views. They conceived the market as an undesigned social order of decentralized flows of information protected by merely formal laws—it was, for this reason, the perfect analogy to highlight the virtues of freedom of inquiry against their soviet political-epistemic opponents. The formal traits they found in market competition (e.g., publicity, low barriers of entry, decentralization, non-coercion, spontaneous order, dispersion of information...) reinforced their picture of scientific development as a progressive but never-ending competition of ideas, persistently threatened by the authoritarian enforcement of dogmas. Such mutually reinforcing comparisons of scientific freedom and market freedom influenced later

²¹ Martin Beddeleem, “Epistemological Battles on the Home Front: Early Neoliberals at War against the Social Relations of Science Movement,” *Journal of the History of Ideas* 82, no. 4 (2021): 615–36. Notice, however, that the epistemic properties of the price system were already developed a decade earlier by Hayek in the late 1930’s—not against soviet models of science, but in the context of the socialist calculation debate. See his “Economics and Knowledge” (1937), in *Individualism and Economic Order* (University of Chicago Press, 1948), 33–56. On this issues, see Herzog, *Citizen Knowledge*, §IV.2. Even critics of markets as the analytical Marxist Gerald Cohen accepted their positive epistemic qualities, as noted in Lisa Herzog, “The Epistemic Seduction of Markets,” *The Raven. A Magazine of Philosophy* Fall (2021).

²² Michael Polanyi, *The Contempt of Freedom. The Russian Experiment and After* (Watts & Co., 1940), 57–60.

²³ Friedrich Hayek, *The Road to Serfdom* (Routledge, 2001 [1943]), 39.

²⁴ Karl Popper, *The Open Society and Its Enemies* (Princeton University Press, 2013 [1945]), 337, 694. On a very plausible source of these ideas, Walter Lippmann’s analysis of mass communications, see §2.2.3 and §2.3.1. See also John Rawls’ criticism of the free speech libertarianism of the US Supreme Court in the late 1970s, precisely on campaign expenditures, §3.1.3.

Chicago School economists and their views on education policy and “information economics,” as the early George Stigler.²⁵

At the same time, during the second half of the twentieth century, the field of intellectual history was flooded with research on the normative foundations of “liberal democracy” that explicitly chased ideas of negative liberty and rights, excavating an Anglo-American tradition that could antagonize real or imagined oriental despotisms.²⁶ Thus, the Western canon of political thought was artificially divided to isolate a properly liberal tradition of formal negative rights.²⁷ In this sanitized canon, freedoms of thought and speech were the crown jewels. It was described as historically endangered by dogmatists and collectivists of all sorts—by a thread of authoritarianism that linked Rousseau with Lenin. The better-known case is Isaiah Berlin’s “Two Concepts of Liberty,” but this influential work was only part of a much bigger and earlier trend.²⁸ The abovementioned Hayek, for example, antagonized a “true individualism” from a “false” “Cartesian” “rationalistic individualism” that

²⁵ Edward Nik-Kahn, “The ‘Marketplace of Ideas’ and the Centrality of Science to Neoliberalism,” in *The Routledge Handbook of the Political Economy of Science*, ed. David Tyfield et al. (Routledge, 2017), 32–42. Stigler was one of the founders of the “economics of information.” This approach, however, has been described as treating information in a wholly different way than epistemic justifications of free speech. While the theorists of free speech as a marketplace of ideas understand information as a traditional economic good to be traded, information economics studies how a certain distribution of information affects economic decision-making. On this observation, see Gregory Brazeal, “How Much Does a Belief Cost?: Revisiting the Marketplace of Ideas,” *Southern California Interdisciplinary Law Journal* 21, no. 2003 (2012): n. 31.

²⁶ Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso, 2019); Efraim Podoksik and Yiftah Elazar, “How Did Negative Liberty Become a Liberal Ideal?,” *Journal of Political Ideologies* 26, no. 2 (2021): 142–60. Samuel Moyn’s last book came out too late to be integrated in this research, but the 2022 Carlyle Lectures on which it is based have contributed to shape my thought on these issues, see Samuel Moyn, *Liberalism against Itself: Cold War Intellectuals and the Making of Our Times* (Yale University Press, 2023). In regard to Chapter 1 and interwar progressives, it is worth noticing that the second postwar anti-totalitarian reconstructions of liberalism as the core Western democratic tradition are but a continuation of innovations starting in the 1930s (this connection can be found in Bell, “What Is Liberalism?,” 698–705.) My view is that while liberalism was built against totalitarian politics in both the first and the second postwar periods, the earliest reconstructions of the tradition displayed a critical edge that the propagandistic efforts of the Cold War dampened (see, e.g., §2.2, §2.3.1). If I had to bet on an explanation for this, I would point to the anti-fascist commitment of the 1920s and 1930s, which allowed for a degree of intellectual porosity between the socialist and left-liberal camps (Laski, only to name a protagonist of this thesis, is one of the best examples of this). Unfortunately for both traditions, this porosity grew increasingly unworkable during the second postwar as the Soviet Union and socialism became the main “totalitarian” geopolitical threat.

²⁷ My view of the intellectual dynamics of the Cold War heavily relies on my joint work with Julio Martínez-Cava. See our “Between Tyranny and Self-Interest: Why Neo-Republicanism Disregards Natural Rights.” See also Julio Martínez-Cava, *Gorros Fríos en la Guerra Fría. El socialismo republicano de E. P. Thompson*, PhD Thesis, sup. Jordi Mundó and Pablo López (Universitat de Barcelona, 2020), 195–200.

²⁸ Isaiah Berlin, “Two Concepts of Liberty” (1957), in *Liberty*, ed. Henry Hardy (Oxford University Press, 2002), 166–217.

tends to limit inquiry and apply abstract theory into society with violence.²⁹ Karl Popper also made a parallel move by tracing back in the history of political thought his distinction between “open” and “closed” societies.³⁰ Analogous distinctions were established by many other scholars, such as Robert Nisbet, Anthony Quinton, or T. D. Weldon.³¹ In doing this, they were arguably putting forward something else besides badly-aged handbook divisions of Western political theory. These distinctions also conveyed a normatively charged idea: that the truly liberal, desirable, and rule-of-law-compatible expressive rights were *negative* rights.

This was the favorable intellectual context in which *Four Theories of the Press* thrived—recall, the influential handbook that consolidated, in Frederick Siebert’s chapter, the epistemic justifications of free speech by early twentieth-century progressives into a “libertarian tradition” “from Milton to Holmes” (§1.3.3). In this setting, it was hard for the “free trade in ideas” or truth emerging from the “competition of the market” not to be turned into a shorthand for libertarianism in the public sphere. Recall the 1953 United Nations report on freedom of the press and its dichotomic opposition between “state control and indoctrination” and “unrestricted access to the marketplace of ideas.”³² The closest to an empirical analysis we have on this matter points to this conclusion. A quantitative study of the use of the market-of-ideas metaphor by the US Federal Communications Commission (FCC) between 1956 and 1998 shows that “marketplace of ideas” and related expressions were used primarily to advocate for deregulatory policies.³³

2.2. FREE SPEECH LIBERTARIANISM WITH ECONOMIC INTERVENTIONISM: THE LOST INTERWAR AWARENESS OF INDUSTRIAL CIVILIZATION

Nevertheless, it is worth noticing that free speech libertarianism is not the exclusive heritage of those who also advocate economic libertarianism. This might seem paradoxical given the dominant reading of the marketplace-of-ideas metaphor discussed above. And what is even more surprising, given the contemporary imbrication of free speech laissez faire and economic deregulation: in today’s United States a libertarian interpretation of the First Amendment and the “marketplace of ideas” serves as a major argument in

²⁹ Hayek, “Individualism: True and False” (1945), in *Individualism and Economic Order*, 1–32.

³⁰ Popper, *The Open Society and Its Enemies*, 161–89.

³¹ Robert Nisbet, “Citizenship: Two Traditions,” *Social Research* 41, no. 4 (1962): 612–37; Anthony Quinton, *Political Philosophy* (Oxford University Press, 1967), 9–17; T. D. Weldon, *States and Morals* (McGraw-Hill, 1947).

³² Quoted in Siebert, Peterson, and Schramm, *Four Theories*, 69.

³³ Philip M. Napoli, “The Marketplace of Ideas Metaphor In Communications Regulation,” *Journal of Communication* 49, no. 4 (1999): 151–69.

courts to prevent government interference with private economic interests that are legally construed as “speech.”³⁴

But, as I said, today’s free speech libertarianism contrasts with its earlier history. For a long time, libertarian free speech principles were seen as compatible with the vigorous rejection of principled economic libertarianism, all of it under the same constitutional view. Holmes’ legal opinions personify this (today surprising) position very well. For it is not without historical irony that the father in 1919 of the most fertile laissez-faire metaphor for free speech was also responsible, in 1905, for one the greatest ideological and jurisprudential deathblows to economic laissez faire. Jointly with his market-of-ideas opinion in *Abrams*, the other landmark dissent by Holmes was a straight rejection of libertarian economics as a suitable constitutional standard of judicial review. It was in *Lochner v. New York*, a case in which the Supreme Court rejected the constitutionality of legally imposed limits on working hours in the name of freedom of contract. According to Holmes, dissenting, his colleagues in the majority opinion were leaning on:

an economic theory which a large part of the country does not entertain (...) The Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics* (...) a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire.³⁵

It has become a scholarly platitude to contrast Holmes’ dissents in *Lochner* and *Abrams*. The first is a plea against granting economic laissez faire constitutional protection. The second, less than 15 years later, reads in the constitution the call for a “free trade in ideas” (§III.2; §1.3; §2.1.2). But these two ostensibly contradictory opinions give us a sign of the times. As I will show below, according to one of the main US legal narratives consolidated from the 1930s onward and during the New Deal, laissez faire or pure negative liberty was still a satisfactory normative ideal to realize freedom of speech, while in other fields of society, particularly the economy, state activism was broadly accepted as a necessity to guarantee freedom.

This *décalage* or delay of regulative ideas in which laissez-faire was kept alive by free speech may be explained by the late development of industrial capitalism in mass communications, at least if compared to other sectors. From a technological point of view, there is not much distance between the original wooden printing press operated by Gutenberg in fifteenth-century Germany and the one we find portrayed, for example, in the eighteenth-century *Encyclopédie*. Generalized mechanization of printing, the rotary press with steam engines or later, electrical power, only spread in mid-nineteenth century. And, even so, it was not until the last decades of that century, with the invention of linotype techniques, which quintuplicated the speed of a

³⁴ Genevieve Lakier, “The First Amendment’s Real *Lochner* Problem,” *The University of Chicago Law Review* 87 (2020): 1248–70.

³⁵ *Lochner v. New York*, 198 U.S. (1905), 75.

skillful manual typesetter, that the entire printing process could be industrialized.³⁶ It was precisely at the turn of the twentieth century that industrialization began to condition newspaper markets. It was then that the sector started to suffer the trends toward oligopoly and monopoly that were already affecting other industries: reducing the diversity of media, increasing barriers to entry, deepening dependence on advertising revenue, and so on (§2.2.3; §6.3.1). 1909 was the peak of newspaper plurality in the United States—since then the number has only decreased, feeding the trends toward monopoly.³⁷ Similar things could be said of other means of communication. The political and economic power of telegraph companies also began to make itself felt only during the later years of the nineteenth century, raising deep political concerns about the control and ownership of networks and news agencies.³⁸ The power associated with owning or controlling radio frequencies was consolidated a bit later.³⁹

I find it significant that not even European Marxists of the time had developed a veritable critique of the political economy of communication. For turn-of-the-century socialists, the media were of course an organ of representation of their owners’ interests and, by extension, of capitalist values. But the critique of the ideological function of the media was not part of an analysis of their commodification and industrialization, of the “purely economic” role played by media in the emerging communication markets (e.g. the function of advertising in monopoly capitalism). The late nineteenth-century Marxist assessment was, in fact, an account suited to the traditional, preindustrial model of newspaper business: partisan and non-generalist, financed through the patronage of those interested in its editorial line (the very publications of the labor movement suitably fitted in this model). As far as I know, one would have to wait until the writings of a Walter Benjamin or a Theodor Adorno in the 1930-40s to find studies connecting content degradation to the industrialized features of mass media and culture.⁴⁰ But even in these texts the focus is on the ideological attributes of media and their effects on consciousness, not on the novel economic role played by communications in the late stage of capitalist development (e.g., the joint processes of increasing advertising, commodification of media content and audiences, and their function in oligopolistic markets). Perhaps there is no better way to capture this gap than to recall the work of Dallas Smythe. In one of his seminal papers, he could provocatively emphasize its groundbreaking

³⁶ James Curran and Jean Seaton, *Power without Responsibility: The Press and Broadcasting in Britain*, 5th ed. (Routledge, 1997), 30–33; Corey Ross, *Media and the Making of Modern Germany: Mass Communications, Society, and Politics from the Empire to the Third Reich* (Oxford University Press, 2008), 20–23.

³⁷ Lebovic, *Free Speech and Unfree News*, 19.

³⁸ Dwayne R. Winseck and Robert M. Piker, *Communication and Empire: Media, Markets and Globalization, 1860-1930* (Duke University Press, 2007), chap. 2.

³⁹ Robert W. McChesney, *Telecommunications, Mass Media, and Democracy: The Battle for the Control of U.S. Broadcasting, 1928-1935* (Oxford University Press, 1993).

⁴⁰ Francisco Sierra Caballero, *Marxismo y comunicación. Teoría crítica de la mediación social* (Siglo XXI, 2020), 71–87.

approach (in 1977!) with the title “Communications: The Blind Spot of Western Marxism.”⁴¹

Thus, it is worth stressing that the protagonists of this chapter were writing and thinking on expressive liberties in a moment of enormous changes in communications. Even if I will argue that there are good reasons to affirm that Holmes’ “free trade of ideas” was never meant to evoke a laissez-faire market (§2.2.1), we should acknowledge that at least some of his contemporaries also had good reasons to think that media markets were exceptional—vestiges of a happier and more competitive stage of capitalism, both in an economic and technological sense. In other economic sectors, as I will stress below, some of these trends had been going on for decades, and their effects were much more consolidated (§2.2.2). But insofar as media industries had not reached that point as visibly as other sectors by the early 1920s, a reasonable doubt in favor of laissez faire could still be sustained. In 1919, put differently, the “free trade” allegory in the *Abrams* dissent applied to the press market could evoke a very different regulatory picture than if applied to the oil or railroad markets. Even someone like Emma Goldman, not at all suspicious of capitalist affinities, a far-leftist advocate for free speech rights and herself victim of US government persecution in these years, could grant that “Herbert Spencer’s formula of liberty” (i.e., laissez faire) is “the most important on the subject.”⁴²

Anyhow, the fact is that many of the advocates of what later came to be interpreted as an argument for free speech laissez faire not only rejected laissez faire economics in theory, but actively contributed to its demise during the first decades of the twentieth century. Harold Laski, a declared socialist, is perhaps the most striking example of this position—the only misgivings he had about the increasing state regulation of the American economy in the 1930s came from his Marxism, not his libertarian leanings.⁴³ Furthermore, many of the critical progressives that contributed to the development of free speech libertarianism against Wilsonian censorship were integrated in the New Deal administrations or shared its aspirations of economic reform. Felix Frankfurter is the most notable case: he became a trusted advisor of F. D. Roosevelt and a controversial Supreme Court justice instrumental in granting the federal government a wider latitude in economic matters.⁴⁴ The case of Chafee, albeit less strong from a strictly political point of view, was no different. He used his role in the American Bar Association to consolidate the alliance between civil libertarianism and New Deal economic policy, although he had become hesitant with Roosevelt’s final years.⁴⁵ In sum, they all looked at state power in a much more positive light than the adjective “libertarian” and their late 1910s radical critique of the federal government might suggest.

⁴¹ Dallas W. Smythe, “Communications: Blindspot of Western Marxism,” *Canadian Journal of Political and Social Theory* 1, no. 3 (1977): 1–27.

⁴² Quoted in Graber, *Transforming Free Speech*, 54.

⁴³ Newman, *Harold Laski*, 174–6.

⁴⁴ E.g., Snyder, *The House of Truth*, 566–69.

⁴⁵ Wertheimer, “Freedom of Speech: Zechariah Chafee and Free-Speech History,” 368; Smith, *Zechariah Chafee, Jr.*, 120

The disparities between the goals of early free speech libertarians and today’s free speech libertarians (including the libertarian reading of the *Abrams* dissent discussed above) are nowhere clearer than in the recurring progressive-era apologies for government intervention; in their repeated calls for positive action by public authorities as a necessary element to secure freedom, including expressive freedoms.

For our purposes, their view might be reconstructed as follows: (1) the struggle of ideas promoted by free speech must be fair in order to be socially valuable and promote truth (i.e., inequalities of power undermine the value that justifies expressive freedom); (2) fairness in the struggle of ideas should not be taken as given (i.e., truth-seeking free speech requires certain socioeconomic and institutional preconditions that are not spontaneously fulfilled in the modern public sphere); (3) this implies that modern, twentieth-century defenders of free speech must go beyond the purely negative freedom of early modern canonical advocates of expressive liberty (i.e., the guarantee of free speech in industrial conditions was thought of as “paradoxical,” as I will show, for it must protect an essentially negative right through positive state action).

2.2.1. *Not any marketplace of ideas: competition must be fair*

First, then, there is the often-forgotten notion that the “clash of ideas” must be fair if we want it to yield true knowledge or deliberative consensus. “All I want,” Chafee complained against accusations of being a communist, “is to have everybody given a fair chance.”⁴⁶ Holmes himself understood expressive freedom within capitalist markets in this manner. Arguing for the workers’ right of picketing, he observed that:

the policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man’s business by some means, when the damage is done, not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade. (...) Combination on the one side [i.e., “capital”] is patent and powerful. Combination on the other [labor] is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.⁴⁷

Similarly, a *New Republic* editorial just after the *Abrams* decision, said that there could be a “faith” in achieving the “ultimately liberating truth,” but with an important caveat: “provided all parties, all classes and all minorities obtain a full and a fair hearing.”⁴⁸ Compared with the later, Cold War emphasis on

⁴⁶ Quoted in Smith, *Zechariah Chafee, Jr.*, 226.

⁴⁷ Dissenting in *Vegeahn v. Guntner*, 167 Mass. (1896), 106–108. Partially quoted in Weinrib, *The Taming*, 23.

⁴⁸ Anon., “Americanism in the Present Crisis,” *The New Republic*, November 12, 1919, 305.

Holmes' "market competition" and "free trade" as spontaneous, "self-righting" epistemic mechanisms indifferent to inequalities of power, the earlier progressive reception of the *Abrams* dissent did not give much importance to economic language. Answering a correspondent, Walter Lippmann already complained about this interpretation of expressive liberties in 1935: "I do not believe that 'under free speech truth is supposed to automatically conquer falsehood.' History shows clearly, it seems to me, that falsehoods often conquer truth." Then, he added "The reason for free speech is not that truth is automatically victorious under it but that there is a chance to correct error (...) Free speech in actual life depends upon certain rules of the game."⁴⁹

Or take the representative view of the philosopher John Dewey in the pages of *The New Republic* during these years. Of the "three outstanding ideas" he found in Holmes' dissent, none had to do with markets. In its most violent interpretation, Dewey conceded that the *Abrams* dissent could be understood as a call for a "fair combat," as a "struggle for existence." But significantly, when Dewey dealt with the influential economic metaphor, he did not understand market competition as the maximization of one's own chances. In contrast, he read in Holmes' words a defense of an other-regarding deliberative arrangement: an "open market of social life" in which "one defers to the beliefs of others," which requires a "generosity beyond the scope of lesser souls."⁵⁰ The *Abrams* dissent was far from suggesting a laissez-faire communication market in the eyes of its contemporary progressive readers. On the contrary, it suggested a particular institutional arrangement that should nurture the civic dispositions of individuals toward fairness in public discussion.

2.2.2. Ensuring competition in an industrial civilization

The point above leads us to the second step in the argument: fairness in the competition of ideas should not be taken as given. In the progressive-era economic discourse, fair competition was clearly incompatible with unbalanced relationships of power. And, in contrast to a naturally emerging order, competition was thought to be an institutional condition created and preserved by public power. Notice how the social conditions for the decline of the laissez-faire worldview that permeated much of the nineteenth-century legal and economic views had been brewing since the last third of the nineteenth century—think of the Civil War and the Reconstruction period, the late upshots of the westward expansion and the spreading of railroads, or the second industrial revolution and immigration waves. Among others, these processes are testimony to the joint development of US industrial capitalism,

⁴⁹ "To Stevens Werner" (March 29, 1935), in Walter Lippmann, *Public Philosopher: Selected Letters of Walter Lippmann*, ed. John Morton Blum (Ticknor & Fields, 1985), 392.

⁵⁰ John Dewey, "Justice Holmes and the Liberal Mind," *The New Republic*, January 11, 1928, 211.

with its novel anti-competitive threats due to economies of scale and monopoly, and the expansion of government power over the economy (e.g., a growing federal budget and administrative capacity during and after the Civil War and WWI, the first system of social security, land grants for peasants and railroad entrepreneurs, investments in infrastructure, antitrust law, creation of regulatory agencies, etc.).

Although their ideas did not get to shape Supreme Court majorities until much later (the 1930s), outside the courts, the turn-of-the-century progressive field clearly identified the political, and not merely economical, problems posed by the new circumstances.⁵¹ Thus, the new economic reality further developed an already existing rich language of political-economic critique of *laissez faire*, shaping antitrust law and trade regulations, populist and reform-minded politics, trade-unionism and socialism and many other cultural expressions, such as journalistic and academic critique.⁵² Leaving things as they are was not enough anymore—the new accumulations of resources and power in private hands endangered the normal functioning of public sovereignty and liberty. As a contemporary put it, leaving things as they are and relying only in “individual initiative,” was de facto “maintaining a private paternalistic regulation of other men’s affairs.”⁵³ Thus, metaphors reminding of old-regime Europe were soon to dominate the critique of the new political economy: “robber barons,” “economic monarchs,” “autocrats of trade,” “private government,” “wage-slavery,” “benevolent feudalism,” and so on. Or consider the Sherman Anti-Trust Act of 1890, soon after struck down by the Supreme Court, which branded monopolies as a “conspiracy, in restraint of trade or commerce.”⁵⁴ To name a less studied example that may give a feel of the widespread animosity in the progressive field, monopolists became the most fertile target for political cartoonists during the early 1900s.⁵⁵

All these processes called for a wider and deeper role for the state in the creation and preservation of liberty. Take, as a mere example, Laski’s words in 1925: “[t]he problem, in fact, is not whether government intervention is desirable. The truth is that government intervention is essential, and the problem is simply of methods whereby it can bear its maximum fruit.”⁵⁶ Or think of Carl Becker’s epochal reflection that “It is beating the air to discuss

⁵¹ On F. D. Roosevelt court-packing attempts in the late 1930s and the constitutionally challenged authority of federal regulatory agencies, see White, *Law in American History*, vol. III: 155–211.

⁵² E.g., Harold U. Faulkner, *The Decline of Laissez Faire, 1897-1917* (New York: M. E. Sharpe, Inc., 1977), 366–82; Norman Pollack, *The Populist Response to Industrial America. Midwestern Populist Thought* (Cambridge: Harvard University Press, 1962), 43–67; Joseph Fishkin and William E. Forbath, *The Anti-Oligarchy Constitution* (Harvard University Press, 2022), chaps. 4–6. For a wider perspective, including Europe, see Habermas, *The Structural Transformation*, §V.16.

⁵³ Carl L. Becker, *The United States: An Experiment in Democracy* (Harper & Brothers, 1920), 317.

⁵⁴ Quoted in White, *Law in American History*, vol. II: 612.

⁵⁵ Richard R. John, “Robber Barons Redux: Antimonopoly Reconsidered,” *Enterprise and Society* 13, no. 1 (2012): 1–38.

⁵⁶ Laski, *A Grammar of Politics*, 489.

whether government should regulate private property; private property is the very essence of governmental regulation—the most fundamental and far-reaching of all the regulations upon which modern society is founded.”⁵⁷ Recall, too, Holmes’ observation in his *Lochner* dissent cited above, that the constitution does not uphold Spencerian laissez-faire. This intuition went far beyond the progressive camp, as this observation by Hayek in this most militantly anti-statist pamphlet show:

There is, in particular, all the difference between deliberately creating a system within which competition will work as beneficially as possible, and passively accepting institutions as they are. Probably nothing has done so much harm to the liberal cause as the wooden insistence of some liberals on certain rough rules of thumb, above all the principle of laissez-faire. Yet in a sense this was necessary and unavoidable. (...) The attitude of the liberal towards society is like that of the gardener who tends a plant and in order to create the conditions most favourable to its growth must know as much as possible about its structure and the way it functions.⁵⁸

These views of property as created and embedded in the legal-political order answered to long-term processes and were rooted in pre-industrial insights about the relationship between public sovereignty and ownership—integrated already in many cases by the earliest critics of capitalism in the first decades of the 1800s.⁵⁹ Yet for the purposes of my argument, it is important to show how much of the early twentieth century political thought and its openness to the unavoidable need of government interference did not come from purely abstract reflection or assimilation of past intellectual legacies. On the contrary, these considerations were based on their social and political awareness of historical change, on their self-conscious modernism and the shape it took in the US. Hence the *locus classicus* in the progressive- and New Deal-era justification of state power in the promotion of freedom: the contrast between the “complexity” of modern society against the “simplicity” of earlier societies—and its consequence, the need to update, restore or apply differently

⁵⁷ Becker, *The United States: An Experiment in Democracy*, 320.

⁵⁸ Hayek, *The Road to Serfdom*, 18. My italics. Or take this other remark by the Chicago economist Frank Knight in 1923: “No error is more egregious than that of confounding freedom with free competition, as is not infrequently done. (...) Under freedom all that would stand in the way of a universal drift toward monopoly is the fortunate limitations of human nature,” *The Ethics of Competition and Other Essays* (Allen & Unwin, 1935), 53. On Knight, his intellectual legacy and the differences between interwar justifications of market-centered arrangements and late-twentieth century arguments against state regulation, see Angus Burgin, “The Radical Conservatism of Frank H. Knight,” *Modern Intellectual History* 6, no. 3 (2009): 513–38.

⁵⁹ Domènech, “Socialismo: ¿de dónde vino?”; Jordi Mundó, “Del absolutismo propietario a la constitucionalización de la utilidad social de la propiedad,” in *La precariedad desde la filosofía social. Genealogías, diagnósticos y resistencias*, ed. Nuria Sánchez Madrid (Los Libros de la Catarata, 2021), 23–48.

older republican ideas.⁶⁰ For instance, the influential legal scholar Robert Hale justified his realist view of state coercion as constitutive of property rights due to recent historical socioeconomic circumstances; that is, against the more acceptable laissez-faireism of “more primitive times” when “a man might acquire without great expense ownership of a piece of land.”⁶¹

In like manner, Dewey regularly evoked the American “pioneers and their fortunate conditions,” such as the abundance of “free land” that nurtured the kind of egalitarian relationships essential for the flourishing of natural individual freedom and republican democracy. His point was, however, that things had changed a century and a half later. The old ideals now called for positive action: “we now have to re-create by deliberate and determined endeavor the kind of democracy which in its origin (...) was largely the product of a fortunate combination of men and circumstances.”⁶² And, in the same vein, Walter Lippmann pitted “the early democrats [who] insisted that a reasoned righteousness welled up spontaneously out of the mass of men” against “modern industrialism” in which “thought goes on in a bath of noise.”⁶³

2.2.3. Mass media: the preconditions of free speech undermined

Although the *Abrams* dissent did not explicitly reflect it, the progressive, modernist responsiveness to late socioeconomic changes did shape turn-of-the-century political reflections on press freedom.⁶⁴ Let us see how some of the protagonists of Chapter 1 incorporated this awareness about industrial civilization. According to Laski, after equal education, the “second condition of political liberty is the provision of an honest and straightforward supply of news.” This was because “Those who are to decide must have truthful material upon which to decide. Their judgment must not be thwarted by the presentation of a biased case.” However, he added a political-economic and historical observation:

⁶⁰ For a wide range of examples of this attitude, see Fishkin and Forbath, *The Anti-Oligarchy Constitution*, chaps. 5, 6.

⁶¹ Robert L. Hale, *Freedom Through Law: Public Control of Private Governing Power* (Columbia University Press, 1952), 18, 24–28.

⁶² John Dewey, “Creative Democracy—The Task Before Us” (1939), in *America’s Public Philosopher*, ed. Eric Thomas Weber (Columbia University Press, 2020), 59. I owe the discovery of this text to Just Serrano. See also John Dewey, *The Public and Its Problems: An Essay in Political Inquiry*, ed. Melvin L. Rogers (Swallow Press, 2016 [1927]), chap. 4.

⁶³ Walter Lippmann, *Public Opinion* (Transaction Publishers, 1997 [1922]), 275, 73, 258; see also Walter Lippmann, *Liberty and the News*, ed. Paul Rozen (Transaction Publishers, 1995 [1920]), 36. For similar views, see e.g., the reflection on “private” threats to freedom as a reason to be less optimistic about individual liberty than in earlier ages, Harold Lasswell, *Democracy through Public Opinion* (George Banta, 1941), 9–12, 155; Carl L. Becker, *Freedom and Responsibility in the American Way of Life* (Vintage Books, 1945), 27–49. A contemporaneous critical account of these developments, depicting them as an “inversion of the old [liberalism]” can be found in Knight, *The Ethics of Competition and Other Essays*, 293–95.

⁶⁴ Lebovic, *Free Speech and Unfree News*, 18–22, 37–63.

Our civilisation has stimulated the creation of agencies which live deliberately on the falsification of news. (...) The problem is made more complex than in the past by the area over which our judgment must pass. We have no leisure to survey that area with comprehensive accuracy. We must, very largely, take our facts on trust. But if the facts are deliberately perverted, our judgment will be unrelated to the truth. A people without reliable news is, sooner or later, a people without the basis of freedom. For to exercise one's judgment in a miasma of distortion is, ultimately, to go disastrously astray.⁶⁵

In Laski's view, "civilisation" meant the "mechanisms" by which "an increasing number of human beings realise at their best their highest faculties." And, as it had happened recently, "To the extent that those mechanisms fail, so do our faculties, at their best, remain unrealised."⁶⁶

Did modern industrial society and mass communication grant those "mechanism" for the development of our "highest faculties" and the "truthful material" in which our "judgment" is rooted—and with them, the subjective requirements of a free citizenry apt for classically understood democratic self-government?⁶⁷ For Laski, it did not: "we can have none of the comfortable assurance of a century ago that, whatever our errors, we may rest confident in the knowledge of progress."⁶⁸ Lippmann, who would even grow pessimistic about democracy over the years, thought the same: "modern industrialism" was "that helter-skelter which we flatter by the name of civilization," the complex, large-scale societies with their faulty mass media in which individuals were not able to form rational and truthful images of the world.⁶⁹ So much for the modern "vast, expensive transmitting and editing apparatus" of newspapers and news agencies, that held "a power unlike any that has been exercised since the Pope lost his hold on the secular mind"⁷⁰ (recall §IV.1). Albeit with a stronger democratic optimism, Dewey also saw in the recent technological changes in communication (e.g., the telegraph, radio, cheap industrial printing, film, news agencies...) a challenge to the older conditions

⁶⁵ Laski, *A Grammar of Politics*, 147–48.

⁶⁶ *Ibid.*, 20.

⁶⁷ For three contemporary sociological classics on these transformations, see C. Wright Mills, *The Power Elite* (Oxford University Press, 1959), chap. 13; Jürgen Habermas, *The Structural Transformation of the Public Sphere*, trans. Thomas Burger and Frederick Lawrence, (Polity Press, 1989 [1962]), pt. V and VI; Richard Sennett, *The Fall of Public Man* (Knopf, 1977), chaps. 1 and 7.

⁶⁸ Laski, *A Grammar of Politics*, 20.

⁶⁹ Lippmann, *Public Opinion*, 73.

⁷⁰ Lippmann, *Liberty and the News*, 39, 44–45.

in which democratic deliberation originated.⁷¹ This was not a problem of technology itself. The social consequences of the new media were determined by the industrial and monopolistic economic circumstances of the time. "Business conditions almost automatically force these agencies into highly concentrated forms," Dewey protested. Hence, mass communication undercut the chances of lower-level communication: "the small operator in news and 'facts' can hardly exist. Comprehensive undertakings with large capital are required."⁷²

With these enormous social changes in mind, many progressives criticized, in Dewey's words, "earlier liberals" who "lacked historic sense and interest." Abstract principled politics had been undeniably useful against reactionaries of the past ages. "But disregard of history took its revenge," he continued. "It blinded the eyes of liberals to the fact that their own special interpretations of liberty, individuality and intelligence were themselves historically conditioned, and were relevant only to their own time."⁷³ Thus, as a liberal who did not discount history and sensible social change, Dewey suggested that the tradition needed a "reversal" of its older methods to "realize its professed aims." This meant "organized social planning" to create "institutions that provide the material basis for the cultural liberation and growth of individuals."⁷⁴

It is interesting to contrast the progressive-era indictment on earlier liberalism with the previous and better-known "quarrel of the Ancient and the Moderns" that shaped much liberal reflection around "modern" or "negative" freedom from the French Revolution up to the First World War (i.e., the debate molded by the likes of Benjamin Constant and influentially recovered much later by Isaiah Berlin).⁷⁵ Instead of Ancient and Moderns, however, the contenders in the progressive-era dispute around liberty were preindustrial Moderns against industrial Moderns. It is worth contrasting these two denunciations of past political thought because the message of the latter quarrel went in the opposite direction of its nineteenth-century predecessor. The progressive-era lesson was that, after the late civilizational changes, the

⁷¹ E.g., John Dewey, *Liberalism and Social Action* (Capricorn, 1963 [1935]), 72–73; Dewey, *The Public and Its Problems*, 167–70, 200–201. Lippmann and Dewey, as it is well known, had open differences during this years, precisely on the issue of freedom in the public sphere. My take here is emphasizing their shared analysis of the modern conditions of mass communication—common assumptions that led, nevertheless, to different solutions. On their debate in the context of free press, see Lebovic, *Free Speech and Unfree News*, 25–36.

⁷² John Dewey, "The New Paternalism," *The New Republic*, December 21, 1918, 216. A very influential earlier reflection by a personal acquaintance of many of these authors, but outside the progressive camp, is found in the academic work of the then President of Harvard: Lawrence A. Lowell, *Public Opinion and Popular Government* (Longmans, Green and Co., 1913), e.g., 39–40, 48–53, 109–110.

⁷³ Dewey, *Liberalism and Social Action*, 32.

⁷⁴ Ibid., 54–55. Similarly, see Dewey's argument that the agrarian ideal of "Jeffersonian democracy," if it were to be applied under industrial conditions, would require much more state intervention and a "socialized economy" to redistribute power and wealth (Grabber, *Transforming Free Speech*, 67.)

⁷⁵ On the nineteenth-century debate, see Nippel, *Ancient and Modern*, esp. chap. 7.

traditional or preindustrial “modern” focus on “individualism,” simply “negative,” “formal,” or “civil” freedom was not enough.

And yes, this was also true for one of the quintessential individual, negative freedoms—free speech. “The idea of liberty has its own special history,” Laski warned in a forgotten book review for *The New Republic*, “and nothing is more fatal to its adequate analysis than an attempt to bind it to an unchanging content.”⁷⁶ To prove the point, he added an extraordinary example:

A hundred years ago, freedom of the press meant the right to preach one’s faith in the face of governmental opposition. Today the attempt is to free the newspaper from the control implied in an elaborate network of subsidization. It is not, to say the least, clear that a man is less free when his fear is of governmental suppression than when his livelihood depends upon being able to agree with the opinions of Lord Northcliffe [i.e., the British newspaper tycoon].⁷⁷

For Laski, the moral values that justify freedom of expression—the uncoerced development of personality and intellectual flourishing—were still to be cherished. However, this appreciation must avoid moralism and ahistoricism. This was because “without a minimum basis of civilization” the “material basis of personality is destroyed.” For this reason, he thought that the “real thing to be examined is the elements of human nature which must be satisfied before personality is provided with the means of its expression.”⁷⁸

Dewey went in a similar direction. “Merely legal guarantees of the civil liberties of free belief, free expression, free assembly,” he observed, “are of little avail if in daily life freedom of communication, the give and take of ideas, facts, experiences, is choked by mutual suspicion, by abuse, by fear and hatred.”⁷⁹ The new civilization (or lack thereof), had spoiled the epistemic infrastructures that linked freedom of expression with its traditional truth-seeking function. According to Lippmann, “civil liberty (...) does not guarantee public opinion in the modern world” because the canonical liberal reflection on the matter had been too naïve: “For it always assumes, either that truth is spontaneous, or that the means of securing truth exist when there is no external interference.”⁸⁰ In the challenging circumstances of modern mass communication, a thicker conception of freedom was needed: “*liberty is the name we give to measures by which we protect and increase the veracity of the information upon which we act.*”⁸¹

⁷⁶ Harold Laski, “Freedom [Review of ‘Freedom’ by Gilbert Cannan],” *The New Republic*, December 21, 1918, 228.

⁷⁷ Ibid., 229.

⁷⁸ Ibid., 229. Laski’s more developed views behind this text, connecting with the broader arguments of this section (e.g., need of public institutions to guarantee liberty and the development of personality, changing requirements of civilization brought about by industrial conditions, etc.) can be found in his *A Grammar of Politics*, 15–25, 144–52, 433–38.

⁷⁹ Dewey, “Creative Democracy—The Task Before Us,” 63.

⁸⁰ Lippmann, *Public Opinion*, 319.

⁸¹ Lippmann, *Liberty and the News*, 61.

Chafee, for his part, also suggested “the development of positive forces” to “remove the sluggishness of thought into which we all easily lapse even without any prohibitions upon opinion.”⁸² And years later he became even more explicit: “We must do more than remove the discouragements to open discussion. We must exert ourselves to supply active encouragements.” He clearly stated his misgivings with purely negative ideals of free speech: “lack of interference alone will not make discussion fruitful (...) because truth does not seem to emerge from a controversy in the automatic way [the received tradition] would lead us to expect.”⁸³

2.3. THE SEPARATION OF POLITICS AND ECONOMICS IN THE MID-CENTURY ANALYSIS OF EXPRESSIVE LIBERTIES

But all this political-economic awareness and perception of social change in the free speech discussion was lost throughout the twentieth century. It was as if the normative legacy of progressive-era free speech libertarians had become frozen, so to speak, in their opposition to Wilsonian repression and their vindication of negative liberty against government interference. The other side of their legacy was forgotten by the later Cold War defenses of the “marketplace of ideas” and the “libertarian tradition” “from Milton to Holmes.” Instead of embodying the rich, progressive-era reflection on the importance of constituting expressive liberty both against despotic public power and the rising private powers of industrialism and mass communications, the *Abrams* dissent and its “trade in ideas” came to symbolize something very different: a justification for *laissez faire* and non-interference in the public sphere (§1.3.3 and §2.1).

Other scholars have wondered about this distortion of the progressive-era free speech agenda. How, in other words, the *thicker* free speech libertarianism of the early decades of the twentieth century, with its criticism of industrial life and mass communications, with its positive view of the active role of government in setting the preconditions of liberty, with its concern with private sources of unfreedom, was turned into a *thin* free speech libertarianism, oblivious of power relationships, only focused on state interference as a threat to freedom, unaware of the political-economic and institutional preconditions of its own ideal, prone to be instrumentalized for the defense of the status quo, etc. The initial chapters of this thesis, but especially this and the last section, build heavily on original hypotheses that were previously suggested by other scholars, such as Mark Graber, Thomas Healy, Victor Pickard, David Rabban, or Laura Weinrib. Before continuing, I want to make a special mention to two of them.

Laura Weinrib’s archival work has documented how the mid-century, court-centered “liberal compromise” on civil liberties involved not so much a

⁸² Chafee, “Liberty and Law,” 113.

⁸³ Chafee, *Free Speech in the United States*, 559.

continuity, but a rupture with the early twentieth-century defenders of civil liberties—as she put it: it was a “calculated bargain” by progressive advocates of free speech that “backfired,” undercutting in the end their originally transformative and radical agenda.⁸⁴ Much of this story can be traced through the origins and rise of the ACLU, arguably one of the most important sources to track the changing civil rights litigation during the period I am considering, and even still today. Most names mentioned in this and the earlier chapter founded or actively participated at some point in the initial years of the ACLU (e.g., Harold Laski, Zechariah Chafee, Felix Frankfurter, John Dewey, Alexander Meiklejohn, or Jane Addams). Weinrib argues that what became consolidated in the ACLU litigation strategies and later free speech jurisprudence—a procedural, politically neutral, negative right against government—was far from what many of the earlier advocates of free speech and founders of the ACLU had in mind: expressive rights embedded in networks of political radicalism and democratic activism, class struggle, labor rights, and trade-union politics, protecting freedom from both private and public threats, and so on.

Mark Graber, in turn, focused more on legal theory rather than legal practice, has emphasized the continuities between today’s and progressive-era free speech libertarians.⁸⁵ But, importantly for my purposes, he frames those continuities as resulting from theoretical failures within the progressive-era project of civil liberties, that is, the failure of early free speech libertarians, notably Chafee, in translating into constitutional law (e.g., into a thicker understanding of the First Amendment) what was the interwar two-fold political ambition about what a democratic public sphere should look like. Namely, they missed that a free and fair clash of ideas must be protected from government interference, but also that fair and rational debates at a societal level are only possible through a major transformation of the social and economic relations that characterize industrial capitalism—changes for which government interference was much needed.

A way of accounting for these developments is by showing how politics and economics became detached domains of reflection in the analysis of free speech throughout the twentieth century. I will offer three episodes of how free speech libertarianism contributed to this separation of free speech from the discussion of its preconditions. The first concerns the birth of the sociology of communication and its modernist rejection of the free speech “tradition” as too optimistic about truth and imprudently focused on the state as the only threat to expressive freedom (§2.3.1). The second explains how mid-century American policy debates on media reform were held captive by their own background libertarian assumptions, allowing one of the extremes of the political spectrum (free speech *laissez faire*) a higher presumption of reasonability and feasibility. Thus, advocates of reform self-undermined the

⁸⁴ Weinrib, *The Taming*, 13; Laura M. Weinrib, “From Left to Rights: Civil Liberties Lawyering Between the World Wars,” *Law, Culture and the Humanities* 15, no. 3 (2019): 622–55.

⁸⁵ Graber, *Transforming Free Speech*.

chances of repairing many of the problems that they had themselves diagnosed in light of the experiences of interwar and postwar mass media markets (§2.3.2). The third illustrates the separation of politics and economics in the analysis of free speech through the practice of “bifurcated” constitutional review, a two-tier approach to constitutional adjudication by which the Supreme Court applied a stricter review of cases concerning state interference with civic-political liberties, while giving state interference a higher presumption of constitutionality when it addressed other policy domains, especially those related to the economy (§2.3.3).

2.3.1. Sociology: the free speech tradition suited “*simpler times*”

Where did all the progressive historical and political-economic awareness explored in the last section leave the “tradition” of free speech which they themselves had contributed to fabricate to denounce Wilsonian repression (as seen in §1.2 and §1.3)? A “tradition,” recall, molded in early modern struggles for religious toleration and freedom of thought, for the inviolability of personality against despotic regimes; a “tradition” that demanded “absolute” freedom from government for the flows of information in the public sphere, that proclaimed a staunch epistemic optimism as the “philosophical basis” of expressive freedom—a “tradition,” to sum up, that was soon to be branded as “libertarian” and advocating for *laissez-faire* communication markets against all public intervention.

In the next two decades after the *Abrams* dissent and its “trade in ideas,” it was clear to many of the minds that had contributed to its inception and canonization that the libertarian “tradition” of epistemic free speech it purportedly retrieved was, at best, expired or in need of serious revision—invalidated by the new circumstances of industrial mass communication. At worst, that “tradition” had been wrong all along: naïve about itself, about the power of truth, and about the specific socioeconomic and civilizational preconditions on which it was built. In his handbook of the early 1920s, Chafee appropriated Lord Russell’s famous words in defense of English civil liberties: “I wish we could imitate the courage of our ancestors.”⁸⁶ In the expanded edition of the early 1940s, he kept Russell’s quote, but added a final chapter titled “Free Speech Today” with the following opening:

Speech should be fruitful as well as free. Our experience introduces this qualification into the classical argument of Milton and John Stuart Mill, that only through open discussion is truth discovered and spread. In their simpler times, they thought it enough to remove legal obstacles like the censorship and sedition prosecutions. Mill assumed that if men were only left alone, their reasoning powers would eventually impel them to choose the best ideas and the wisest course of action. To us this policy is too exclusively negative. (...)

⁸⁶ Chafee, *Freedom of Speech*, 227.

Is it any longer possible to discover truth amid the clashing blares of advertisements, loud speakers, gigantic billboards, party programs, propaganda of a hundred kinds? (...) Debating is only fiddling while Rome burns.⁸⁷

Zechariah Chafee, arguably the main responsible figure for deploying a libertarian tradition of epistemic defenses of free speech to condemn the wartime government repression of radicals, was now qualifying his leading appeal to the past. The reflection above was reinforced by remarks such as “Of late years the argument of Milton and Mill has been questioned,” “Reason is more imperfect than we used to believe.”⁸⁸ He was thus again charting a libertarian tradition of free speech around an essentially negative ideal of freedom. Only this time, instead of vindicating it as vital for his time, Chafee was recovering it for critical purposes—to stress the need of updating the older intuitions.

Such a condemnatory view of the “tradition” of free speech as too libertarian and naïve about the power of truth or the rationality of individuals was one of the foundational intuitions of the emerging academic field of sociology of communication during the interwar years. According to Harold Lasswell, who would become one of the most influential researchers in media studies in the next decades, “To illuminate the mechanisms” of modern mass communication, such as propaganda, “is to reveal the secret springs of social action.” This task had weighty historic-philosophical implications: “to expose to the most searching criticism our prevailing dogmas of sovereignty, of democracy, of honesty, and of the sanctity of individual opinion.”⁸⁹ In the same vein, consider his later warning that “There is no royal road to truth.” This was the sociological lesson of the interwar period. In light of the fascist use of propaganda and mass media in Europe, the libertarian understanding of the public sphere allegedly charted by the classic canon of free speech seemed pointless, or even self-defeating. “We have seen many republics made suicidal decisions to believe that passivity is enough,” to which he added the habitual case study: “Obviously there was not enough affirmative effort in Weimar Germany.”⁹⁰

Much of these insights were owed to Lippman’s groundbreaking studies of news and mass communications in the early 1920s. In them, he had determined, after showing how easily historical champions of the power of truth limited the scope of toleration and free speech, that “the older doctrine

⁸⁷ Chafee, *Free Speech in the United States*, 559–60. Lord Russell’s quote at 195.

⁸⁸ *Ibid.*, 559, 561.

⁸⁹ Harold Lasswell, “Propaganda Technique in the World War” (1927), in *Mass Communication and American Social Thought: Key Texts, 1919–1968*, ed. John Durham Peters and Peter Simonson, Critical Media Studies (Rowman & Littlefield Publishers, 2004), 50. In this sense, see also the editors’ introduction to Part II, at 79–90.

⁹⁰ Harold Lasswell and Myres S. McDougal, “Legal Education and Public Policy: Professional Training in the Public Interest,” *The Yale Law Journal* 52, no. 2 (1943): 230. On Lasswell’s view of Weimar as showing the tragic trends of the modern public sphere, see also his *Democracy through Public Opinion*, 16–17, 98–99.

of liberty was misleading.”⁹¹ In the modern, industrial world of mass communication the “hard-won rights of man” cannot be secured “simply by imitating the earlier champions of liberty.”⁹² Making reference to Milton, Mill, the Bill of Rights, and Chafee himself, Lippmann almost derided the “classic doctrine” and its naïve epistemic optimism: “Convinced that the wisdom was there if only you could find it, democrats have treated the problem of making public opinions as a problem in civil liberties.”⁹³

These views of the democratic, liberal or free speech “tradition” were firmly established for posterity in the Commission on Freedom of the Press, also known as the Hutchins Commission—the most relevant attempt to study US media markets in the years after the Second World War.⁹⁴ Chafee, at that moment the most reputed legal scholar on the First Amendment, was the Commission vice-chairman. His involvement put his historical and normative views even more at the center of the emerging fields of media studies and the sociology of communication. In the policy discussions of the Commission, the minimization of government interference was the normative position considered as the point of departure or default view. This was because, due to a Chafeean interpretation of the past, free speech libertarianism was considered to be the accepted, Western, uncontested view on freedom of communication until then. The reading list, distributed by Harold Lasswell to make all the commissioners familiar with the past common sense, reflected this almost to perfection. Hence, it included the *Apology* of Socrates, Milton’s *Areopagitica* and Mill’s *On Liberty*.⁹⁵

However, as discussed above, as years passed and industrial capitalism matured into the modern system of mass communications, the currency of the “tradition”—with its presumed Miltonic epistemic optimism and its calls against government interference—became no longer so clear. Chafee’s contribution to the Commission report betrays the vulgarization of his own scholarship, now using the “tradition” he had conscientiously rediscovered as a straw man to compare with his new policy recommendations:

Our ancestors were justified in thinking that if they could prevent the government from interfering with the freedom of the press, that freedom would be effectively exercised. In their day anybody with anything to say had comparatively little difficulty in getting it

⁹¹ Lippmann, *Liberty and the News*, 57. His analysis of Plato, Milton, Mill and Bertrand Russell at 21–37.

⁹² Ibid., 22.

⁹³ Lippmann, *Public Opinion*, 318. In the same line, see his later *The Phantom Public* (Transaction Publishers, 1993 [1925]), 152–62.

⁹⁴ On the Hutchins Commission and its members, see Victor Pickard, *America’s Battle for Media Democracy: The Triumph of Corporate Libertarianism and the Future of Media Reform* (Cambridge University Press, 2015), 143–51 and chap. 6; Stephen Bates, *An Aristocracy of Critics: Luce, Hutchins, Niebuhr, and the Committee That Redefined Freedom of the Press* (Yale University Press, 2020).

⁹⁵ Pickard, *America’s Battle*, 154. This was, recall, the triumvirate of truth-seeking free speech that Chafee had glorified since his early texts against the Espionage Act in the late 1910s (§1.1.3).

published. The only serious obstacle to free expression was government censorship. If that could be stopped, the right of every man to do his duty by his thought was secure.⁹⁶

The Commission thought that the situation was different in the oligopolistic US media environment of the late 1940s: “Those circumstances which provided variety and interchange of opinion and easy individual access to the market place of ideas have changed so radically (...) the right of free public expression has therefore lost its earlier reality.” Now, freedom from government was not enough, since “owners and managers of the press determine which persons, which facts, which versions of the facts, and which ideas shall reach the public.”⁹⁷ With variations, this emphasis on social change, and how received ideas of free speech should be adapted, is the central idea in the diagnosis of the Commission’s report.⁹⁸ Was it perhaps time to get rid of what the Commission proceedings call the “Milton-Mill-Holmes First Amendment formula”?⁹⁹ In Chafee’s own report these fears are confirmed.¹⁰⁰ And although he thought that the truth-seeking tradition partially “holds good” (i.e., that reason “still remains the best guide we have”) he systematically framed the likes of Milton and Mill as representatives of an innocent “self-righting process” which, unaware of non-government threats to freedom, deserved to be updated according to the findings of modern sociology.¹⁰¹

Thus, we again arrive at the interpretive conjuncture I identified in the Introduction (§III.2). That is, the pervasive presence of a what I called the “free speech libertarian framework,” and one of its most striking features—that it is reproduced by scholars and activists across the political spectrum. The idea is, recall, that a set of more or less vague intuitions about the “libertarian” nature, past, or legal reality of expressive liberty structure much academic research and political reflection on the matter, even when the authors criticize or do not promote libertarianism as a suitable normative program for the public sphere. Consequently, free speech libertarianism acts at the level of descriptive, historical or conceptual common ground. The mid-century American consensus around this free speech libertarian framework is arresting. It is notably present in the three major normative stances on the question of media regulation: for market laissez-faire, for government regulation, and for corporate responsibility.

With the first we are already familiar. Recall Fredrick Siebert’s Cold War typology of press models, his opposition between old-regime autocratic and soviet models versus the Western libertarian model of press freedom based on the “tradition” of truth-seeking expressive liberties that went “from Milton to

⁹⁶ The Commission on Freedom of the Press, *A Free and Responsible Press* (The University of Chicago Press, 1947), 14.

⁹⁷ *Ibid.*, 15–16.

⁹⁸ See, e.g., *ibid.*, vii–viii, 1–3, 30–51, 104, 129–130.

⁹⁹ Quoted in Lebovic, *Free Speech and Unfree News*, 18.

¹⁰⁰ Zechariah Chafee, *Government and Mass Communications: A Report from the Commission on Freedom of the Press* (The University of Chicago Press, 1947), vol. I: 28.

¹⁰¹ *Ibid.*, vol. I: 23–26, 28, 150, 386.

Holmes” (§1.3.3). Siebert remained a consistent libertarian on policy issues, so to speak. That is, he vindicated the currency of that centuries-old “libertarian tradition” as he understood it, consequently doubting any government interference with the public sphere.¹⁰² Later libertarian critics of US media reform, such as Milton Friedman or Ayn Rand are also “consistent” in this sense: what they saw in history they vindicate it for today.

Recall, nevertheless, one of the most interesting features of the free libertarian framework, which I argued it makes it the more pervasive—that its reproduction is not only the result of “consistent” libertarians. This is true of advocates of the second view on media policy. Those who pursue what one could call an anti-libertarian agenda in media reform fully accepted the libertarian essence and history of expressive freedom. Staying within the Hutchins Commission, consider the views of William Hocking, a Harvard idealist philosopher who argued in favor of the conceptual lessons on free press coming from the Soviet Union. His approach to the western canon is essentially the same as Siebert’s—the canon is a classical liberal or libertarian tradition lacking social awareness and excessively distrustful of how state intervention constitutes the social and legal setting of expressive liberty.¹⁰³ Accordingly, as Stephen Bates demonstrates, Hocking “accused Milton of lapsing into a ‘somewhat roseate optimism,’ Mill of purveying ‘gracious poisons,’ and Holmes of reducing ‘to absurdity the agnosticism latent in toleration.’”¹⁰⁴ Or consider the only other member of the Commission slightly in favor of stronger government regulation, the prominent theologian with a socialist past Reinhold Niebuhr. His normative views partly relied on his criticism of the American tradition of freedom and its “unique innocence” exemplified by Jeffersonian ideology.¹⁰⁵

The third view, that of corporate responsibility of media and journalists, represents the consensual policy recommendations of the Hutchins Commission—which we can ascribe to the later, post-WWII Chafee discussed above.¹⁰⁶ It emphasizes the need of government interference in the modern circumstances of mass communications, while also pointing to the dangers of state despotism. Note how this is the obvious prudent midpoint in a policy debate held hostage by a Cold War dichotomy between the allegedly canonical, Western libertarian intuitions about free speech vis-à-vis Eastern collectivism and excessive uses of state power. Significantly, just like the two ends of the spectrum, the middle position shared the conceptual and historical libertarian framework. As I have shown, Chafee’s rediscovery—and even

¹⁰² For his policy position, see e.g., Fredrick Seaton Siebert, “The Future of a Free Press,” *Journalism Quarterly* 23, no. 1 (1955): 6–9. On his influence in policy circles and legal strategy against press regulation, see Smith, *Zechariah Chafee, Jr.*, 96–100.

¹⁰³ William E. Hocking, *Freedom of the Press: A Framework of Principle* (University of Chicago Press, 1947), 1–21.

¹⁰⁴ Quoted in Bates, *An Aristocracy of Critics*, 73. On Hocking, see generally *Ibid.*, chap. 7.

¹⁰⁵ Reinhold Niebuhr, *The Irony of American History* (Charles Scribner’s Sons, 1952), 28; see generally 21–35, 92–101. On his pro-regulatory position within the Hutchins Commission, see Pickard, *America’s Battle*, 162; Bates, *An Aristocracy of Critics*, 102, 160–62.

¹⁰⁶ Smith, *Zechariah Chafee, Jr.*, chap. 5.

invention—of a “tradition” of epistemic free speech, first to vindicate it, then to condemn it, was instrumental in the consolidation of this common ground. If in the late 1910s and early 1920s, the libertarian past was something to recover against government repression, that same libertarian past became in later years something to overcome. The model of social responsibility of the press presented itself as a conscious update of what “our ancestors” had concluded in “their simpler times”—unaware of the political-economic preconditions of their own ideals, too focused on fighting state despotism, overly optimistic about the power of truth.

2.3.2. Media policy: free speech reform is “paradoxical”

For many, coming to terms with the late social, economic and technical changes that brought about “mass society” involved the revival of gloomy views on the prospects of modern democracy.¹⁰⁷ In light of all those transformations that undermined the preconditions of freedom and rational debate, what was the point of democratic regimes led by masses incapable of self-government? This was the road taken by the likes of Walter Lippmann, himself a late antagonist of the New Deal coalition.¹⁰⁸ In his own words, can “government by consent (...) survive in a time when the manufacture of consent is an unregulated private enterprise”?¹⁰⁹ This context of disillusionment was also a suitable ground for the development of many of the elitist and technocratic leanings that had accompanied the progressive project of state building since the beginning.¹¹⁰ For those who rejected the possibility of democracy or doubted of its value, the goal of thicker guarantees of expressive liberties (e.g., balancing the field of competition of ideas, deepening access to information, more government and corporate

¹⁰⁷ On turn-of-the-century psychological and sociological literature on mass society, and their relationship with economic and technical changes in media, see Ross, *Media and the Making of Modern Germany*, 213–22. On late nineteenth-century and interwar liberalism and the distrust of democracy, see Domènech, *El eclipse*, 23–37, 229–72; Domenico Losurdo, *Liberalism: A Counter-History*, trans. Gregory Elliott (London: Verso, 2011), 181–218, 223–328. On the Cold War recovery of earlier misgivings about mass democracy, see Corey Robin, *Fear: The History of a Political Idea* (Oxford: Oxford University Press, 2004), chaps. 4 and 5; Jan Werner Müller, “Fear and Freedom: On ‘Cold War Liberalism,’” *European Journal of Political Theory* 7, no. 1 (2008): 45–64. See also my earlier reflections and the literature cited at the end of §2.1.2.

¹⁰⁸ On its theoretical reflection leaning against democracy, see Lebovic, *Free Speech and Unfree News*, 29–31. On American progressives and New Deal liberals condemning Lippmann’s views in the 1930s, including Frankfurter and Laski, see Brad Snyder, *The House of Truth* (Oxford University Press, 2017), 569–72.

¹⁰⁹ Lippmann, *Liberty and the News*, 8.

¹¹⁰ See e.g., how late progressive-era analysis of modernity in a context of democratic disenchantment led to corporatist theories of the state, such as that represented by Italian fascism, in Katy Hull, *The Machine Has a Soul: American Sympathy with Italian Fascism*, America in the World (Princeton University Press, 2021), chap. 3.

transparency, redistributing access to mass media, etc.) was a futile enterprise, if not a dangerous empowering of wanton masses.

But not everyone took the Lippmannian road. For many others, the guarantee of expressive liberties in the modern system of mass communications continued to be a conceivable, if challenging project. This was precisely the issue that the Hutchins Commission set itself to face: How to overcome or update the received, excessively negative, libertarian legacy in matters concerning free speech? The answer could not be the abandonment of free expression and democratic politics. A commission on freedom of the press could not accept, in other words, the cynical disenchantment of the interwar period—which was certainly out of fashion in the late 1940s, after the political and military defeat of fascism.¹¹¹ The Commission could neither accept the libertarian doctrine that maximization of non-interference and “private initiative” in the public sphere were the safest arrangements to preserve pluralism and free speech. This defense of expressive liberties was merely a rhetorical device in light of the interwar and postwar experience with oligopolistic mass media markets—a rhetorical device, nevertheless, much used by media industry lobbyists then and now, forming the ideological narrative that critics call “corporate libertarianism.”¹¹²

What were then, the alternative answers? As the media historian Victor Pickard has argued, what was decisive was not so much the mild policy recommendations of the Commission—the “social responsibility” model of the press. He has called attention to the “more crucial ideological move” that settled the “discursive bounds” of the Commission’s debates and its “overall bias toward preserving the status quo.” As he puts it: “By determining early on that structural intervention [in media markets and ownership] was off the table the commission essentially ensured that the basic precepts of libertarianism would be preserved.”¹¹³ In other words, the Commission was not able to fairly consider all possible alternatives to the libertarianism advocated by corporate actors. The “discursive bounds” of the mid-century policy debate on media reform were the ends of the political spectrum: *laissez-faire* media markets in one end and government regulation in the other. Although this framework placed libertarianism at one end of the spectrum, the Commission’s background assumptions about free speech created a biased field of debate, tilted toward *laissez faire*. Put differently, the Hutchins Commission’s inquiry into media reform, which would define the state of the art for the next decades, gave libertarianism the higher ground.

This higher ground was, in the first place, moral. Although many commissioners explicitly contributed to developing a “positive” conception of free speech, any debate shaped by the opposition between “*laissez faire*” and “regulation” puts the idea of “freedom” on one side of the debate—in the

¹¹¹ The Commission on Freedom of the Press, *A Free and Responsible Press*, 4–5.

¹¹² Victor Pickard, “Social Democracy or Corporate Libertarianism? Conflicting Media Policy Narratives in the Wake of Market Failure,” *Communication Theory* 23, no. 4 (2013): 336–55.

¹¹³ Pickard, *America’s Battle*, 165.

“laissez faire” extreme of the spectrum.¹¹⁴ The resulting intuition is well-known: the closer a political position comes to the “regulation” side of the spectrum, the greater the justificatory burden must be.¹¹⁵ And as we move away from “freedom” in a narrow sense, our reasons to regulate instead of leaving things “as they are” must be more or weightier. This process was strengthened by a historical higher ground: libertarianism enjoyed the comparative advantage of being the “traditional” or historically accepted position by Western canonical defenders of freedom of expression. As a commercial broadcaster put it, the conflict was between government control or competition among private actors: “The second theory is native to the United States. The first is imported,” they concluded.¹¹⁶ This meant that the libertarian or laissez-faire end of spectrum benefited from a greater presumption of feasibility and reasonability, while depriving the opposite view, government regulation, of these two attributes.

Then, mid-century US media reformers accepted a skewed field of policy debate, inherently biased toward media corporate interests and against state interference. A framework that undercut the chances of media reform. But we already know that many of these media reformers had themselves contributed to this libertarian-friendly framework. This is especially clear if we focus on the “historical” basis of the argumentative higher ground mentioned just above. The mid-century, biased field of debate is partially the result of how the earlier reflection on free speech had construed the “traditional” view on the matter—expressive liberties have always been essentially libertarian claims against government interference.

This was done, as I have shown earlier, in two different ways. Initially, progressive-era advocates of free speech praised the past tradition of negative freedom (§1.3.1). It was a way of exonerating themselves in the late 1910s: their cause against Wilsonian repression was simply, and for this reason all the more outrageous, another episode in the centuries-old struggle for expressive freedom against government despotism. In doing this, they arguably distorted the ideas of past advocates of expressive liberties, exaggerating their hostility to public power or their unqualified conviction about the spontaneous power of truth (§1.3.2). Later, as Wilsonian authoritarianism faded away and the risks of industrial capitalism spread through the modern markets of mass communication, dangers to freedom of expression other than state interference came to the forefront (§2.2.3). Now, justifying their agenda did not involve praising past canonical thinkers, but

¹¹⁴ On “positive” free speech, see Chafee and Hocking views in the section above (§2.3.1). The Commission’s report reflected these conceptual developments: “Freedom of the press means freedom from and freedom for,” *A Free and Responsible Press*, 18, see also 107–134.

¹¹⁵ On this point, see the criticism of “status quo neutrality” in Sunstein, *The Partial Constitution*, 68–92. I examine this argument in the context of neorepublican political philosophy later: as supporting the republican conception of freedom (§4.3), but also as evidencing a neorepublican quandary when dealing with structural domination (§5.4.3; §6.2.2).

¹¹⁶ Quoted in McChesney, *Telecommunications, Mass Media, and Democracy*, 114.

blaming them for their lack of historical sense and political-economic awareness (§2.3.1).

The 1940s added fuel to the fire of this already ambivalent free speech diagnosis, oscillating between distrusting the recent and age-old repressive tendencies of too much public power and praising the transformative power of the modern state. On the one hand, Cold War politics rejuvenated the free speech libertarian tradition in two conflicting ways. Firstly, the rhetorical blend of civil liberties and free markets made free speech libertarianism a suitable ideological banner against the Eastern Bloc (§1.3.3; §2.1.2). Yet, secondly—and rather ironically—as the Second Red Scare surged in the late 1940s, free speech libertarianism still had a part to play in shaping a protective First Amendment that would become crucial in the litigation strategies of prosecuted communists within the US. On the other hand, the economic context of the second postwar period (i.e., capital-labor compromise, industrial policy, military Keynesianism, strong financial regulation, etc.) enhanced the policy toolkit of the state, enlarging even more its earlier administrative capacity, including media and telecom infrastructure regulation.

This was the constellation of opportunities and constraints that shaped the American twentieth-century reflection on media reform, which ended up profiling mainstream views about the legitimate role of state power in the guarantee of expressive freedoms. It was a positive role, but ultimately subsidiary to the already developed commodification of media and communication infrastructures (i.e., to their distribution through the market, subject to dynamics of profit-maximization and private accumulation).

It was positive because, to an exceptional degree if compared with earlier or later periods, state power charted how media markets should look like. This understanding of government was in fact reflected by the Hutchins Commission.¹¹⁷ In this and the next decades, the state deployed antitrust legislation and regulation policies that opened up spaces for content not necessarily focused on the maximization of profits, such as educative, and cultural programming, even giving time to dissenting voices without direct access to media. “America in the 1940s,” concludes the important study by Victor Pickard, “was closer to following a social democratic trajectory in media policy than is generally acknowledged.”¹¹⁸

However, the positive role of the state in the public sphere was subsidiary to previously existing dynamics of commodification of the media. The aforementioned set of constraints and opportunities left alternatives to purely commercial ownership of media out of reach. This was the puzzle, as Chafee put it, of “whether the giants should be slain or persuaded to be good.”¹¹⁹ The Hutchins Commission clearly rejected the first option and, rather ingenuously given the entrenched *laissez-faire* ideals that prevailed in the corporate and

¹¹⁷ *A Free and Responsible Press*, 81–88.

¹¹⁸ Pickard, *America’s Battle*, 198.

¹¹⁹ Internal comments on chapter IV of the Commission’s report, quoted in Pickard, *America’s Battle*, 164.

professional opposition, “hope[d] that the press itself will recognize its public responsibility and obviate governmental action to enforce it.” In short: “We do not wish to break up these agencies.”¹²⁰ Thus, private, public or mixed ownership of public-service broadcasting regulated by public law was cornered in one of the extremes of the policy debate. (For comparison, with all its flaws and with different degrees of centralization, this was not only the well-known English model of the BBC; in other Western European countries, other forms of ownership than purely private, for-profit commercial media were devised to regenerate the postwar communication markets and expressive freedom, victims during the interwar period both to oligopolist media conglomerates and authoritarian statist trends—which more often than not had reinforced each other.)¹²¹ But in the United States, the deeper questioning of media ownership, which had been nevertheless present in the radical discourse of social movements, was quietened by the established mid-century framing of free speech as a traditionally libertarian right, guaranteed by interacting private actors against the threat of government censorship.¹²²

Thomas Emerson, a New Deal lawyer and later one of the most prominent First Amendment and civil liberties scholars since the 1950s, revealed most clearly the situation in which many critics of pure free speech libertarianism (himself included) found themselves. Although *laissez-faire* is presumed to be an antiquated and normatively flawed standard for the public sphere of today, these critics still concede some value to it, contrary to what they did in economics or other spheres of government intervention. While they think free speech *laissez-faire* insufficient, they also think, reproducing what I have called the free speech libertarian framework, that negative freedom is the conceptually or historically significant understanding of expressive rights. This is why, for Emerson:

The situation is indeed paradoxical. Freedom of expression is by its very nature *laissez-faire*; it implies absence of government control. Yet the conditions under which freedom of expression can successfully operate in modern society require more and more governmental regulation.¹²³

¹²⁰ *A Free and Responsible Press*, 91–92.

¹²¹ On public-service broadcasting models in Europe, see Humphreys, *Mass Media and Media Policy*, chap. 4. See also the study on the competing ideas of freedom in Western German radio policy after the Second World War by Mandy Tröger, “U.S. Media Policy Discussions in Postwar Germany, 1945–1947,” *International Journal of Communication* 7 (2013): 1990–2009. On the interwar synergies between European media conglomerates and authoritarianism, see the case of Weimar Germany, Ross, *Media and the Making of Modern Germany*, 175–78, 180, 241. In the same vein, for the case of the most important corporations in the British and US newspaper industry, see Kathryn S. Olmsted, *The Newspaper Axis: Six Press Barons Who Enabled Hitler* (Yale University Press, 2022), esp. Introduction.

¹²² Pickard, *America’s Battle*, chaps. 6 and 7.

¹²³ Thomas I Emerson, “Toward a General Theory of the First Amendment,” *Yale Law Journal* 72, no. 5 (1963): 902.

That this "paradox" was the product of a particular historical reflection of Chafeean overtones he made clear in a later text. "Perhaps the major discrepancy between the system of freedom of expression visualized by the colonists," Emerson suggested, "is the nature of the marketplace in which political expression takes place." Today's "marketplace is dominated by the mass media (...) many would-be speakers do not have access to the market, and there is a serious lack of diversity." In short, he added, this is "hardly a pure Adam Smith type of market, as the colonist undoubtedly expected it could be."¹²⁴

In almost every other sphere of society this left-of-center epoch-making awareness of the "discrepancy" between colonial eighteenth-century markets and industrial capitalism had led to the affirmation of public power in the constitution and guarantee of liberty—by balancing, constraining, conditioning and even equalizing the functioning and outcomes of markets. Despite accepting all this, including the specificities of these changes in communication markets, Emerson thought expressive liberties deserved a different treatment:

The solution is clearly not government regulation of the mass communications industry in the same way government attempts to regulate the nuclear power industry or other business enterprises. (...) The system of freedom of expression (...) must remain essentially *laissez faire*. It may be the last vestige of *laissez faire*, but the one thing it cannot be, and still remain a free system, is government controlled.¹²⁵

To conclude, due to their own framing of the debate, media reformers set themselves a self-defeating goal or, at least, strongly undercut the possibilities of what they wanted to achieve: namely, a robust guarantee of free speech in a modern system of mass communication. In this system, the risk of domination did not come anymore only from state overreach, but also, due to the rising industrial private threats to expressive freedom, from a lack of adequate state control. However, the free speech libertarian framework these media reformers had contributed to construe put the greatest tool of socioeconomic transformation developed during the last decades—the modern administrative state—practically out of reach: free speech, "by definition, is immune from government control."¹²⁶ And all this, despite their then mainstream emphasis on the need for more and deeper government action in the guarantee of rights and freedom; despite the policy consensus and historical lessons that had put nineteenth-century *laissez-faire* economics in the ash heap of history (at least for the time being). The free speech policy debate, as I have shown, was different. In it, *laissez-faire* intuitions, purely

¹²⁴ Thomas I. Emerson, "Colonial Intentions and Current Realities of the First Amendment," *University of Pennsylvania Law Review* 125, no. 4 (1977): 751.

¹²⁵ *Ibid.*, 751. Same argument at 756.

¹²⁶ *Ibid.*, 756.

negative ideals of liberty, and absolute rejection of government power still had a role to play. Several decades after the demise of laissez-faire economics, laissez-faire in matters of free speech was still alive and shaping reasonability and background assumptions in policy debates. As I will discuss now, this was not only a way of honoring the “tradition” or emphasizing spiritual continuity with the past in the face of vast material changes. Upholding the validity of laissez-faire ideals in free speech debates was also a way of respecting the then established libertarian interpretation of the First Amendment to the Constitution.

2.3.3. Constitutional law: free speech is “separate and apart”

The earlier sections wanted to recover a rather lost legacy within American free speech libertarianism. Particularly, how its interwar forefathers thought that freedom in a system of modern communications required something else than the absence of interference, especially when it comes to the political economy of industrial mass media. Yet I showed that if this legacy is partly lost or forgotten today—when free speech libertarianism is associated with a consistent rejection of state power in all domains of society—it is partly because of the ambivalent or “paradoxical” attitude that these very free speech libertarians developed towards the state.

I previously mentioned an earlier example of this ambivalence that rejected purely negative ideals of liberty in most domains of society, while keeping these ideals alive in the reflection on expressive liberties: the contrast between Holmes’ dissent in *Lochner* (1905), and *Abrams* (1919). The first, a powerful criticism of the common, conservative late nineteenth-century practice of reading laissez-faire economics into the Constitution; and, against this, approving of public legislation in the regulation of labor relationships. The second, a no-less formidable plea for the “free trade in ideas” as a key element to understand the First Amendment as a protective trump against government power. And my point is that, against the apparently conflicting rationale that these two dissents might seem to endorse in the eyes of contemporary readers, this ambivalence toward state power was perfectly cogent for progressive- and New Deal-era advocates of free speech. As a representative mid-century legal commentator, Chafee explained this compatibility:

So it is not really surprising that Justice Holmes dissented in both *Lochner v. New York* and *Abrams v. United States*. Liberty for the discussion which may lead to the formation of a dominant opinion belongs side by side with the liberty of lawmakers to transform this dominant opinion into the statute that is its natural outcome.¹²⁷

This was the essential element of what Chafee called “the critical judicial spirit” that, on the one hand “gives the legislature a wide scope in limiting the

¹²⁷ Chafee, *Free Speech in the United States*, 361.

privileges of property owners” while, on the other, “also tend to allow speakers and writers a wide scope in arguing against those privileges.”¹²⁸

The compatibility of free speech *laissez faire* with a rejection of *laissez faire* as valid ideal in the economic domain was perfectly reflected in the “critical judicial spirit” that Chafee praised. He was referring to the developing judicial practice in the Supreme Court that Edward White has later called the project of “bifurcated review.” This was the “effort to fashion a double standard of constitutional review in which judges would defer to legislative regulation of the economy but scrutinize legislative regulation of noneconomic rights, including the right to free speech.”¹²⁹

Bifurcated review involved, in other words, the separation of civic-political rights from economic rights in constitutional adjudication. Politically, it is clear how this separation was very valuable to the left-of-center reformist agenda represented first by progressives and afterwards by new dealers: it created the necessary degree of judicial scrutiny vis-à-vis government power. On the one hand, it allowed for greater judicial deference to government and legislative interventions in the economy (which was instrumental to give constitutional coverage to the interwar and postwar regulation of capitalist markets, thus permitting public policies that fostered economic equality, the regulation of commerce or redistribution, and, by extension, political equality). On the other hand, it granted a strict protection of civic-political rights against government interference (which would serve, in later years, to guarantee more inclusive citizenship rights against discriminatory state-level legislation, or to limit the effects of McCarthyism from the Supreme Court).¹³⁰ Put differently, bifurcated review turned upside down the strategies of the conservative nineteenth-century Supreme Courts. It granted a presumption of constitutionality for economic policy, but a presumption of unconstitutionality for any government interference in the realm of speech and the political process—a two-tier approach to constitutional review that was actively promoted by Chafee and his judicial and First Amendment theories.¹³¹

However, my point here is that, notwithstanding political convenience, this practice of judicial restraint with economic policy and strong judicial guardianship of civil rights did not develop from a constitutional model connecting civic-political liberties with their economic setting—say, in the manner of the many meanings and traditions under the notion of “material

¹²⁸ Ibid., 361.

¹²⁹ G. Edward White, “The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America,” *Michigan Law Review* 95, no. 2 (1996): 309.

¹³⁰ White, *Law in American History*, vol. III: 413–425. On bifurcated review in First Amendment cases, see Ibid., vol. III: chap. 11.

¹³¹ On Chafee’s supportive views of a two-tier practice of constitutional adjudication and the “preferred position” of speech rights, see Smith, *Zechariah Chafee, Jr.*, 202–11. On Chafee inheriting and spreading the view from sociological jurisprudence that economic rights protect “individual interests” (thus regulable by government) while speech rights protect a “social interest” (thus absolutely protected from government by courts), see Graber, *Transforming Free Speech*, 154–59.

constitutionalism.”¹³² It was exactly the opposite. The acceptance of economic reforms in courts was the consequence, not only of the termination of past judicial activism, but also of the conceptual separation in constitutional theory of “formal” or “procedural” freedoms from their “material” or “substantive” content (i.e., the public arrangement and distribution of resources so that “formal” freedoms are equally and substantively guaranteed).¹³³ This was the shape that the ideas of the progressive free speech libertarians of the 1910s and 1920s took when they became judicialized in mid-century litigation strategies and Supreme Court arguments.¹³⁴ In short, juridically speaking, the compatibility of free speech libertarianism with economic interventionism was not predicated on the awareness that the former may be a strategy to settle the preconditions for the flourishing of the latter—as the progressive reflection outside constitutional theory had arguably suggested (see §2.2.3). If legislative activism in the “material” world was considered compatible with legislative constraints in the “formal” domain, it was only insofar as these two areas of guarantee of rights were completely detached from each other.

A later Supreme Court justice, William Douglas, captured this position very well in a 1952 case—acceptable interventionism in the economy but maximization of non-interference in the “marketplace of ideas.” He famously argued that:

In matters relating to business, finance, industrial and labor conditions, health and the public welfare, great leeway is now granted the legislature, for there is no guarantee in the Constitution that the status quo will be preserved against regulation by government.¹³⁵

And then he added a proviso with which we have become already familiar in the historical and policy debates examined in the two last subsections:

Freedom of speech, however, rests on a different constitutional basis. The First Amendment says that freedom of speech, freedom of press, and the free exercise of religion shall not be abridged. That is a negation of power on the part of each and every department of government. Free speech, free press, free exercise of religion are placed separate and apart; they are above and beyond the police power; they are not subject to regulation in the manner of factories, slums, apartment houses, production of oil, and the like.¹³⁶

¹³² Marco Goldoni and Michael A. Wilkinson, “The Material Constitution: The Material Constitution,” *The Modern Law Review* 81, no. 4 (2018): 567–97.

¹³³ Graber, *Transforming Free Speech*, chaps. 5 and 6; Jeremy K. Kessler and David E. Pozen, “The Search for an Egalitarian First Amendment,” *Columbia Law Review* 118, no. 7 (2018): 1967–68.

¹³⁴ On the histories behind this change, see Weinrib, *The Taming*, esp. Ch. 8 and Epilogue.

¹³⁵ Beauharnais, 286.

¹³⁶ *Ibid.*, 286.

Doing otherwise (i.e., allowing for greater leeway in the public regulation of expressive liberties as was happening in the economy) was for Douglas “an ominous and alarming trend.” It would mean, he added, the disappearance of the “free trade in ideas which the Framers of the Constitution visualized.”¹³⁷

In what follows, I want to make four observations about the consequences of bifurcated review for freedom of expression.

1. *Free speech as a merely formal right.* The first refers to how freedom of speech became typically conceptualized in US constitutional law and legal philosophy for the most part of the twentieth century—as a negative right essentially antithetical to state interference and chiefly enforced by courts. The legal-conceptual distinction between “procedural” rights (or “civic-political,” or “formal”) and “substantive” rights (or “economic,” or “material”) obscured the empirical relationship between freedom of speech and political economy that had much been clearer for progressive-era free speech libertarians.¹³⁸ The judicial split between procedural constitutional issues and substantive policy removed civic-political rights from its material and social preconditions—a separation of the political and economic realms that parallels broader developments in the modern social sciences.¹³⁹ As Mark Graber has put it:

Although this division enabled them [progressive-era free speech libertarians and their successors] to increase judicial protection for minority opinions, the modern constitutional defense of free speech became oblivious to the manifold relationships between political expression and private property. Libertarians soon assumed that politics and economics had always been two autonomous realms within constitutional discourse. Alternative understandings of expression rights were no longer rejected; they were lost.¹⁴⁰

The practice of bifurcated review—and the Chafeean judicial and First Amendment theories behind it—nurtured the modern, politically charged but disguised as “neutral,” and anti-republican belief that the political procedure and its preconditions are detached domains of the social reality (§III). They also advanced, as I will explain below, the associated policy view that the successful robust guarantee of “procedural” liberties is independent of legislation securing the “substantive” social and political-economic

¹³⁷ Ibid., 285.

¹³⁸ Graber, *Transforming Free Speech*, 164, 219, 222. Though with a different focus, this thesis also structure the major argument in Weinrib, *The Taming*. My own reading of some primary sources can be found in §2.2.

¹³⁹ For a critical overview of this separation, see Ellen Meiksins Wood, “The separation of the ‘economic’ and the ‘political’ in capitalism”, *Democracy against Capitalism*, 19–48. For the account of this separation in the birth economics as a discipline, see Casassas, *La ciudad en llamas*, 195–206; Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2001), chap. 10 (though with a more critical view of the role of Adam Smith). See also the related intellectual history in Whyte, *The Morals of the Market*, chap. 2.

¹⁴⁰ Graber, *Transforming Free Speech*, 222.

background, the institutional preconditions in which those liberties are to flourish.

2. *State interference as the primary threat to free speech.* The second reflection that I want to make, then, concerns the practical guarantee of free speech in the United States since the late 1930s. The practices of bifurcated review encouraged a free speech constitutionalism in which state interference is the only or main threat to freedom of speech—at least the only threat that courts should or can care about. By understanding free speech from a purely negative and procedural point of view (i.e., free speech as a formal rule of democracy), courts could not demand the executive or the legislative to deal with free speech deficits or any other failure of the democratic process that could not be directly ascribable to state interference. It was mainly government interference with free speech that was subject to judicial review, not so much coercive interference by private actors. Comparably, the lack of adequate government action in the protection of free speech—the failure of government on its freedom-promoting duties, so to speak—is not of much judicial concern.¹⁴¹

As Laura Weinrib has argued, the interpretive legacy associated to the *Abrams* dissent and the early free speech libertarians contributed, in the subsequent decades, to a “court-centered constitutionalism” on civil liberties.¹⁴² This, far from promoting the interwar and postwar progressive agenda of active government transformation of society, ended up undermining it, for it established a libertarian core of absolute protection from government interference through the First Amendment. This argument was already made by one of the earliest progressive critics of the *Abrams* dissent who, worried about its largely negative argument for freedom, considered that “it [was] much more to the point to insist upon the responsibility of legislators than their lack of power.”¹⁴³

3. *Substantive free speech relies on democratic majorities.* My third observation also concerns the practical provision of free speech in the United States. For good or ill, due to the practice bifurcated review the material or substantive preconditions of democracy and freedom of expression were to be ensured by democratic majorities through economic legislation and policy,

¹⁴¹ Genevieve Lakier has construed an alternative story through some First Amendment cases in the New Deal courts, from which she recovers insightful arguments that suggest a “positive” conception of free speech (i.e., aware of relationships of material inequality, limiting the power of private actors to defend the expressive rights of the weak, mandating the protection of open public spaces for speakers, etc.). However, she concedes that in no “decision did the Court hold that the legislature was constitutionally *required* to ensure that powerful speakers did not use their economic muscle to shut others up, even if this is the conclusion that the logic of the opinion might suggest,” Lakier, “The First Amendment’s Real *Lochner* Problem,” 1310. Original italics.

¹⁴² Laura Weinrib, “Power and Premises: The Contested Meanings of the *Abrams* Dissent,” *Seton Hall Law Review* 51, no. 1 (2020): 61–103. For a parallel story, see Graber, *Transforming Free Speech*, 180–184.

¹⁴³ Edward S. Corwin, “Freedom of Speech and Press under the First Amendment: A Resume,” *Yale Law Review* 30, no. 48 (1920): 55, quoted by Weinrib, “Power and Premises,” 91.

and not by Supreme Court justices through the enforcement principles enshrined in the Bill of Rights.

“For good,” because bifurcated review partly put the substantive guarantee of free speech within the reach of elected officials—this is the judicial expression of the New Deal constitutionalism in which “economic rights” were subject to “democratic deliberation.”¹⁴⁴ Consider the unequal distribution of speech opportunities due to oligopolistic media markets that, as examined earlier, was so crucial for establishment media reformers up to the first half of the twentieth century (see e.g., §2.2.3, §2.3.1 and §2.3.2). Since, according to bifurcated review, the regulation of communication infrastructure and markets remains within the scope of government power over commerce, some speech inequalities created by media and telecom oligopolies could be solved by, say, antitrust law, provided there is a legislature willing to pass such policies—as there was in the US for most of the first half of the twentieth century. In this sense, it is interesting to see how mid-century free speech libertarians that aimed at a fair guarantee of expressive liberties (e.g., supporting media regulation), attempted to frame such debates as policy issues on commercial regulation; that is, as distinct and conceptually separated issues from free speech proper.¹⁴⁵

“For ill,” because, given that the judiciary could not question media oligopolies in terms of a transgression or threat to the constitutional right to free speech, in the absence of suitable democratic majorities media ownership would remain unchallenged (just what it started to happen in the US in the 1970s as the New Deal consensus on state intervention waned).¹⁴⁶ In other words, bifurcated review put all the eggs for reforming the political economy of free speech in one, volatile, basket—that of democratic majorities and national consensuses on economic policy.

4. *Free speech as a rationale for general libertarianism.* Lastly, the fourth remark I want to make has to do with the long-term legacy of free speech libertarianism in a context of bifurcated review and the current symbiosis between free speech libertarianism and economically libertarian constitutional and political agendas. As I have shown, the strategy of differential or bifurcated constitutional adjudication involved, on the one hand, a strict scrutiny in cases directly concerning civil liberties constitutive of the democratic process and, on the other, a wider judicial latitude in cases about economic policy. This strategy of constitutional review, moreover, made compatible, for most of the twentieth century, two seemingly opposite regulative patterns: it mixed free speech libertarianism with economic interventionism.

This was the epoch-making progressive arrangement, foundational to modern American liberalism, that the prominent economist Ronald Coase was attempting to challenge still in the early 1970s. He wanted to question that

¹⁴⁴ Weinrib, *The Taming*, 313.

¹⁴⁵ See the discussion of Thomas Emerson and Alexander Meiklejohn in Graber, *Transforming Free Speech*, 169–78, 201–4.

¹⁴⁶ Kessler and Pozen, “The Search for an Egalitarian First Amendment,” 1968–70.

“general view” in which “in the market for goods, government regulation is desirable whereas, in the market for ideas, government regulation is undesirable and should be strictly limited.”¹⁴⁷ Aaron Director—jointly with Coase, a key member in the consolidation of the Chicago school of economics—had raised the same issue a decade earlier. Director, a decidedly right-wing libertarian economist, protested that “free speech” was “the only area where laissez faire is still respectable.”¹⁴⁸ As the New Deal consensus declined in the second half of the twentieth century, those who wanted to challenge the administrative state and the active role of public power in the economy (or in society in general), had a wistful eye on free speech jurisprudence. A laissez-faire worldview of the public sphere, rooted in the core of the First Amendment—made possible by a libertarian interpretation of the turn-of-the-century case law studied earlier, consolidated by the mid-century assumptions of media reformers and the practice of bifurcated review—could be used to argue for a consistently libertarian constitutionalism, expanding absolute protection from government interference to other areas than those strictly related with expressive rights, especially the economy. Now, to guarantee free speech one had to ensure free markets as well—by “free” meaning as isolated from government power as possible. This is the political wisdom enclosed in Friedman’s warning, very fitting in the late 1980s but negligible four decades earlier, that “Interferences with markets constitute and produce interferences with free speech.”¹⁴⁹ Which led to the correlate question: “can a free market in ideas long be maintained if a free market in goods and services is destroyed?”¹⁵⁰

Where friends of media reform such as Zechariah Chafee or Thomas Emerson saw a “paradox” that significantly restricted the possibilities of government interference (§2.3.2), late-twentieth century friends of dismantling the postwar regulatory state—including any small chances of media reform—saw a political contradiction that could be exploited: we should have stayed with purely negative liberty all along. This was, to illustrate, the intelligent case made by one of the most read and cited American legal scholars of the last decades, Richard Epstein, who put the finger on the issue by observing that “Emerson, very much a product of the New Deal, did not perceive any serious tension between his authoritarian politics [i.e., market regulation] and his libertarian views on speech.”¹⁵¹ Epstein’s claim (or Coase’s, or Director’s) is perfectly cogent: Why should we politically reject

¹⁴⁷ Ronald H Coase, “The Market for Goods and the Market for Ideas,” *American Economic Review* 64, no. 2 (1974): 384.

¹⁴⁸ Director, “The Parity of the Economic Market Place,” 5. For Coase and Director relationship with early neoliberals, who also found in the flow of ideas and information a theoretical stronghold from which to deploy a broader program for the maximization of negative liberty, see §2.1.2.

¹⁴⁹ Milton Friedman, “Free Markets and Free Speech,” *Harvard Journal of Law Public Policy* 10, no. 1 (1987): 3.

¹⁵⁰ Friedman, *Capitalism and Freedom*, 114.

¹⁵¹ Richard Epstein, “Property, Speech, and the Politics of Distrust,” *The University of Chicago Law Review* 59, no. 1 (1992): 61.

economic laissez faire while accepting that free speech laissez faire is promoted by the constitution? Is not the maximization of non-interference enshrined in the First Amendment appropriate for all the Bill of Rights, or even a negative protection against government in general?

This is what has just happened in the last four decades of free speech jurisprudence in the United States. It is what contemporary commentators call the “Lochnerization” of the First Amendment (from the deregulatory legacy associated with the majority vote in the *Lochner* case, of which I have only discussed above Holmes’ dissent). Free speech Lochnerism refers to the recent trend by which diverse private interests are legally construed in Courts as “speech” and are thus subject to almost absolute constitutional protection against government interference—e.g., money in political campaigns, intellectual property, contract law, corporate anti-union policies, discriminatory norms by religious healthcare providers...¹⁵² It is, in other words, a preference for private ordering instead of public rules; a preference, in turn, legally argued for by using constitutional theory to assimilate other forms of public regulation to illegitimate acts of government censorship of expressive and religious liberties. In this recent transformation, the laissez-faire aspirations that have been read in the metaphoric “marketplace of ideas” have been translated into the (de)regulation of non-metaphoric markets of goods and several other areas of society. The wishes of Coase and Director, one may say, eventually became true. Since laissez faire was “still respectable” in the area of free speech, why not make it respectable again elsewhere?

2.4. CONCLUSION: LAISSEZ-FAIRE KEPT ALIVE BY FREE SPEECH

Even if Holmes wanted to convey a wholly different message, the dominant intellectual trends of the twentieth century fostered the libertarian reading of the metaphor. To challenge this reading, partly retrieving Holmes’ original intent—as “regulatory” readings attempted to do, regaining the marketplace of ideas for a non-libertarian free speech agenda—is commendable, but it was to row against the tide (§2.1.1). In economics, market models of perfect competition encouraged the idea that economic competition and market freedom are something that happens in the absence of political intervention. Cold war politics and historiography, on the other hand, saw negative liberty as a civilizational beacon against communism, and intellectual and expressive

¹⁵² For a critical review of this process, see e.g., Amy Kapczynski, “The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy,” *Columbia Law Review* 118, no. 7 (2018): 179–206; Kessler and Pozen, “The Search for an Egalitarian First Amendment,” esp. 1959–1964; Lakier, “The First Amendment’s Real Lochner Problem,” 1248–1270. On the specific case of religious freedom, see Elizabeth Sepper, “Free Exercise Lochnersim,” *Columbia Law Review* 115, no. 6 (2015): 1453–1520. For a wider view of the equalization of money and speech, see Graber, *Transforming Free Speech*, 206–16. For a more political account, McChesney, *Rich Media, Poor Democracy*, chap. 6.

freedoms were particularly valued in that fight. Freedom of expression, especially when outlined according to Holmes' market metaphor, was the perfect fuel for the contemporary libertarian mind, grouping together capitalism and democracy, private property, and intellectual freedom (§2.1.2).

However, such contemporary libertarianism, despite claiming continuity with turn-of-the-century progressive free speech libertarians through Holmes' dissent in *Abrams* and the epistemic justification of freedom, is a rather different kind of libertarianism. I have shown that throughout the twentieth century reinterpretation and appropriation of progressive-era arguments for free speech, a significant part of their richness was lost. Particularly, the earlier libertarian awareness of the political economy of the public sphere—on how the free flow of information, rational debate, expressive liberties or the chances of truth winning out error are all embedded in a socioeconomic and institutional environment of power relationships.

This awareness shaped the progressive-era "libertarian" reflection on free speech in rather "anti-libertarian" ways (at least in today's conventional understanding). In the first half of the twentieth century, advocates of free speech libertarianism also supported an important degree of economic interventionism. Not only did they insist that the "trade in ideas" promoted by expressive rights must be "fair" (§2.2.1). More importantly, they insisted that fairness in an industrialized civilization molded by big private powers could not be spontaneous (§2.2.2). Hence, in line with the regulatory view of the state developed in much progressive and New Deal thought, early free speech libertarians stressed the need for affirmative government policies and regulations in the domain of expressive freedom due to the industrial conditions of mass communication (§2.2.3).

I have explained the loss of these insights throughout the twentieth century as resulting from a process of separation of politics and economics in the analysis of expressive liberties, or put differently, as resulting from the detachment of free speech from its political economy. I offered three pictures of this development.

The first concerns a new, modernist, critical attitude toward the free speech tradition (§2.3.1). Integrating and influencing the interwar sociological critique of communication, progressive-era free speech libertarians started to question the currency of canonical reflections on the public sphere. In the face of modern mass communications and the increasing industrial threats to expressive liberty, the classical doctrine of free expression was not enough. The likes of Milton, Jefferson, or Mill had been naively optimistic about the power of truth and lacked a positive view of the state necessary to deal with the private threats to liberty posed by industrial civilization. Their supposedly laissez-faire view of communication was important against state despotism, but it was outdated.

Then, for many free speech libertarians up to the Second World War, the "traditional" view of free speech laissez-faire was made obsolete by mass communications. However, mid-century policy debates on media reform prove that free speech laissez-faire, no matter how archaic, was still alive

(§2.3.2). Compared to other policy debates, *laissez faire* was still regarded as a reasonable and feasible regulatory ideal. This strongly skewed the mid-century American debate on media policy against reform. Even to moderate reformers, state interference (either in the form of public ownership, public broadcasting, or structural intervention of markets) was essentially considered as antithetical to the guarantee and goals of free speech.

One of the reasons behind the persistence of a *laissez faire* worldview in media reform was the constitutional weight of a purely negative conception of freedom in the major twentieth-century interpretation of the First Amendment (which is not unrelated to the issue of tradition, since it is ultimately a legal institution dating from the eighteenth century). Thus, one of the most influential processes that illustrate the separation of politics and economics in free speech is the practice of bifurcated constitutional review (§2.3.3). This was a two-tier strategy of constitutional adjudication in which the Supreme Court performed a stricter scrutiny of state interferences in domains related to civic-political liberties such as expressive freedom, but giving more leeway to state interferences with other domains, especially the economy. This arrangement had interesting promises for the guarantee of free speech under industrial capitalism: bifurcated review, for example, was instrumental to give constitutional coverage to the twentieth century transformative agenda of American liberalism. It struck the right balance of judicial activism: a court-centered constitutionalism for the protection and extension of civil rights, and broad judicial authorization of a growing administrative state, with an ample range of economic and social reform led by legislative majorities.

However, the legacy of bifurcated review also had important limitations. From a conceptual point of view, it nurtured the idea that expressive liberties are formal, procedural, and negative rights, with the consequent practical belief: that the only or main variable in the guarantee of expressive freedom is the judicial surveillance against government interference. In other words, bifurcated review contributed to detaching expressive liberties from their political-economic and social preconditions, obscuring the empirical relationship between enjoyment of free speech constitutional rights and the world outside high constitutional theory. In practice, it created an unstable foundation for the robust guarantee of expressive freedom because fairness in the exercise of expressive rights was not seen as a matter of civil constitutional rights, but as matter of economic reform—thus, hinging on the unreliable existence of democratic majorities committed and powerful enough to transform the economic and infrastructural bases of communication. Lastly, from a political point of view, bifurcated review kept *laissez faire* alive within the First Amendment, precisely in an age that, inheriting and developing the progressive-era and New Deal diagnosis of industrial capitalism, had excluded *laissez faire* from mainstream policy discussions (except in media reform). As the policy consensus of that age declined in the second half of the twentieth century, the First Amendment and its well-preserved libertarian core—now disconnected from the early-twentieth-century political-economic awareness

that contributed to its inception—would turn into a powerful tool to litigate against different forms of state interferences.

CHAPTER 3

Commonsense political sociology

Rawlsian liberalism, free speech and private power

Public resources have not been devoted to maintaining the institutions required for the fair value of political liberty. Essentially the fault lies in the fact that the democratic political process is at best regulated rivalry; it does not even in theory have the desirable properties that price theory ascribes to truly competitive markets. Moreover, the effects of injustices in the political system are much more grave and long lasting than market imperfections. Political power rapidly accumulates and becomes unequal; and making use of the coercive apparatus of the state and its law, those who gain the advantage can often assure themselves of a favored position.

John Rawls¹

This chapter examines John Rawls' view of free speech and the public sphere. Rawls is particularly interesting for this thesis because he was one of the most prominent American political philosophers of his generation. His influence and context bear witness of the lasting impact of the free speech libertarian framework in contemporary political and social theory, but also provide clues for developing a powerful freedom-centered criticism of it.

As we will see, Rawls developed part of his work by glossing free speech scholarship and jurisprudence (§3.1). Rawls' review of First Amendment case law shows the ambivalent legacy of free speech libertarianism I developed in Chapter 2: a legacy marked by how the free speech "tradition" and its libertarian insights were consolidated in interwar and mid-century Supreme Court jurisprudence. Starting by an appraisal of one of the landmark free speech cases of the 1960s that compiled much of the free speech libertarianism reviewed in earlier chapters, Rawls concludes with a severe criticism of the Supreme Court in the late 1970s. He denounces a decision that declared campaign expenditures regulations unconstitutional in the name of free speech—in the terms of the last chapter, one of those cases in which the laissez-faire core of First Amendment jurisprudence served to unleash a wider

¹ John Rawls, *A Theory of Justice*, 199.

libertarian agenda against the fair and robust guarantee of freedom and the state interferences this involves.

I argue that Rawls’ disenchantment with the Supreme Court’s free speech libertarianism of the late 1970s is rooted in several intuitions that structure his theory of justice (§3.2). These intuitions include concerns about what I have called the “political economy” of free speech, such as the risk of plutocracy or a materialist conception of political liberties demanding an egalitarian distribution of the resources necessary to use them effectively.

Some of these concerns about how non-state actors can undermine the preconditions of free speech are also present in Rawls’ account of the “stability” of political liberalism (§3.3). My argument here will be, first, that Rawls’ acceptance of “the fact of pluralism” gives us information about one of the roots of private power—comprehensive conceptions of the good that may clash with public justice. Second, I will examine how this bears on Rawls’ special account of “stability,” which is intended to give reasons for allegiance to a just regime regardless of the distribution of power within that society. Third, I discuss a consequence of this Rawlsian account of stability, namely: that citizens’ “sense of justice” (i.e., their “reasonableness”), albeit requiring certain preconditions to be nurtured, persists even if such preconditions disappear.

This leads me to conclude that Rawls’ political liberalism is very vulnerable to socio-historical change, as it tends to assume that the lessons learned from early modern and modern favorable circumstances are irreversible (§3.4). Furthermore, it does not have the tools—because it assumes it will not need them—to reproduce or preserve its preconditions whenever they are at risk. The practices required for “liberalization” (i.e., where preconditions do not obtain) or preservation of liberalism against trends that undermine it are excluded from the toolkit of the late Rawlsian theory—for they are deemed, at best, historical relics fitting earlier “comprehensive” forms of liberalism. However, I will defend that Rawls’ disenchantment with libertarian First Amendment jurisprudence suggests a more positive outlook. His emphasis on public reason and his insistence on anti-plutocratic reforms to make expressive freedom and deliberation possible point to Rawls’ willingness to confront many of the challenges posed by this chapter. His late nod to “civic republicanism” as a way of preventing liberalism from being turned into libertarianism shows the path to further discussions in Part II.

3.1. JOHN RAWLS AND THE AMBIVALENT CONSTITUTIONAL LEGACY OF THE FIRST AMENDMENT

Rawlsian political philosophy has been severely criticized for its excessive abstraction. It is not uncommon to find Rawls and his methodological contribution named as the paradigm, if not the culprit, of how contemporary normative philosophy disregards current or historical political institutions and

processes in which individuals are embedded.² This critique often takes aim at an attribute of Rawls' work that is usually extended to "liberalism" in general, in our terms: that it does not pay enough attention to "political economy," generally understood as the study of how power relationships within a society affect the distribution of resources, including those essential for the guarantee of basic civil rights.

Interestingly, Rawls' treatment of freedom of expression can be counted as one of the few exceptions to this stigma of abstraction. In one of the lectures that would later form *Political Liberalism*, Rawls provides an extensive commentary on several Supreme Court decisions to make sense of what he means by freedom of political speech, why it should enjoy "priority" as a "basic liberty," and why his view of "justice as fairness" demands the guarantee of a "fair value" of this freedom.³ Although there are important, properly Rawlsian reasons, to account for this characterization of free speech that I will discuss below (§3.2.1), first I want to examine the relationship between Rawls' own ideas and the American case law that he uses to illustrate his own conception of free speech.

This is especially important for this thesis, since Rawls' attitude toward First Amendment case law—as we will see, sometimes laudatory, sometimes very critical—provides much information about his relationship with much of the "free speech libertarian framework" studied in earlier chapters and the particular form it took in American constitutional reasoning. Examining this relationship is interesting from the point of view of intellectual history. My view is that Rawlsian political liberalism digested much of those earlier free speech disputes and background assumptions, influentially transmitting them to audiences and debates completely disconnected from US jurisprudence. But, as I will also show, examining this relationship is also profitable from a hermeneutical point of view, as it helps identify the root of what I see as problems within Rawls' view of the public sphere, especially when it comes to the role that state interference should or should not play in the guarantee of expressive freedom in pluralistic societies.

3.1.1. Free speech libertarianism redux: *New York Times v. Sullivan*

Before continuing, then, let me dive a bit more into Rawls' relationship with the free speech scholarship and politics of his time. This may come as a surprise and require some justification. Compared to the main interpretive approaches toward Rawls' work (i.e., systematic normative analyses, developments or criticisms of his arguments), it has not been until very

² Sandel, *Democracy's Discontent*, 14, 190–291; Bertomeu and Domènech, "El republicanismo y la crisis del rawlsismo metodológico"; Alasdair C. MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd ed. (University of Notre Dame Press, 2007), chap. 17.

³ Rawls, *Political Liberalism*, §VIII.10–13.

recently that a sort of “historical turn” in Rawls studies has started to flourish.⁴ That this turn is a latecomer in Rawlsian scholarship is unsurprising, given his still recent death in 2002 and the later accessibility of archival material. It is indeed odd to stress the historicity of a thinker so close to us in time, whose historical context is partially ours. But the benefits of contextualizing “contemporary” thinkers are huge. Significantly, they go beyond what is expected from the intellectual historian: a better understanding of political-philosophical arguments as such or how they are shaped by, or contribute to shape, external reality. Contextual studies of contemporary political thinkers also pave the way for detecting their background assumptions and blind spots which, due to our contextual proximity, are often similar to ours. This is, I believe, what Katrina Forrester has partially shown in her recent book on Rawls and postwar liberalism, or Samuel Moyn in his 2022 Carlyle Lectures on Cold War liberals.⁵

Closely following Forrester’s research, my view is that much of the foundational works of contemporary political philosophy from the 1970s and 1980s inherit the assumptions their authors developed in earlier stages of their formation, during their personal, professional, or academic experiences with the politics of earlier decades. For mid- and late-twentieth-century American liberal theorists interested in free speech, these are roughly the experiences I covered in Chapters 1 and 2: they grew up during the New Deal, developed their academic careers when its legal-political-economic program and reformist worldview became established after the Second World War, and their ideas matured in the following decades marked by the waning of that earlier consensus.

As a particularly telling example, consider the case of the legal philosopher Ronald Dworkin, who shared academic spaces with Rawls during the mid 1960s.⁶ Dworkin had gotten his BA in philosophy from Harvard in 1953, just at the peak of Zechariah Chafee’s academic career. By then, Chafee had been teaching at the Harvard Law School for almost 40 years, and had just been promoted to a professorship in law in 1950, allowing him the privilege to teach in other departments—which he gladly did through a course he designed on “Fundamental Human Rights” addressed to non-law undergraduates with juridical interests.⁷ Dworkin plausibly was one of those undergraduates because after finishing his philosophical training in Harvard he spent the next years studying law in Oxford. He would later return to Harvard to get his law degree in 1957. After becoming a lawyer, Dworkin clerked for none other than the half-retired Judge Learned Hand (recall, an authority in Chafee’s early

⁴ E.g., Mark Bevir and Andrius Gališanka, “John Rawls in Historical Context,” *History of Political Thought* 33, no. 4 (2012): 701–25; Andrius Gališanka, *John Rawls: The Path to a Theory of Justice* (Harvard University Press, 2019); Forrester, *In the Shadow of Justice*; Sophie Smith, Teresa M. Bejan, and Annette Zimmermann, “The Historical Rawls: Introduction,” *Modern Intellectual History* 18, no. 4 (2021): 899–905; Sophie Smith, “Historicizing Rawls,” *Modern Intellectual History* 18, no. 4 (2021): 906–39.

⁵ Forrester, *In the Shadow of Justice*; Moyn, *Liberalism against itself*.

⁶ Forrester, *In the Shadow of Justice*, 40, 59.

⁷ Smith, *Zechariah Chafee, Jr.*, 242–44.

legal arguments and one of Holmes' interlocutors on "toleration" before *Abrams*), and was offered a position to do the same for Felix Frankfurter some years later, albeit he did not accept it.⁸ Other thinkers in Rawls' networks during the mid-1960s and, just as Dworkin, fundamental in later free speech scholarship, also show this intertwinement with the intellectual environment described in previous chapters. Take the younger legal scholars Owen Fiss and Frank Michelman, both Harvard graduates from the 1960s, both clerks in this decade for Justice William Brennan.⁹

Justice Brennan was, precisely during these years, partly responsible for the expansive interpretation of civil rights in the Supreme Court. One of the landmark free speech decisions by Brennan, writing for the Court's unanimous majority, was *New York Times Co. v. Sullivan* (1964). It was a great improvement in First Amendment jurisprudence, since it gave unprecedented protection to defamatory speech directed at public officials. For our purposes, it is worth noting that, in justifying the Court's decision, Brennan's opinion compiled the already familiar epistemic justifications of free speech of Milton, Mill, Learned Hand, Holmes, and Brandeis, and even included, quoting his handbook, Chafee's dubious anti-Blackstonian account of the framers (recall §1.3.2).¹⁰ All this is what gives form and constitutional pedigree to Brennan's oft-quoted view of the case; that there was "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."¹¹ The Court's decision, including the concurring votes that demanded further protection, involved a complete mobilization of the historical and jurisprudential legacy of the free speech libertarians.

In *Political Liberalism*, Rawls used the *New York Times v. Sullivan* decision to explain the first of the "three fixed points" of "freedom of political speech"—which were, respectively: absence of seditious libel, absence of prior restraint, and absence of punishment for advocating subversive doctrines.¹² Brennan's arguments for the Court in the *Sullivan* case and his reconstruction of the interwar protective view of the First Amendment must have resonated with ideas already familiar to Rawls. In 1949, we know he learnt about arguments discussed in earlier chapters by taking a Princeton

⁸ On clerking for Hand, see Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1996), 332. On Frankfurter and other details of Dworkin life, I follow Stephen Guest and Jeffrey Jowell, "Dworkin, Ronald Myles," in *Oxford Dictionary of National Biography*, 2017. On Hand, expressive liberties, and Holmes, see my own remarks and bibliography in §1.2.1 and §1.3.1, especially Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine."

⁹ On Fiss, see his own account in Owen Fiss, "In Honor of Justice William J. Brennan, Jr.: Brennan's Faith" 26, no. 1 (1991). On Michelman, see his *Brennan and Democracy* (Princeton University Press, 1999), ix.

¹⁰ *New York Times v. Sullivan*, 269–270, 272 n13, 273–277, 279 n19.

¹¹ *Ibid.*, 270.

¹² *Political Liberalism*, 342–343. To illustrate the second point, absence of prior restraint, he merely cites *New York Times v. United States*, 403 U.S. 713 (1971), which I will not discuss. To clarify the third point, acceptance of subversive advocacy, Rawls makes a long commentary on *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which I examine in the next subsection.

seminar with the biographer of Justice Brandeis, Alpheus Mason. In that seminar, the main reading material was Mason’s large compilation *Free Government in the Making*, which included fragments on liberty ranging from the Levellers, Roger Williams and the American Founders, to twentieth-century texts by Holmes, Brandeis, Lipmann, Dewey, or New Deal disputes.¹³ Rawls’ other important postgraduate experience with traditional views on freedom—which we might assume were slightly bent toward a “negative” conception—had occurred in the next two years, 1950-52, when he attended an Oxford seminar under Isaiah Berlin, Stuart Hampshire and H. L. A. Hart which, among others, involved reading modern classics of liberalism by Condorcet, Rousseau, and John Stuart Mill.¹⁴

3.1.2. Free speech libertarianism reexamined: *Brandenburg v. Ohio*

However, not everything Rawls wanted to say about free speech could be referred to the interwar protective First Amendment jurisprudence compiled in *Sullivan* and based on the landmark dissents of Holmes and Brandeis and their constitutionalizing of apparently older intuitions about liberty in the public sphere. This is clear when Rawls illustrates the third of the “fixed points” of free speech: that the advocacy of subversive ideas must be legal. To do it, he relied on another recent decision, *Brandenburg v. Ohio* (1969), in which the Supreme Court had replaced Holmes’ “clear and present danger” in the assessment of punishable speech. It substituted it for the more protective test of “imminent lawless action.” Significantly, albeit the case produced an unsigned, *per curiam* opinion, we know Justice Brennan was responsible of this major legal implication.¹⁵ We might say that, with regard to the free speech libertarian tradition echoed by earlier jurisprudence, the *Brandenburg* decision expanded the normative goals of such tradition, yet the way of doing this was by overriding its practical record and mechanisms in the legal precedents of Holmes and Brandeis, now seen as insufficiently protective.¹⁶

Rawls engages in a detailed commentary of the constitutional transformations involved in this decision, going over how Holmes, Hand, and Brandeis had used balancing tests to determine the scope of protected speech in earlier cases.¹⁷ Rawls’ conclusion, in line with the legal upshot of *Brandenburg*, is that earlier free speech tests—as much as they were rightly

¹³ Thomas Pogge, *John Rawls: His Life and Theory of Justice*, trans. Michelle Kosch (Oxford University Press, 2007), 15; Alpheus Mason, *Free Government in the Making: Readings in American Political Thought*, 3rd ed. (Oxford University Press, 1965 [1st ed. 1949]).

¹⁴ Pogge, *John Rawls*, 16.

¹⁵ Bernard Schwartz, “Justice Brennan and the *Brandenburg* Decision - A Lawgiver in Action,” *Judicature* 79, no. 1 (1995): 24–29.

¹⁶ On tradition as *practice* vs. tradition as *general norm*, and on how upholding the latter might mean overriding the former, just as Brennan did this and other cases to protect the traditionally libertarian values he saw in the Constitution, I follow the reading of Michelman, *Brennan and Democracy*, 103–8.

¹⁷ *Political Liberalism*, §VIII.11.

welcomed by free speech advocates in the late 1910s, 1920s and 1930s—had proven to be insufficiently protective. Concretely, they yielded bad results whenever judges were able to construe the evil consequences of speech as more “present,” “clear” and “dangerous” than they actually were.¹⁸ No better proof of this existed than the use of the “clear and present danger” test by Learned Hand to sentence the leaders of the American Communist Party to prison in 1951, and the later upholding of his opinion by the Supreme Court, which Rawls duly criticizes.¹⁹

Much of this constitutes additional evidence of Rawls’ attitude toward the interwar free speech libertarian legacy once we realize that, in providing his interpretation of *Brandenburg*, he was closely following the then-unpublished manuscript by the legal scholar Harry Kalven, *A Worthy Tradition*.²⁰ In this book, Kalven concedes the common debt that any First Amendment scholar or advocate must have to Chafee’s seminal work on the interwar free speech cases. However, he criticizes Chafee’s “strained” construction of the early jurisprudential transformations because it creates a “benign conspiracy.”²¹ Kalven complained that Chafee’s interest in presenting Holmes as a free speech hero all along produced a distorted interpretation in which the protective argument of the *Abrams* dissent was used retrospectively to give meaning to earlier cases, particularly *Schenck*—in which Holmes, recall, this time writing for the Court, devised the “clear and present danger” test for the first time, though not to justify the protection of speech but the ex-post punishment of speech in the name of the war effort, thus upholding the Espionage Act of 1917 (§1.1.2).

Kalven’s view was, *pace* Chafee, that the very origins of the “clear and present danger” test already pointed to its failure: despite its later protective uses, and despite the improvement it represented compared to nineteenth-century jurisprudence, Holmes first devised the test to limit free speech, not to protect it. These two points—that the “clear and present danger” test had been all along a deficient criterion for the guarantee of expressive rights, and that Chafee had been wrong in promoting it—were also central to the other free speech monographs that Rawls followed closely in these sections of *Political Liberalism*. It was a thesis developed by Kalven himself in his earlier book on free speech and racial protests, and by Alexander Meiklejohn’s influential criticism of 1948.²² Rawls was evidently integrating their reading

¹⁸ *Ibid.*, 352–353.

¹⁹ *Dennis v. United States*, 341 U.S. 494 (1951). *Political Liberalism*, 352–353, 355.

²⁰ *Political Liberalism*, 344 n53. Harry Kalven, *A Worthy Tradition: Freedom of Speech in America*, ed. Jamie Kalven (Harper & Row, 1988). The passages on *Brandenburg* Rawls is following are at 227–234. On Rawls and Kalven and the manuscript of the latter’s book, see the letter Rawls sent to Owen Fiss in 1981, published as John Rawls, “The Best of All Games,” ed. Owen Fiss, *Boston Review*, March 1, 2008.

²¹ Kalven, *A Worthy Tradition*, 137–138.

²² *Political Liberalism*, 342–343, 348. Harry Kalven, *The Negro and the First Amendment* (Ohio State University Press, 1965), e.g., 13–17, 49–50 (incidentally criticizing Chafee); Meiklejohn, “Free Speech and its Relation to Self-government” (1948), in *Political Freedom*, 54–60.

when he concluded that “[f]ocusing on the danger of political speech flawed the clear and present danger rule from the start.”²³

Shortly put, the lesson from *Brandenburg* was that interwar free speech libertarians were not sufficiently “libertarian” after all, or at least so it seemed to the liberal commentators Rawls attentively read in the second half of the twentieth century. In this sense, his views tracked the concerns of the political climate awakened by the 1960s with the strategies and demands of the Free Speech Movement, the Civil Rights Movement, and the opposition to the Vietnam War. In this context, the shortcomings of the interwar protective jurisprudence were a matter of public and scholarly debate, particularly due to its visible weaknesses in shielding against discrimination by private parties or state-level statutes, crimes of sedition, regulation of speech, or punishment of civil disobedience. As often happens, constitutional law lagged behind politics.

Would the Supreme Court justices as the principal interpreters of American constitutionalism be up to the task of integrating these latest demands, of devising a truly neutral guarantee of civil liberties? For Rawls and many others in his academic circles—most of them sympathetic to the demands of these new social movements—the Supreme Court and its deliberative procedures, far from the noise of politics, were indeed up to the task. Rather than street protests and legislative majorities, mid-century liberals optimistically considered the Supreme Court the best site to begin the needed constitutional renovation.²⁴ In Rawls’ analysis of free speech, the *Brandenburg* decision was proof of this, for it demonstrated how reasonable individuals deliberating on common constitutional principles with a background democratic public culture and traditions (i.e., Supreme Court justices) could be able to specify the exact shape of the otherwise abstract idea that free speech must be a basic liberty.²⁵ Moreover, *Brandenburg* demonstrated all this rather dramatically, exemplifying in a vivid manner the value neutrality that a political conception of justice must treasure. Rawls does not even mention it, but his silence is in fact telling, illustrating the wide latitude afforded by his free speech libertarianism: it should not be forgotten that the appellant benefited from the Court’s decision in *Brandenburg* was a Ku Klux Klan leader, indicted for arranging the news coverage of a meeting in which he and other armed Klansmen, burning a cross, uttered threats and anti-Semitic and anti-black slurs.²⁶

²³ *Political Liberalism*, 355.

²⁴ Forrester, *In the Shadow of Justice*, chaps. 2 and 3.

²⁵ Rawls’ detailed discussion of case law is not helpful to understand that his treatment of First Amendment jurisprudence has two purposes. First, as I show above, it helps him to specify his view of free speech. But second, it also serves him to explain how the later stages of the construction of justice could actually work out (thus, Supreme Court justices are assimilated to delegates of a constitutional convention). On the second purpose, see *Political Liberalism*, 336–337, 339–340, 348. This is a derivative purpose of Rawls’ view of the Supreme Court as “the exemplar of public reason,” *Political Liberalism*, 235–240.

²⁶ *Brandenburg*, 445–449.

The more philosophical argument developed by Rawls to reinforce the *Brandenburg* conclusion of substituting the “clear and present danger” test underpins this need to go beyond interwar free speech libertarianism. Rawls’ own problem with earlier protective First Amendment case law (including the *Abrams* dissent, Brandeis’ and Learned Hand’s opinions) is that it paved the way for utilitarian trade-offs of free speech. Therefore, the conventional rule to assess whether free speech deserved protection could be turned, according to Rawls, into something “like a maxim of decision theory.” That is, it was a “constitutional doctrine that justifies all decisions by what is necessary to maximize the net sum of social advantages, or the net balance of social values.”²⁷ This was for him contrary to the spirit of the lexicographical “priority” of the “basic liberties” that his philosophical system advocates.²⁸

Again, Rawls was not alone, and his sources reveal more clearly the implications that this view had for earlier First Amendment jurisprudence. His anti-utilitarian free speech reasoning paralleled that of Dworkin’s—recall, another of Rawls’ main sources and interlocutors on legal philosophy. Dworkin had made the exact same argument to point out the insufficiencies of the free speech libertarian precedents compiled by Justice Brennan in the *Sullivan* case. Dworkin’s point was that in the *Sullivan* decision the Court could have charted a much better and truly protective First Amendment, were it not for the merely “instrumental” epistemic justification of free speech it upheld.²⁹ This criticism can be traced back to Dworkin’s work against legal positivism and what he called “goal-based” rights theories in the early 1970s—which was the somewhat analogous agenda, in legal theory, of Rawls’ attack on utilitarianism.³⁰ Applied to free speech, this criticism helps to explain Dworkin’s reprimands to the Supreme Court in the 1980s due to its reliance on the earlier First Amendment orthodoxy he associated with Milton, Mill, Chafee, and the “market-place of ideas”—a tradition, Dworkin thought, that rooted free speech in the interests of the political community, leaving it vulnerable to cost-benefit analysis.³¹

²⁷ *Political Liberalism*, 353.

²⁸ *Ibid.*, §VIII.2. On Rawls’ wider critique of utilitarianism, see *A Theory of Justice*, §8.

²⁹ Dworkin, *Freedom’s Law*, chap. 8. Originally published as “The Coming Battles Over Free Speech,” *The New York Review*, June 11, 1992.

³⁰ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), 171–77. Note this chapter was originally published in 1973 as “The Original Position,” and that it heavily engages with Rawls’ work. Furthering the distinction between goals and rights that will inform Dworkin’s later criticism of the Supreme Court, see *Ibid.*, 90f.

³¹ Dworkin, *A Matter of Principle*, chap. 19. See also chap. 17 and 18 for similar criticisms of the Court. This is a collection of essays that Rawls often cites in *Political Liberalism*, especially its chapter 2, “A Forum of Principle,” which involves explicit engagement with Dworkin’s later free speech discussions in chapter 19 (*A Matter of Principle*, 60–63). Chapter 19 was originally published as “Is the Press Losing the First Amendment?,” *The New York Review*, December 4, 1980.

3.1.3. Free speech libertarianism unleashed: *Buckley v. Valeo*

Then, it is worth noticing up what point Rawls was a follower of the basic interpretive constitutional consensus of his time (and, as I will show below, how his own disenchantment with a later case, *Buckley v. Valeo*, epitomizes the limits or the dangers of such consensus).³² As I have just shown above, Rawls admired the Supreme Court’s commitment with the spirit of interwar free speech jurisprudence (as epitomized in the *Sullivan* case), including the necessary rejection of legal precedents whenever that same spirit demanded rejuvenation (as the *Brandenburg* decision did). This point has not escaped the attention of legal commentators. Hence, we can read that Rawls “endorses (...) the fully libertarian and activist approach to First Amendment questions taken by the Warren and Burger Courts [i.e., 1953-1986].”³³

In the same vein, Rawls’ construction of justice tellingly outlines a separation of politics and economics much in line with the practices of “bifurcated review” examined earlier (§2.3.3). This separation explains the two principles of justice and their ordering: that is, a (1) lexically prior scheme of non-negotiable basic liberties understood as fundamental for the democratic procedure, which frames how far government can take its (2) distributive concerns about the conditions that socioeconomic inequalities must satisfy.³⁴ This is a decisive separation that has not gone unnoticed by legal scholars either: “Rawls’s constructivist framework in this respect parallels the doctrine of ‘preferred freedoms’ or ‘preferred position’ outlined in footnote four of *United States v. Carolene Products Co.*”³⁵ Or as Katrina Forrester has it, “[i]n this disaggregation of civil rights from economic justice, Rawls’s theory tracked the fate of postwar liberalism.”³⁶ Thus, echoing the New Deal and mid-century liberals, Rawls also accepted the normative upshot of this legal-conceptual separation of politics and economics. While the first principle is

³² *Buckley v. Valeo* 424 US 1 (1976)

³³ Michael P. Zuckert, “The New Rawls and Constitutional Theory: Does It Really Taste That Much Better?,” *Constitutional Commentary* 751 (1994): 239.

³⁴ John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Harvard University Press, 2001), §13.

³⁵ James E. Fleming, “Securing Deliberative Democracy,” *Fordham Law Review* 72, no. 5 (2004): 1445. Footnote four of *United States v. Carolene Products Co.* 304 U.S. 144 (1938) is one of the main precedents shaping the rationale of “bifurcated review” discussed in the last chapter. In the *Carolene* decision, the Supreme Court held that federal regulation of interstate commerce enjoyed a presumption of constitutionality, and thus could be subject of a less stringent judicial review. However, in footnote four, the court justified exceptions to this general view, recommending “a more exacting judicial scrutiny” for any law that could be thought to violate “the first ten Amendments,” to “restrict (...) political processes,” or to discriminate against “particular religions” or “discrete and insular minorities” (*Ibid.*, 152–3 n4). On Chafee helping to consolidate this judicial approach, see Smith, *Zechariah Chafee, Jr.*, 202–6. Even if I agree with Fleming’s suggestion, it should be added that Rawls plausibly agreed with Dworkin’s criticism of the *Carolene* footnote rationale, or at least with the central role it played in John Hart Ely’s theory of democracy and judicial review. On this point, see *Political Liberalism*, 422 n68, where Rawls positively cites Dworkin, *A Matter of Principle*, chap. 2.

³⁶ Forrester, *In the Shadow of Justice*, 68.

“incorporated” in the constitution to outline “a just political procedure,” the second principle is not: distributive justice and “just legislation” are not a matter of “constitutional restrictions” but of “fairness in representation” (i.e., a matter left to democratic majorities).³⁷

However, was this constitutional legacy, with its entrenched free speech libertarian intuitions and its distinctive shielding of civil liberties, enough to guarantee Rawlsian free speech? No, it was not. Its excessive focus on the state as the major or only threat to freedom created a First Amendment constitutionalism blind to the other realities undermining expressive liberties. Proof of it was the 1976 Supreme Court decision in *Buckley v. Valeo*, which Rawls deemed “profoundly dismaying.”³⁸ In *Buckley*, the Court concluded that federal limitations on campaign expenditures were illegal on First Amendment grounds (much in line with the current view, as established, for example, in *Citizens United*, that money expended in the context of a public debate can be construed as constitutionally protected speech). His hard condemnation of the Court’s reasoning in *Buckley* places Rawls again just at the intersection of many of the issues covered in the earlier chapters. His criticism can be read as an extension of the argument, explicitly taken from Meiklejohn’s work on expressive liberties, that free speech regulations and rules of order should not be mistaken for content-based free speech limitations—the former make free discussion possible, it is only the latter that threaten it.³⁹

First, not unlike interwar progressive advocates of free speech (§2.2.1; §2.2.2), Rawls stresses the acceptability of using public policy to establish the conditions for a fair public conversation:

The regulations [of campaign expenditure] proposed by Congress and struck down in *Buckley* would quite possibly have been ineffective; but in the present state of our knowledge they were admissible attempts to achieve the aim of a fair scheme of representation in which all citizens could have a more full and effective voice.⁴⁰

Then, paraphrasing Holmes’ 1905 dissent in *Lochner*—in which, recall, he repudiated “Mr. Herbert Spencer’s *Social Statics*” and laissez faire as valid interpretive standards of the Fourteenth Amendment (§2.2)—Rawls continued:

³⁷ *Political Liberalism*, 337; see also 338–339 on how this reasoning generates a major indeterminacy in justice as fairness when it comes to ascertaining whether the basic liberties involve private or social ownership of the means of production.

³⁸ *Political Liberalism*, §VIII.12, 359. Note that the Tanner Lectures in which that chapter of *Political Liberalism* is based were originally given 15 years earlier at Oxford, in 1978. *Buckley* was then an even more topical issue, decided only two years ago.

³⁹ *Political Liberalism*, 296; *A Theory of Justice*, 178. See Meiklejohn, *Political Freedom*.

⁴⁰ *Political Liberalism*, 362.

The First Amendment no more enjoins a system of representation according to influence effectively exerted in free political rivalry between unequals than the Fourteenth Amendment enjoins a system of liberty of contract and free competition between unequals in the economy, as the Court thought in the *Lochner* era. In both cases the results of the free play of the electoral process and of economic competition are acceptable only if the necessary conditions of background justice are fulfilled.⁴¹

And he concluded with a warning against the revival of *laissez faire* and the law of the strongest by means of free speech jurisprudence, the “*Lochnerization*” of the First Amendment just discussed at the end of the last chapter (§2.3.3). “The danger of *Buckley*,” Rawls determined, “is that it risks repeating the mistake of the *Lochner* era, this time in the political sphere.”⁴²

The *Buckley* decision attested that First Amendment jurisprudence was a double-edged constitutional legacy. Disconnecting himself from the unleashed free speech libertarianism of the Court (or, seeing it with historical perspective, reconnecting himself with the richer insights on communication of interwar free speech libertarians), Rawls’ anxiety points to the justices’ lack of awareness of what he calls the “fair value” of political liberties. In this case, granting a fair value of free speech would have meant restricting the access of the wealthy to the public sphere only to improve the relative position of less powerful speakers. This was important, Rawls says, “to prevent those with greater property and wealth, and the greater skills of organization which accompany them, from controlling the electoral process to their advantage.”⁴³ This diagnosis, again shared with Dworkin, would be confirmed in his subsequent work (see below §3.4.3).⁴⁴

This issue—the issue of too much power accumulated in a few private hands and how public rules should limit it—is what I will discuss in the following sections. Despite Rawls’ thoughtful assimilation of the free speech libertarian constitutional legacy, it would be an error to simply overlook the ways in which he attempted to adjust these inherited insights to what we may term, with him, a “commonsense political sociology” (or, with this thesis, an awareness of how free speech interlocks with the “political economy of communication”). As we will see, this effort was particularly clear in Rawls’ later development of an ideal of public reason partially mindful of private power and the risks of plutocracy—“For how else is the full and effective voice of all citizens to be maintained?”⁴⁵

⁴¹ Ibid., 362.

⁴² Ibid., 363.

⁴³ Ibid., 360.

⁴⁴ “The Idea of Public Reason Revisited” (1997), in *Political Liberalism*, 449, n22 citing Ronald Dworkin, “The Curse of American Politics,” *The New York Review*, October 17, 1996. See also, *Justice as Fairness*, 149–150.

⁴⁵ *Political Liberalism*, 362.

3.2. CONSTRUCTING JUSTICE, RESTRAINING PRIVATE POWER

In the earlier chapters, the crux of the matter against the free speech libertarian framework has been its inadequate awareness of private power, that is, threats to expressive liberties other than the state.⁴⁶ I have suggested that this leads to a further lack of awareness: the failure to stress that public interferences can be constitutive elements of freedom, including expressive freedoms. The following sections argue that Rawls' egalitarian liberalism presents a very strong case for addressing some of these problems.

3.2.1. Political-economic awareness in the construction of justice

On the one hand, Rawls has been identified as a theorist with sympathies for negative liberty and non-interference.⁴⁷ I believe, then, that many of his critical readers would agree with my reading in the earlier section: Rawls is a sophisticated case in point of how free speech libertarian assumptions infused the postwar liberal reflection on the public sphere—with all its advantages in strengthening civil rights in the face of Cold War authoritarianism in the West, yet with all its weaknesses when it comes to adequately acknowledging the role of state power in the substantive or fair guarantee of such rights. On the other hand, Rawls' work offers several ways to cope with the problem of freedom-threatening accumulations of private power. This Rawlsian awareness of private power makes sense of his frustration with the path that First Amendment libertarianism was taking in the late 1970s, becoming the new stronghold of laissez-faire constitutionalism. If one bears in mind the major topics addressed in this thesis, Rawls takes the shape of a Janus-faced piece of evidence, able to speak both in favor and against my hypotheses.

1. “*Commonsense political sociology*” in the original position. At first sight, it might seem that Rawls' “constructivist” method explicitly excludes conflict and undecided power asymmetries from normative analysis and, with them, any threat that private power may pose to freedom. As is well known, the first stage of Rawls' theory is the selection of the principles of justice in an “original position.” The parties in this hypothetical situation rationally

⁴⁶ Rawls distinguishes between “private” and “nonpublic” (*Political Liberalism*, 220 n7). Note, however, this distinction applies to reasons, not relationships of power. Rawls wants to stress that reasoning without following a “public” conception of justice is not necessarily a “private” reasoning, for all reasoning he is concerned with has a “social” nature, involving groups and associations. “[T]here is no such thing as private reason,” he adds; it is in this area that he uses “nonpublic” as different from “private.” Yet it should be clear how “nonpublic” reasons can give shape or justify what social scientists and political theorists often call “private power” (broadly speaking, social agents different from the government). Given that I am mostly focused on power rather than reasons, and to be coherent with the rest of the thesis (especially with the neorepublican critique of private power or *dominium* that comes in the next chapters), I will avoid the specific Rawlsian idea of “nonpublic” in my text.

⁴⁷ Jean-Fabien Spitz, “The Concept of Liberty in ‘*A Theory of Justice*’ and Its Republican Version,” *Ratio Juris* 7, no. 3 (1994): 333; Pettit, *Republicanism*, 50.

decide on the principles of justice that they believe are in their best interest. However, in this task, they are subject to some constraints. First, the parties are situated symmetrically: they have the same bargaining power. Second, they are behind a “veil of ignorance”: they do not know relevant information that might shape any of their future interests in actual society (e.g., their social status, wealth, regional interests). How can we even think about private power among such “artificial persons,” inhabitants of a “device of representation,” a “thought-experiment” intentionally abstracted from empirical reality?⁴⁸ Is private power not laid aside *ex hypothesi*?

Note, however, that ignoring on which side of a conflict your interests are going to be does not imply ignoring other relevant information in politics. Parties in the original position have other “general beliefs,” including a “commonsense political sociology.”⁴⁹ This means that they can guess whether some social positions will generate conflict, unfair advantages, or incentives to violate the established fair terms of cooperation, even if they do not know concretely who will enjoy such positions. How is this important for thinking about private power in the public sphere? The veil of ignorance does not allow us to know if one is, say, rich enough to become a media mogul. The parties thus ignore whether they or those they represent would benefit, for instance, by a media law that takes many radio and TV frequencies out of the market. But concealing this sort of information should not prevent the parties from acknowledging that such a media law, to keep with the example, could set in motion private interests connected with the social positions affected by the law. Or, further, the parties in the original position could conjecture that some of those interests are attached to private accumulations of power that could bend justice in their favor. The veil of ignorance, then, need not cover the conceivable fact that corporations and individuals whose income hugely depends on commercial media may have incentives to oppose a non-market distribution of communication resources, probably making use of their advantaged position to shape public opinion.⁵⁰

⁴⁸ *Justice as Fairness*, 83, 133.

⁴⁹ On general beliefs, see *Political Liberalism*, §II.4 and §VI.4; earlier referred to as “general facts” in *A Theory of Justice*, §24. On commonsense political sociology see e.g., *Justice as Fairness*, xvii, 71, 101, 122.

⁵⁰ A further problem not addressed here is whether what Rawls considers “general facts” (i.e., “first principles” or “accepted facts of social theory,” “commonsense political sociology”...) are so limited in scope as to exclude from the public use of reason the sort of information I present here about private power. Put differently, whether these epistemic items needed to build justice as fairness have an irreducibly disputed normative standing, not resolved by the later recognition of “burdens of judgement” (*Political Liberalism*, §II.2). William Edmunson has gone as far as to claim that acknowledging the “fact of domination” is an essential part of justice as fairness, especially clear in its latest formulation; see his *John Rawls: Reluctant Socialist* (Cambridge University Press, 2017), 52–64. The opposite interpretation was common among early critics from the left, who depicted Rawls’ fact-sensitivity as particularly biased and ideological, excluding important strands of social theory if not empirical evidence. In this vein,

2. *The “fair value” of political liberties.* Another capable device to address private power or non-state threats to freedom within Rawlsian liberalism is the notion of the “worth” of liberty.⁵¹ According to this idea, the “inability to take advantage of one’s rights and opportunities” does not affect liberty in itself, but only liberty’s “worth.”⁵² Thus, Rawlsian citizenship provides equal basic liberties for all, but the inequalities allowed by the difference principle can make some to have “greater means to achieve their aims” due to their authority or wealth.⁵³ This would make their liberties more “worthy” than the liberties of others, because they the former would have more access to the all-purpose means (wealth, education and so on) to exercise them successfully.

Thinking about free speech in terms of its “worth” introduces socioeconomic concerns in the analysis of freedom. Take the case of Spanish citizens. Although they all enjoy the right to freedom of expression under article 20 of the Spanish Constitution, this freedom—this “legally protected path” of action—is not worth the same to all, its “usefulness to persons” is unequal.⁵⁴ Imagine that the non-interference value of free speech in Spain applies equally to all: they are equally protected against government censorship. However, free speech, the Rawlsian says, is more “worthy” for the media mogul or for a young person with six million followers on Twitch than it is for, say, my illiterate grandparents. While they all enjoy the same freedom under the constitution, from the point of view of the worth of their liberty the illiterate grandparents lack something the others have: relevant resources to use freedom of expression profitably and successfully. A voice in prime-time television, money to have newsrooms on your payroll, internet literacy, a natural talent to get people’s attention, or even basic education, are resources of that kind.

How to tackle unequal worth? Censoring or restricting the most advantaged to bring their free speech closer to my grandparents’ is not permissible according to the first principle of justice (equal basic rights and liberties). But the unequal *worth* of liberty can be compensated without encroaching the formal liberties of the best-off. For instance, it is possible to favor a fairer distribution of the types of resources that determine the profitable use of freedoms: “The basic structure of society is arranged so that it maximizes the primary goods available to the least advantaged to make use of the equal basic liberties enjoyed by everyone.”⁵⁵ Note, however, that “maximizing” the resources needed to even out the worth of liberty for those who are worst-off is still subject to inequalities allowed by the difference principle. In a Rawlsian society we cannot escape the fact that “some have

see e.g. Seyla Benhabib, “The Methodological Illusions of Modern Political Theory: The Case of Rawls and Habermas,” *Neue Hefte Fuer Philosophie*, no. 21 (1982): 47–74. For a critique of fact-sensitivity in moral theory (especially Rawls’), see G. A. Cohen, *Rescuing Justice & Equality* (Harvard University Press, 2008), 229–73.

⁵¹A *Theory of Justice*, §32; *Political Liberalism*, §VIII.7; *Justice as Fairness*, §45.

⁵²A *Theory of Justice*, 179.

⁵³A *Theory of Justice*, 179.

⁵⁴*Political Liberalism*, 325, 326.

⁵⁵*Political Liberalism*, 326.

more income and wealth than others, and so more all-purpose material means for realizing their ends.”⁵⁶

To solve the problem, Rawls introduces a more stringent criterion in the first principle when applied to political liberties. Advancing the radical democratic and socialist critique of the merely “formal” liberty and equality granted by liberal constitutionalism, justice as fairness grants a “fair value” of political liberties. The worth of the political liberties of each citizen must be roughly equal “whatever their social or economic position,” so that “everyone has a fair opportunity to hold public office and to influence the outcome of political decisions.”⁵⁷ This is the reasoning behind Rawls’ criticism of the Supreme Court in *Buckley* discussed above. The Court explicitly argued against attempts by the federal government to compensate the highly unequal value of liberty through regulations on campaign expenditure (§3.1.3). For Rawls, this was a huge error in understanding the fair guarantee of liberty. And this is the reasoning, as he put it, that should make us aware that the “requirements of the prior principles have important distributive effects.” “Consider,” he added, “the distributive effects of the fair value of the political liberties.”⁵⁸ This leads to a perhaps surprising portrayal of Rawls’ two principles, at least in the eyes of readers who take basic liberties as purely negative claims): when it comes to resources associated with political liberties, the first principle (equal basic liberties) carries a prior and heavier egalitarian distributive weight than the second, difference principle.⁵⁹

Ensuring a fair value of political liberties, then, involves an assessment of private power sources of unfreedom. Bearing the worth of liberty in mind, the range of social phenomena that might endanger free speech goes beyond state interference. Not having access to the relevant resources can make free speech worthless or irrelevant to influence political decisions. Justice as fairness does not obtain where there is no fair distribution of those resources.

3.2.2. “Continually required adjustments” to the basic structure

The later steps of Rawlsian justice are more open to real-world inputs. Once the principles of the political conception of justice are chosen in the original position and corrected by reflective equilibrium, a “basic structure” of liberties is established. This basic structure is much more than a mere initial distribution of resources and rights. Even if one is skeptical about the optimistic and self-fulfilling nature of the original position, once we consider the functioning of the basic structure, Rawls’ liberalism becomes sensitive to the nuances of actual social interaction.

⁵⁶ *Justice as Fairness*, 149.

⁵⁷ *Political Liberalism*, 327. See generally, *A Theory of Justice*, §36.

⁵⁸ *Justice as Fairness*, 46 n10.

⁵⁹ Developing this point, see e.g., Alan Thomas, *Republic of Equals: Predistribution and Property-Owning Democracy* (Oxford University Press, 2016), 99–103; Edmundson, John Rawls: *Reluctant Socialist*, 45–61.

This is clearest when Rawls notes that even a perfectly just initial distribution of rights and resources can produce unjust outcomes. This leads to a dynamic and not merely static reflection about the justice of the basic structure. For the purposes of spotting private power, this observation becomes especially relevant:

the accumulated results of many separate and ostensibly fair agreements, together with social trends and historical contingencies, are likely in the course of time to alter citizens' relationships and opportunities so that the conditions for free and fair agreements no longer hold.⁶⁰

This empirical prediction—that fair agreements may lead to unfair situations—could look at odds with Rawls' earlier claims. In particular, it seems to contradict his account of justice as fairness as a case of “pure procedural justice.”⁶¹ This is the idea that what is to be considered a just distribution is not defined independently beforehand, but that “the correctness of the distribution is founded on the justice of the scheme of cooperation.”⁶² To illustrate the concept, this the basis of justice behind a lottery: following the just procedure always brings about results considered “just,” no matter the particulars of the result. The Rawlsian basic structure sets a just procedure of this kind in motion, a “scheme of cooperation”—made up of a priori claims to basic goods and liberties, mechanisms that prevent inequalities incompatible with the difference principle and so on. Hence, the distributive outcome of individuals interacting within this well-functioning background of pure procedural justice is always considered just. Is this not conflicting with Rawls' empirical observation quoted above? In later formulations, Rawls made the problem more explicit: “although a society may reasonably rely on a large element of pure procedural justice,” there is something more to it:

a conception of justice must incorporate an ideal form for the basic structure in the light of which the accumulated results of ongoing social processes are to be limited and adjusted.⁶³

Then, the basic structure, as a case of pure procedural justice, is capable of preserving the justice of the ongoing process (e.g., guiding and constraining self-interest according to the principles chosen in the original position). Say, the lottery rules prevent me from altering the pool of balls from which the winning numbers will be drawn. However, what is important to note for our purposes is that despite being able to do that, those background institutions of the basic structure are incapable of preserving themselves over time: “the upshot of many separate transactions will eventually undermine background

⁶⁰ *Political Liberalism*, 266 and, more generally, §VII.4.

⁶¹ *A Theory of Justice*, §14.

⁶² *Ibid.*, 76.

⁶³ *Political Liberalism*, 281.

justice.”⁶⁴ Imagine that I fairly win many lotteries, and I end up in a powerful position that allows me to subvert the initial scheme. Such a conclusion is not, for Rawls, a matter of mere non-ideal theory:

Even in a well-ordered society, adjustments in the basic structure are always necessary (...) Even with strict-compliance with all reasonable and practical rules, such adjustments are continually required.⁶⁵

Therefore, in Rawls’ theory, some “adjustments” are “continually required” to preserve the integrity of the basic structure against unintended results generated through righteous interaction among compliant individuals and associations. This is interesting insofar as it implies that the Rawlsian theorist does not need to get out of the hypothetical realm of strict compliance to identify private threats to freedom. These can be conceived in the first stages of the theory, since there is no need to assume “special psychologies” (e.g., envy or the classic view of the corrupting effects of excessive wealth and privilege).⁶⁶ The fact is that mere circumstances resulting from procedure-respecting interactions can nevertheless undermine the very functioning of the procedures supported by the basic structure.

In this rather pessimistic (or maybe “realistically utopian,” as he would put it later) turn of Rawls’ theory, once one leaves the original position, certain “laws and tendencies of the social world” must be considered.⁶⁷ They may move the basic structure toward plutocracy—hence the need for background mechanisms to prevent accumulations of private power based on property rights.⁶⁸ An even clearer image of private threats to freedom emerges:

the tendency is rather for background justice to be eroded even when individuals act fairly (...) in this case the invisible hand guides things in the wrong direction.⁶⁹

From the point of view of the basic structure, then, procedure-respecting interactions are subject to a kind of unpredictable contingencies that require vigilant institutional action.

But what kind of actions are exactly these “adjustments” to the basic structure? In *Political Liberalism*, there is still a certain reluctance to recognize openly their normative status as what they must be: state interferences, administrative acts, public undertakings, etc. That is, diverse

⁶⁴ Ibid., 284.

⁶⁵ Ibid., 284–85; on this point, §VII.9.

⁶⁶ On special psychologies, *A Theory of Justice*, §80–81. Put differently, the Rawlsian can frame private power even if he does not meet the “anti-utopianism” desideratum, despite what Philip Pettit suggests in his Philip Pettit, “Political Realism Meets Civic Republicanism,” *Critical Review of International Social and Political Philosophy* 20, no. 3 (2017): 331–47.

⁶⁷ *Justice as Fairness*, 4.

⁶⁸ Ibid., §39.

⁶⁹ *Political Liberalism*, 267.

uses of public power to revise and change the basic structure whenever needed. Most probably responding to Robert Nozick's libertarian critique of "patterned" justice, Rawls' observed that:

The objection that the difference principle enjoins continuous corrections of particular distributions and capricious interferences with private transactions is based on a misunderstanding.⁷⁰

Rawls' argument here is that "adjustments" in the basic structure should not be seen as a modification of already allocated resources, as if they were correcting the outcome of free interaction.⁷¹ The subject of such "adjustments" is the basic structure itself—the very rules and procedures, not its distributive results—so it can be adapted to any situation that could challenge the functioning of its "ideal form." The subtle distinction is meant to protect these "adjustments" from the charge of being arbitrary state interferences with free interactions: they are not arbitrary, according to Rawls, because they merely modify public *rules* in foreseeable ways in the light of the two principles; they do not modify the *outcome* of private transactions.

Thus, Rawls is able to escape, at least conceptually, from the libertarian objection against the need for public institutions making continual adjustments on the basic structure.⁷² But I believe the libertarian anxiety generated by the Rawlsian appeal to a continual use of public power captures an important feature of the basic structure. The idea that these "adjustments" deal with distributive rules instead of outcomes does not change the fact of the need for such legislative action—a continuous recourse to state interference. It is not true that *predistribution* requires a less powerful state *redistribution*. In practical terms, Rawls would perhaps not say that we should break up or expropriate Google, only that we must "adjust" the basic structure so that, say, antitrust and media law can deal with recent developments in telecommunications. The "subject of justice" is the basic structure—the

⁷⁰ Ibid., 283. Compare with *Justice as Fairness*, §14.4. Nozick's critique can be found in *Anarchy, State and Utopia* (Blackwell, 1974), 160ff. It also answers, for instance, the concerns raised by the sociologist Raymond Boudon in his "Perverse Effects and Social Philosophy: Rawls's Theory of Justice," in *The Unintended Consequences of Social Action* (St. Martin's Press, 1982), esp. 140–146, 150–151.

⁷¹ Since that would be a case of "allocative justice" far from the limits of "pure procedural justice." This is because such sort of interference would require an independent standard to judge a given distribution, for instance, an external measure of general utility. See *A Theory of Justice*, §14, §43.

⁷² On Rawls basic structure as integrating a common postwar liberal distrust of the administrative state, see Forrester, *In the Shadow of Justice*, 10–15, 32–33. But see how its main context of reception, when the arguments of *TJ* were published as a book in the early 1970s, obscured Rawls' original postwar concerns, and his theory was wrongly interpreted as a justification of welfare state capitalism; *ibid.*, 105–110. Later, she concludes: "At the same time that Rawls's theory, born in part of anxiety about the New Deal state, was naturalized in the discipline of political philosophy, it was also written into a narrative of liberal egalitarian progress that claimed the New Deal as its victory," *ibid.*, 130–131. A similar argument in Stefan Eich, "The Theodicy of Growth: John Rawls, Political Economy, and Reasonable Faith," *Modern Intellectual History* 18, no. 4 (2021): 988–91.

procedure itself—not the outcome. However, the libertarian point is that such an “adjustment” will eventually involve a coercive alteration of *outcomes*, not merely *rules*, so that the current market position of Google coheres with the newly adjusted basic structure.

For the purposes of justice, it is of course important to justify why these Rawlsian “adjustments” are not a case of despotic interference, why they are different from, say, an absolute monarch seizing your land to give it to someone else. But it may also be relevant to recognize more openly the institutional-empirical counterpart of the rather abstract idea of “adjustments”: administrative acts, public undertakings, legally enforced decisions of democratic majorities or courts, legislative changes, and so on—that is, state interferences. Put differently, the distinction between, on the one hand, the legal-rational order, and even the smallest modifications of it, and, on the other, state interferences, as if the former would be less coercive (and thus more legitimate) than the latter, should not be exaggerated.⁷³ In the realm of political philosophy, not to acknowledge unambiguously that “adjustments” to the basic structure are interferences may serve to obscure the fact of coercion vis-à-vis the libertarian opponent.⁷⁴ However, in the realm of politics, it may have the perverse consequence, as I will discuss later, of leaving political liberalism blind to significant coercive mechanisms necessary for the creation or preservation of its own preconditions.

3.2.3. The “fact of pluralism” as a source of faction

Rawls’ ideas on private power receive special attention in the second stage of his political theory, after the principles of justice have been selected in the original position and established in the basic structure. Hence, those “certain general facts of commonsense political sociology” come back into play once

⁷³ This point has certain sociological pedigree. See e.g., Weber’s argument that the contrast between “economic regulation” and “mere order” is “fluid,” because “naturally ‘formal’ order can (and must) also profoundly influence” in a “material manner,” see *MWG*, vol. I/23: 234.

⁷⁴ It is worth noticing that these subtleties lie at the core of Friedrich Hayek’s friendly libertarian reading of Rawls; see e.g. John Tomasi, *Free Market Fairness* (Princeton University Press, 2012), 157–61. That Hayek’s reading is considered by other libertarians as misguided speaks of Rawls’ ambivalence towards the state, at least in the early writings (Hayek’s analysis could not have included the later and more explicit passages of *Political Liberalism* quoted above). For a libertarian that had indeed the opportunity to read them, see Eric Mack, *Libertarianism* (Polity Press, 2018), 280–91. As it should be clear from the paragraphs above, I believe Mack is fundamentally right. Nozick’s criticism can be saved by merely changing its wording against patterned justice: that is, making the rules of the basic structure itself, not its distributive outcomes, the subject of critique. I believe, too, that his point against Rawls’ response to Nozick can be accepted without sharing Mack’s anxieties about the overall illegitimacy of the basic structure. In any case, the point that this libertarian critique of Rawls helps to illuminate one of the working hypotheses of this project: that the dominant framework about expressive freedom makes very complicated to openly acknowledge the huge amount of public coercion (of state interference) concealed behind, or presupposed by, ideals such as free speech, tolerance, neutrality, fairness, non-interference and so on.

the “stability” of justice becomes a variable.⁷⁵ That is, when the theorist must assess the feasibility of a future stage of stable justice, or, put differently, when it must be assessed whether the just regime will be able to reproduce itself over time.

The account of stability in a well-ordered society received renewed interest after Rawls reconsidered the third part of *A Theory of Justice*.⁷⁶ In his later work, the primary goods chosen by the parties in the earlier formulation of the original position were framed as part of a “comprehensive view.”⁷⁷ This means that, given the “fact of pluralism” that characterizes modern societies (i.e., the coexistence of incommensurable comprehensive conceptions of the good), the principles of justice as fairness could not be simply expected to be chosen by every party in the original position. It was too unrealistic, in other words, to presume that any group of reasonable agents under a veil of ignorance would converge so easily in Rawlsian justice. People tend to value different things, and even when their preferences converge, they may value the same things differently. Having this fact of pluralism in mind, how and why would people agree on this specific conception of justice or, for that matter, on any conception at all? This was one of the challenges addressed by the later Rawls in *Political Liberalism*: to present justice as fairness as a “thin,” “political, not metaphysical” (i.e., non-comprehensive) conception that could be the focus of an “overlapping consensus” among reasonable but incompatible comprehensive doctrines.⁷⁸

To model these new concerns, Rawls now imagines citizens as having two “moral powers”:⁷⁹

- a. They have a *sense of justice* that allows them to respect and value fair terms of cooperation provided others do the same; citizens are, in this sense, “reasonable.”
- b. But they also have a *conception of the good*, a “scheme of final ends” and interests that come from their comprehensive doctrines and their belonging to private associations and groups; citizens are in this respect “rational.”

Thus, from the point of view of the Rawlsian liberal, comprehensive doctrines are sources of loyalty to institutions or conceptions of justice other than the properly “public” institutions and rules of cooperation suitable for justice as fairness. To put it in terms of how earlier political thinkers warned against the

⁷⁵ *Justice as Fairness*, xvii.

⁷⁶ For a review of these changes, see Brian Barry, “John Rawls and the Search for Stability,” *Ethics* 105, no. 4 (1995): 874–915.

⁷⁷ *Political Liberalism*, xv–xviii.

⁷⁸ Thus, in what follows, the readers must understand “political” whenever it accompanies “conception” in this Rawlsian, technical sense: “political” points to a thin, non-metaphysical, non-comprehensive conception of justice that coheres with the reasonableness and the sense of justice of citizens.

⁷⁹ *Ibid.*, 19, 48–54.

risk of private power, we might say that here is one of the bases of the Rawlsian account of “faction”: as individuals *rationally* pursue their own comprehensive ideas of the good, often embodied in private associations thanks to their “power of combination,” they may withdraw their support to the terms of cooperation that they would accept if they had *reasonably* pursued their interest in living under rules of justice also fair for others.⁸⁰

However, Rawls’ point is that diversity of comprehensive views of the good is unavoidable in plural societies. They structure worldviews that partially shape citizens’ lives in significant ways, accounting for their interests and aims, their moral views, giving meaning to their “nonpolitical conduct” in different ways.⁸¹ A comprehensive doctrine need not only be a religion. They can be secular ideologies as well, traditional customs and values, and so on. It captures the empirically observable circumstance that citizens display conceptions of the good—and, consequently, behavioral dispositions—independent from, and even maybe incompatible with, the political conception of justice that Rawlsian political theory wants to construct.

How is political liberalism possible under these conditions? Recall that a well-ordered society regulated by a political conception of justice must be “stable.” That is, it must have enough adherents making use of their first moral power (their sense of justice), so they become supporters of the fair terms of cooperation outlined the political conception of justice. But Rawls tells us that this political conception cannot be stable in the wrong way, resorting to an illegitimate use of coercive state power. That is, the Rawlsian just regime cannot be stable by simply repressing the second moral power of its citizens (their comprehensive conception of the good). To achieve this delicate balance, the political conception of justice must be formulated in a specific way. This is what Rawls’ idea of an “overlapping consensus” is intended to test. It was introduced “to make the idea of a well-ordered society more realistic and to adjust it to the historical and social conditions of democratic societies [i.e., to the fact of pluralism].”⁸² An overlapping consensus between reasonable but irreducibly different citizens and their conceptions of the good is the kind of self-sustaining arrangement that Rawls is looking for: able to generate reasons of allegiance in a pluralistic citizenry. Once this overlapping consensus is achieved, stability is based on the citizens’ own sense of justice, which can be ensured independently of the contingent balance of forces between conflicting comprehensive conceptions of the good, and without

⁸⁰ See the clearest expression of this, in relation to economic position, in *Justice as Fairness*, 131 (especially how he borrows Mill’s awareness of the risk associated with “power of combination”). Recall from the Introduction (§IV.1) how this typical republican theme took the shape of anti-clericalism. Thus, it is not surprising that recent attempts of synthesis between republicanism and political liberalism get much inspiration from this reflection, as in Thomas, *Republic of Equals*, 101–5, 111–116. Similarly, see the interpretation to reasonableness as “civic virtue,” in Andrés de Francisco, “A Republican Interpretation of the Late Rawls,” *Journal of Political Philosophy* 14, no. 3 (2006): 270–88.

⁸¹ *Political Liberalism*, 175.

⁸² *Justice as Fairness*, 32.

resorting to despotic uses of state power to suppress such comprehensive conceptions.

For our purposes, it may be noted that Rawls' view of stability deals in a particular manner with what I have been calling private power. It is no more about coercively preempting, by means of basic structure, dangerous accumulations of private power, as happened in the first stage of the theory. The second stage of Rawls' construction of justice clarifies why individuals and groups, despite being empirically capable of not complying with the basic structure of a well-ordered society, or even of overturning it if their power would grow enough, decide nevertheless not to do so. Stability at this point is not about what citizens can do, but about what they actually decide to do. The overlapping consensus, then, moves on the level of citizens' motivations: whether they decide to square their second moral power with their first or not (i.e., the pursue of their own comprehensive conception of the good with their sense of justice). Or, in yet other words, whether they subordinate their non-public interests to what is required by a fair cooperation among a diversity of citizens considered as free and equal.

3.3. LIBERAL STABILITY AND THE PRECONDITIONS OF REASONABLENESS

3.3.1. Stability "with respect to changes in the distribution of power"

As I have shown, one of the most important characteristics of stability in Rawlsian liberalism is that it answers to the moral reasoning of citizens, not merely their prudent self- or group-interests. Citizens do not adhere to an overlapping consensus on justice as fairness because, say, they are afraid of state punishment or social retribution. This means, too, that they do not uphold the fair terms of cooperation only provisionally, say, waiting for any breach in the system to further their non-public interests and their comprehensive conception of the good at the expense of others and justice. This means that citizens value institutions for their own sake. As Rawls put it, groups that support a liberal political conception of justice in an overlapping consensus "will not withdraw their support of it should the relative strength of their view in society increase and eventually become dominant."⁸³

Does this mean that in an overlapping consensus the power asymmetry is completely set aside from the normative analysis? Is it that the motivational forces cultivated by the overlapping consensus outweigh any interest against justice? Are we again facing the vestiges of a libertarian worldview that overlooks private threats to freedom? As in my earlier discussion of the original position (§3.2.1), this might seem to be the case at first sight, but it is not. Recall two things. First, the argument for stability in an overlapping

⁸³ *Political Liberalism*, 148. See also the same idea applied to international relations: "the institutions and practices among peoples continue to satisfy the relevant principles of right and justice, even though their relations and success are continually changing in view of political, economic, and social trends," *Law of Peoples*, 45.

consensus begins only in the “second stage” of Rawls’ theory—that is, only when the principles of justice are “realized” in the basic structure.⁸⁴ Second, at this second stage, political liberalism is not adjusted to any “fact of pluralism,” but only to the “fact of *reasonable* pluralism.”⁸⁵ In this sense, as Rawls points out, his political conception of justice is not intended to be adjusted to “the brute forces of the world” but only to “the inevitable outcome of free human reason.”⁸⁶ Justice as fairness, put differently, does not have to be justified to every conceivable comprehensive doctrine. It only has to be squared with those comprehensive views of the good that already cherish the first moral power; that is, justice as fairness must be formulated as to be compatible only with comprehensive doctrines already open to be *reasonable*, already willing to play by the rules provided other do the same. By comparison, unreasonable doctrines are coercively contained “like war and disease—so that they do not overturn political justice.”⁸⁷

Correctly interpreted, then, the overlapping consensus is indeed “stable with respect to changes in the distribution of power among views,” as Rawls says, but always bearing in mind that:

- a. “Changes in the distribution of power” refers only to variations *allowed by a well-ordered society* or, at best, variations that *do not overturn justice completely*.⁸⁸ Note how this reduces a lot the range of power asymmetries with which the overlapping consensus must be able to deal, especially if we take the strong egalitarianism of the basic structure seriously (recall, e.g., the distributive effects of basic liberties discussed earlier, §3.2.1).
- b. “Power among views” refers only to the power in the hands of *reasonable* groups and individuals with *reasonable* comprehensive views. Note how this leaves outside an arguably large number of people and associations, specifically those not willing to cultivate the first moral power (thus, we are only dealing with a portion of the “fact of pluralism”).

⁸⁴ E.g., “we have to check whether, *when realized*, just institutions as specified by those principles can gain sufficient support,” *Political Liberalism*, 65 (italics added). See also *Political Liberalism*, lvi–lvii for the explicit role of the fair value of political liberty as a prerequisite of stability for the “right reasons” (i.e., the overlapping consensus). More generally, *A Theory of Justice*, §69.

⁸⁵ *Political Liberalism*, 36, esp. 36 n37, italics added.

⁸⁶ *Ibid.*, 36–37. Or the idea that “Justification begins from some consensus,” in the earlier text, John Rawls, “The Idea of an Overlapping Consensus,” *Oxford Journal of Legal Studies* 7, no. 1 (1987): 6.

⁸⁷ *Political Liberalism*, 64 n19. In this line, see his later idea that reconciliation has “limits” or that “unreasonable doctrines” set a limit to the aim of full realization of public reason, *ibid.*, 487–89.

⁸⁸ In this sense, see his remarks that stability is intended to account for forces able to bring back equilibrium “unless of course the outside shocks are too great”; it is concerned only with “normal disturbances,” that is, “however institutions are changed they remain just or approximately so,” *A Theory of Justice*, 400–401.

Notice how, by taking these two points into consideration, the overlapping consensus does not really make much difference in terms of stability as such. First, the basic structure already carries most of the weight against non-public threats to freedom. Second, because it only addresses a segment of the plurality of comprehensive views, those who are already willing to play fairly and be reasonable. Thus, my view is that the motivational effects that an overlapping consensus produces in previously basic-structure compliant and reasonable citizens are very small, especially in the light of all the legal-institutional (i.e., coercive) constraints that the well-functioning basic structure is already imposing on distributions of power, or in how comprehensive doctrines convey their conceptions of the good into action.

Therefore, paraphrasing but detailing Rawls' own formulation, we may conclude that the overlapping consensus is "stable with respect to *just or unjust-but-minor* changes in the distribution of power among *reasonable* views." Put differently, the overlapping consensus is not designed to deal with *unjust major changes* in the distribution of power that overturn justice (e.g., a coup d'état or monopolistic market power), nor with the power held by *unreasonable groups* (e.g., fanatic religious sects or openly racist groups). These are mostly dealt with and prevented in the previous stage of the theory, during the construction of the basic structure.⁸⁹ As Brian Barry put it: "In *A Theory of Justice*, Rawls has no qualms about falling back on Hobbesian methods."⁹⁰ Hence, the overlapping consensus may not look very ambitious given that it is a device aimed at explaining why political liberalism is a non-coercive yet feasible and stable enterprise. In particular, because in this light, the overlapping consensus seems designed for circumstances in which some sort of liberalism already exists. Its politics, then, can provide guidelines for an orderly disagreement among somewhat liberal views within a constitutional regime—which is not an insignificant aim! But in the last retort, the overlapping consensus appears as an uncertain guide against the deeper challenges that liberal polities must confront, as I will discuss later.

Therefore, the heart of the matter must be in the steps that precede the overlapping consensus: the social processes that first generated the preconditions of liberal stability and public reason, the rise, in Rawls' words, of the "historical and social conditions of democratic societies." One of the main attributes of these conditions that deserves to be explained is how the mere "fact of pluralism" was turned into the "fact of *reasonable* pluralism." In other words, why can Rawls develop a political theory that assumes the reasonable to be "dominant and controlling"?⁹¹ Put differently, these

⁸⁹ See, for instance, how the preservation of equal liberty already entails, "to limit the freedom of the intolerant," *A Theory of Justice*, §35; "a coercive sovereign" with penal sanctions §38; "to prevent the formation of unreasonable market power," §43. In the same vein: "Penal devices will play a much larger role" in case there were "many who do not find a sense of justice for their good," §87.

⁹⁰ Barry, "John Rawls and the Search for Stability," 888.

⁹¹ *Political Liberalism*, 441.

“historical and social conditions” are also the circumstances that allow Rawls to discount a non-neutral, stronger state that actively limits and challenges comprehensive views of the good. And these are, too, the conditions that allow “the inevitable outcome of free human reason” to flourish, and on which Rawlsian liberalism claims to be justified. My argument later on will be that if these conditions are simply taken as given or unprompted (e.g., spontaneous, fortuitous, fixed once for all...), then the social, economic, and institutional prerequisites of Rawlsian liberalism will remain undertheorized. The result will be a liberalism unable to identify and tackle structural changes that undermine these prerequisites or preconditions, and therefore unable to ensure its realization in unfavorable circumstances or its stability over time.

3.3.2. “*Modus vivendi*” and hysteresis of “the reasonable”

Yet stability in an overlapping consensus is of a special kind. Delving into what is special about it is necessary to show how Rawls, while paying attention to the issue of private power, ends up effacing its political effects. He does it, precisely, in one of the places in which his liberalism deals most directly with expressive freedom: in his account of the origins of toleration.

Rawls contrasts the stability of the overlapping consensus with that of its theoretical and chronological precedent: the “modus vivendi” between comprehensive doctrines.⁹² Against the liberal, self-sustaining adherence produced by an overlapping consensus, the modus vivendi represents mere coexistence sustained by a balance of power, not by a true compromise on a shared public agreement. Thus, stability in a modus vivendi is achieved by a mutual “self- or group-interest.” Think of a peaceful coexistence between diverse conceptions of the good workable only because the costs of civil war have become insurmountable: “the balance of forces keeps all sides supporting the current arrangements, which happen to be just to each of them.”⁹³ In this sense, different comprehensive views accept settlements in a modus vivendi purely for their own good—is not thus “stable for the right reasons” (i.e., publicly avowable reasons that consider other citizens as free and equal).⁹⁴

Therefore, the modus vivendi serves Rawls to explain why a regime of cooperation may be stable in the wrong way—when its stability is based on merely prudential arguments stemming from non-public interests, not on moral grounds reasonable for all. All these attributes make the modus vivendi a peaceful but precarious equilibrium. The slightest change in the distribution of power among comprehensive views will see attempts of using unreasonable, coercive measures by the dominant group against the others.⁹⁵ Coexistence, toleration and any other liberties achieved in a modus vivendi

⁹² Ibid., 146–147.

⁹³ Ibid., xli.

⁹⁴ Ibid., 143.

⁹⁵ Ibid., 147–148; *Justice as Fairness*, 125.

are seen by each comprehensive doctrine as a second-best conditional to the current distribution of power (the best-case scenario being the complete-but-intolerant spread of the doctrine). For this reason, the stability of a *modus vivendi* “depend[s] on happenstance and a balance of relative forces.”⁹⁶

Despite its precarious security and the mutual distrust that sustains it, not everything is bad in the *modus vivendi*. According to Rawls, a *modus vivendi* paves the way for a deeper agreement on constitutional principles. Peaceful interactions, albeit produced within a mere *modus vivendi*, “tend to encourage the cooperative virtues of political life.”⁹⁷ Thus, these interactions generate “trust” over time and, most importantly for our purposes: they “tend to *shift* citizens’ comprehensive doctrines so that they at least accept the principles of a liberal constitution.”⁹⁸ After some time under this conditions, the “political conception shapes comprehensive views to cohere with it.”⁹⁹ That is, after coexisting in a *modus vivendi*, comprehensive doctrines get refined or polished, and progressively open toward views that they previously abhorred, especially reasonable “political, not metaphysical” arguments that justify the fair terms of cooperation they enjoy. This is the process in which the mere “fact of pluralism” is turned into the “*reasonable* pluralism” in which political liberalism wants to find adherents; a process that Rawls sees as “the long-run result of the powers of human reason within an enduring background of free institutions.”¹⁰⁰ Later, as we already know, a constitutional agreement on the rules of coexistence will develop, and this is the basis of the further overlapping consensus among the plurality of now reasonable doctrines.¹⁰¹ As he puts it, “at each stage the reasonable frames and subordinates the rational.”¹⁰² All this is what brings about the main phenomenon examined in the latest section: stability independent from changes in the distribution of power.

What is the nature of this extraordinary “shift” of comprehensive doctrines that nurtures the reasonable in them? Do we know more about the “shift” that turns the fact of pluralism into a pluralism of reasonable views? I want to note two dimensions or levels of analysis of this “shift.” On the one hand, recall that reasonableness is a disposition built in the moral psychology that models Rawlsian citizens—it is what determines their “sense of justice.”¹⁰³ The increase in reasonability, then, must be in part a sociopsychological process:

⁹⁶ *Political Liberalism*, 148.

⁹⁷ *Ibid.*, 163.

⁹⁸ *Ibid.*, 163 (italics added).

⁹⁹ *Ibid.*, 160 n25. See also, Rawls’ remarks on the “looseness” of comprehensive views, meaning they are not total, “fully general” accounts of the world, giving “lots of slippage” for political principles of justice to cohere, even with unreasonable comprehensive doctrines; *ibid.*, 159–60, *Justice as Fairness*, §58.2. For a response to the common criticism that these assumptions are too demanding for religious believers, see M. Victoria Costa, *Rawls, Citizenship, and Education* (Routledge, 2011), 34–35.

¹⁰⁰ *Political Liberalism*, 144.

¹⁰¹ See generally, *ibid.*, §IV.6.

¹⁰² *Ibid.*, 399.

¹⁰³ *Ibid.*, 81–88.

say, comprehensive doctrines get refined through *modus-vivendi* coexistence because different generations growing and socialized in such coexistence end up devising reasons for upholding that system independent from their own conception of the good.¹⁰⁴ But, on the other hand, recall too that this sociopsychological process is only triggered under certain conditions: the circumstances of balance of power among comprehensive views that allow for *modus-vivendi* peaceful coexistence in the first place. At this second level, the “shift” towards the reasonable conjectured by Rawls and that explain the feasibility of political liberalism must rely on a historical proposition: that there was indeed some past situation in which the suitable conditions for a *modus-vivendi* coexistence obtained. Ronald Beiner cleverly saw this point when he spoke of “Rawls’s political liberalism as an ‘owl of Minerva’ doctrine—it can only be articulated philosophically when the work of liberalization has already been done via a particular historical process.”¹⁰⁵

Notice, in any case, that Rawls’ story about the “shift” to the reasonable is modeled as a one-way transformation (provided that the conditions of a well-ordered society are maintained). That is, once there is a suitable *modus-vivendi* agreement on a just principle over enough time, there are only one-way tickets to reasonable pluralism, so to speak. The successful path is not to be reversed—at least not by actions of reasonable individuals and groups. This is because, as I explained earlier, when doctrines become reasonable and participate in the overlapping consensus, they “will not withdraw their support of it should the relative strength of their view in society increase and eventually become dominant” (§3.3.1).¹⁰⁶

One way of putting it is that Rawls proposes a hysteretic model of reasonableness. The notion of “hysteresis,” often used in physics and engineering, describes a phenomenon in which the effects of past inputs persist and continue to shape the current state of an object, even when the original inputs have changed or disappeared. To illustrate hysteresis, think of projects to ecological recovery of water streams. When a degraded river basin undergoes restoration, one of the most common measures is preventing further human recreative and extractive activities. The goal is to facilitate the reintroduction of native species, the regeneration of the soil, etc. But what it is more important than the active efforts of restoration themselves is that their positive impact persists and even amplify over time, creating a self-sustaining environment. If the restoration project is successful, the more stringent measures will be removed after a while: say, human activities, even extractive ones such as fishing, water withdrawal or logging, will be allowed again; population control of predators will stop. The reason is that the positive ecological outcomes originally sought after have taken hold. Hence, the current state of the recovered, ecologically balanced river basin may be said

¹⁰⁴ Much of this in *ibid.*, 163.

¹⁰⁵ Ronald Beiner, *Civil Religion: A Dialogue in the History of Political Philosophy* (Cambridge University Press, 2011), 291.

¹⁰⁶ *Political Liberalism*, 148.

to depend on the effects left by forces (human conservation efforts) that are no longer there: this is a case of hysteresis.

There is hysteresis in Rawls' account of the reasonable because individuals, groups, and doctrines stay within reasonableness even when the previous balance-of-power conditions that cultivated it in the first place no longer exist. This is possible, recall, insofar as the motivational sources for allegiance "shift" during the *modus vivendi* and, at some point, prudential peaceful coexistence becomes valued in itself, not as a reluctant bargain to avoid mutual destruction—thus, as we saw, the *modus vivendi* evolves to constitutional agreement on fair principles, and later to an overlapping consensus. There is hysteresis in this account to the extent that a reasonable comprehensive doctrine that becomes entirely dominant thanks to non-coercive methods in a well-ordered society—therefore challenging the previous balance-of-power conditions that made it to shift toward reasonableness—is nevertheless expected to remain reasonable. Another way of putting it is that once individuals, groups, and comprehensive doctrines start to cherish reasonableness, they will promote the right over their own good, even if circumstances change and they have the power to do otherwise. New favorable or unfavorable conditions of power asymmetry will not make the reasonable doctrine, group, or individual to turn back to the self- or group-interested antagonistic behavior characteristic of the *modus vivendi*. Even if the balance-of-power preconditions for the rise of the reasonable fade away, the effects of such preconditions remain—as it happens in a denim fabric with hysteretic properties, the past effects of past inputs outlive what caused them in the first place.¹⁰⁷

3.3.3. *Preconditions of the reasonable: crafted or unprompted?*

Rawls' assumptions become clearer when he concretizes in actual history the model of sociopsychological change that takes citizens from a distrustful coexistence under a *modus vivendi* to the self-reproducing and non-coercive moral agreement that features the overlapping consensus. The actual history

¹⁰⁷ In his early work there are less reasons to construe Rawls' model as attributing hysteresis to the reasonable. On the one hand, the intuition about moral learning is present, e.g. "The liberties of the intolerant may persuade them to a belief in freedom." (*A Theory of Justice*, 192). However, citing Barry again, I agree that Rawls has "no qualms about falling back on Hobbesian methods" in *A Theory of Justice*. This is most clear, precisely, in his account of toleration. Notwithstanding his optimistic emphasis on the educative effects of coexistence under liberal institutions, Rawls accepts the typical early modern argument connecting the limits of toleration to public order: "freedom [of intolerant sects] should be restricted only when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger. The tolerant should curb the intolerant only in this case" (*A Theory of Justice*, 193). As in *Political Liberalism*, in *A Theory of Justice* Rawls considers the possibility that a certain distribution of power in society hampers moral learning and the development of the reasonable. Yet in the latter I find a clearer awareness about how an unfavorable distribution of power can also reverse the outcomes of such moral learning.

behind this model is Rawls’ construal of the history of toleration in the West, as he clearly expressed it in his lectures:

gradually over several centuries, through a series of violent religious wars, people eventually came to think it no longer practicable to use force in such struggles and reluctantly came to accept as a *modus vivendi* the principles of liberty and equality. Religious toleration seems to have come about in some such way. All thought the division of Christendom was a terrible disaster, nevertheless toleration seemed better than unending civil war and the destruction of society.¹⁰⁸

Rawls thinks of the early modern origins of toleration in Europe as a case of a *modus vivendi* on a liberal principle; as it must have occurred, in his view, “following the Reformation: at first reluctantly, but nevertheless as providing the only workable alternative to endless and destructive civil strife.”¹⁰⁹ This actual process of social change is helpful for Rawls in accounting for the historicity of the feasibility of political liberalism—how at some point in our past involved suitable conditions for the development of constitutional agreement on liberal principles, paving the way for an overlapping consensus. The story builds on a well-known cliché, fundamental, for example, in Judith Shklar’s idea of a “liberalism of fear” that Rawls followed.¹¹⁰ The narrative is basically this: First, there were unreasonable and warring religious factions. However, war exhaustion and failure to sustain a victory over all led to arrangements of tolerant-but-reluctant coexistence. After some generations, there are enough now-reasonable groups that assert toleration not just for their own survival, but toleration for its own sake: for the right, political reasons—to put it in Holmes’ words in the *Abrams* dissent (§1.3), constitutional toleration only appeared “when men have realized that time has upset many fighting faiths.”¹¹¹

The reader will notice that causality is rather blurry in this model. On the one hand, it should be clear by now how the rise of reasonableness at a societal level plays a significant role among the *causes* of liberal institutions: a citizenry with a developed sense of justice is what allows stability for the right reasons, it explains the chances of an overlapping consensus and thus the

¹⁰⁸ John Rawls, *Lectures on the History of Political Philosophy*, ed. Samuel Freeman (Harvard University Press, 2007), 240. (Hereafter *LHPP*).

¹⁰⁹ *Political Liberalism*, 159; 148–149. This view is the same as in the later *Justice as Fairness*, §58; *Law of Peoples*, 113; John Rawls, *Lectures on the History of Moral Philosophy*, ed. Barbara Herman (Harvard University Press, 2000), 7–8.

¹¹⁰ Judith Shklar, *Ordinary Vices* (Belknap Press, 1984), 5. Which Rawls cites in *Political Liberalism*, xxiv n10, 374; also acknowledging that “I have always relied on her in matters of historical interpretation, crucial at a number of places in the text,” *ibid.*, xxxii. On Shklar and the limits of her postwar liberalism, see Moyn, *Liberalism against itself*, chap. 1. On the wars of religion as a founding myth of modern liberalism, see William T. Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (Oxford University Press, 2009), chap. 3. For my criticism, see §3.4.1 below.

¹¹¹ *Abrams*, 630 (see above, §1.3.)

overall viability of Rawlsian political liberalism. Yet, on the other hand, note how reasonableness is also among the most significant *consequences* of liberal institutions: if we live in a modern age in which the reasonable is “dominant and controlling”—in which the raw fact of pluralism has developed into a “reasonable pluralism”—this was only due to a long and reluctant socialization under institutional arrangements already embodying the kind of principles that would be later captured by properly liberal institutions. Put briefly, the reasonable seems to be an effect and a cause of just institutions: the ascent of the reasonable asks for its “effects” (just institutions) to be already in place, because reluctant coexistence within just institutions is what causes the growth of the reasonable.

This is an old “the chicken or the egg” dilemma in social theory and political philosophy. In a famous passage of *The Social Contract*, to give an example important for Rawls, Rousseau explicitly confronted this very problem of circularity:

For a nascent people to be capable of appreciating sound maxims of politics and of following the fundamental rules of reason of State, *the effect would have to become the cause*, the social spirit which is to be the work of the institution would have to preside over the institution itself, and men would have to be prior to laws what they ought to become by means of them.¹¹²

Rousseau’s solution for this impasse between state of nature and politics is well known: a mythical non-democratic lawgiver whose ostensibly religious influence and power inaugurate the preconditions of free political society.¹¹³ In this, the Rousseauian “statist” or “despotic” solution parallels the speculations of other classical social theorists: institutions must have come first, even if it was at the cost of coercively transforming previous social relationships. Hobbes’ absolutist sovereign comes to mind here, of course to put an end to religious strife.¹¹⁴ But, more interesting in the comparison to Rawls, modern advocates of liberty also intimated this conclusion. Besides Rousseau, this was also Machiavelli’s answer to the problem of a plebeian founding of a republican order.¹¹⁵ This was also the view of Kant and John Stuart Mill.¹¹⁶ The latter is especially interesting given our record with his

¹¹² Jean-Jacques Rousseau, *The Social Contract*, bk. II, chap. 7, §9, in *The Social Contract and Other Later Political Writings*, ed. Victor Gourevitch (Cambridge University Press, 1997). Quoted by Rawls in *LHPP*, 239.

¹¹³ *The Social Contract*, bk. II, chap. 7, §10.

¹¹⁴ Stephen Holmes, “Introduction,” in *Behemoth or The Long Parliament*, by Thomas Hobbes, ed. Ferdinand Tönnies (University of Chicago Press, 2014), vii–xl.

¹¹⁵ Vergara, *Systemic Corruption*, 135–43.

¹¹⁶ Immanuel Kant, “An answer to the question: What is enlightenment?” in *Practical Philosophy*, ed. and trans. Mary J. Gregor (Cambridge University Press, 1996), 11–22. See the

political legacy, his influence on Rawls, and the fact that Mill was a prominent source of the thesis that toleration emerged from early modern war exhaustion.¹¹⁷ Mill endorsed a freedom-promoting despotic authority needed in those times or places where the preconditions of liberty were not, in the eyes of the theorist, ripe.¹¹⁸ The liberal political scientist Stephen Holmes captured this issue unambiguously: “Long before Leninism, in other words, liberalism conceived provisional or transitional dictatorship as a handmaiden of social progress.”¹¹⁹

We might say that, saving minor differences, in all of these thinkers, the solution to the dilemma takes the shape of a subjective teleology. That is, the direction taken by the unfolding of civil society, freedom, or a stable regime depends on the purpose that an actor or set of actors imprint(s) on the social world through their (coercive yet freedom-promoting) political action. There might be additional objective processes accounting for further development (e.g., a theory of how society shapes character, a view of how just institutions generate a special kind of adherence, etc.). But in subjective teleology, some agent-based, purposeful interference is required to set things in motion when preconditions do not obtain.

In an age of less deistic and statist sympathies, it is interesting to contrast Rawls’ solution with the Rousseauian dilemma, since that is what he is precisely trying to answer with his model of social change that goes from *modus vivendi* to the rise of reasonable pluralism, to defend his political liberalism as a feasible project.¹²⁰ Rousseau’s problem is, Rawls says, the problem of “stability”:

how does it happen that political institutions come to generate the social spirit that would be necessary, at the founding, to enact laws establishing those institutions.¹²¹

analysis on Robert S. Taylor, “Democratic Transitions and the Progress of Absolutism in Kant’s Political Thought,” *The Journal of Politics* 68, no. 3 (2006): 556–70. On Mill, see next footnote. Rawls recognized this point: “A society united on a reasonable form of utilitarianism, or on the reasonable [but comprehensive] liberalisms of Kant or Mill, would likewise require the sanctions of state power to remain so,” *Political Liberalism*, 37.

¹¹⁷ “But when the heat of the conflict was over, without giving a complete victory to any party, and each church or sect was reduced to limit its hopes to retaining possession of the ground it already occupied; minorities, seeing that they had no chance of becoming majorities, were under the necessity of pleading to those whom they could not convert, for permission to differ,” Mill, *On Liberty*, in *CWJSM*, vol. XVIII: 222.

¹¹⁸ *Ibid.*, 224; Considerations on Representative Government, in *CWJSM*, vol. XIX: 393–95.

For the colonial context of these ideas, see Mark Tunick, “Tolerant Imperialism: John Stuart Mill’s Defense of British Rule in India,” *The Review of Politics* 68, no. 4 (2006): 586–611; Yvonne Chiu and Robert S. Taylor, “The Self-Extinguishing Despot: Millian Democratization,” *The Journal of Politics* 73, no. 4 (2011): 1239–50.

¹¹⁹ Stephen Holmes, “Making Sense of Liberal Imperialism,” in *J.S. Mill’s Political Thought: A Bicentennial Reassessment*, ed. Nadia Urbinati and Alex Zakaras (Cambridge University Press, 2007), 321.

¹²⁰ *LHPP*, 237–241.

¹²¹ *LHPP*, 239.

Rawls is not happy with the model of subjective teleology described above—or what he calls Rousseau’s “*deus ex machina*.”¹²² In Rawlsian liberalism the explanatory structure accounting for the modern preconditions of a liberal regime takes a different shape. Its model has the structure of a teleonomy: an intergenerational, cumulative process defined by rules of behavior triggered only under adequate environmental circumstances.¹²³ We already know the specifics of the Rawlsian teleonomy, its two devices to avoid circularity, both discussed earlier (§3.3.3). First, a concretization of the process and its rules: a moral psychology that includes the “sense of justice” and how this human disposition can be developed or not.¹²⁴ Second, a historical situation consistent with the adequate environmental circumstances that trigger the process: the balance-of-power choice situation that he calls “*modus vivendi*” and locates in post-Reformation Europe.¹²⁵

Therefore, “success” in Rawls’ account of reasonableness is not unlike in ontogenetic accounts in biology: the final result (i.e., an organ, a behavior) is a mixture of innate dispositions and environmental inputs. Think of how the

¹²² *LHPP*, 241.

¹²³ “Teleonomy” is often used to describe the goal-directedness of evolutionary processes in biology, in which “purpose” is not ascribed to the actions of an agent, but to a fixed program, set of rules or mechanisms, such as natural selection. For this reason, note that “teleonomy” in the sense used above (structural goal-directedness without a transcendent will) need not exclude some forms of immanent deism in which what defines purpose, though “crafted,” is fixed and independent from the will of the creator. I am thinking, for instance, on eighteenth-century Scottish political economists that saw God as a benevolent programmer. On this case, see Lisa Herzog, *Inventing the market: Smith, Hegel, and political theory* (Oxford University Press, 2013), 20–28. The notion of a Rawlsian “secular theodicy,” which stresses Rawls’ attempts to justify concrete evils in terms of overall justice has been recently suggested by Eich, “The Theodicy of Growth: John Rawls, Political Economy, and Reasonable Faith.” Although I want to stress a different gap in Rawls’ theory, Eich’s hypothesis runs parallel to mine: that Rawls’ choices in the explanatory structure of justice left him blind to the vulnerability or unreliability of the social, economic and institutional preconditions of liberalism. On teleological and teleonomic explanatory structures (with notes on its formal relation with theodicy) I follow Jon Elster, “The Case for Methodological Individualism,” *Theory and Society* 11, no. 4 (1982): 453–82; Jon Elster, *Explaining Technical Change* (Cambridge University Press, 1983), chap. 2. Of course, Rawls was not alone in this. For a reconstruction of the Western political tradition written from the side of the evolutionary view, vindicating the legacy of the Scottish political economists, and explicitly against the thesis of the intentional coercive origins of freedom-promoting orders, see Friedrich Hayek, *The Constitution of Liberty*, ed. Ronald Hamowy, Definitive edition (University of Chicago Press [1960], 2011), chap. 4; *Law, Legislation, and Liberty*, ed. Jeremy Shearmur and Bruce Caldwell (The University of Chicago Press [1979], 2021), chaps. 1 and 2. The root of my arguments above is much indebted to Antoni Domènech, *De la ética a la política: de la razón erótica a la razón inerte* (Crítica, 1989), chap. 2; Jordi Mundó, “Integración causal en la explicación científica. Ciencia social con y sin psicología,” *Ludus Vitalis* 13, no. 24 (2005): 29–54; Jordi Mundó, “Filosofía, ciencia social y cognición humana: de la folk psychology a la psicología evolucionaria,” *Papers. Revista de Sociologia* 80 (2006): 257.

¹²⁴ *Political Liberalism*, 87–88; *A Theory of Justice*, §§69–74. For a summary, see Costa, Rawls, *Citizenship, and Education*, 27–31. For a defense that interestingly contrasts it with Hegelian theodicy, see Joshua Cohen, “A More Democratic Liberalism,” *Michigan Law Review* 92, no. 6 (1994): 1530–33.

¹²⁵ *Political Liberalism*, 146–150, 158–164.

development of organs based on genetic determinants relies on a suitable dietary input (e.g., teeth and calcium, the brain and fatty acids, and so on). Rawls’ reconstruction of the feasibility of liberalism—his ontogenesis of political liberalism, we might say—is also predicated on the result of an innate human disposition activated by suitable environmental inputs. The “sense of justice” (or first moral power, or capacity to be reasonable, or full moral personality) is posited as a natural disposition shared by all humans. However, its successful development is not fixed.¹²⁶ It will only develop successfully under the adequate institutional input—at the very least, a “modus vivendi,” a balance-of-power peaceful but reluctant coexistence. Just as a calcium deficit prevents the proper development of dentition, if this modus vivendi had not occurred, then the sense of justice of the general citizenry would not have developed properly and sufficiently, and political liberalism would be unworkable—the political philosopher would be confronted with mere pluralism, rather than reasonable pluralism. What if the modus vivendi had not occurred? Or what if, despite its historical reality, its conditions do not exist anymore? Is political liberalism prepared to reproduce its preconditions of feasibility again or to preserve them if they are challenged?

3.4. POLITICAL LIBERALISM: FROM LIBERTARIAN ORIGINS TO A CIVIC REPUBLICAN CODA

3.4.1. *The history of toleration as a libertarian black box*

It would be unfair to simply assess the descriptive merits of Rawls’ dynamic model of reasonableness, given that it is intended to flesh out a formal account of liberal legitimacy—in this sense, it is not intended to be a sociological or historical account of liberty and toleration (the paragraphs are not intended to do that either). It is worth insisting, though, that the political dynamics giving rise to the conditions favorable for an eventual overlapping consensus are seen by Rawls as factual and historical. Moreover, due to his constructivist approach to political philosophy, Rawls’ stylized descriptive narrative of historical facts answers his normative goals.¹²⁷ For this reason, a criticism of the blind spots or biases of this narrative will give us information on what his normative goals are overlooking or leaving behind.

After all, as I showed, the feasibility of political liberalism is rooted in the historicity of a model socio-historical change: had it not occurred as Rawls says it did, then his normative project would be unworkable. This historicity is made explicit throughout much of his late career, especially since Rawls began to consider the “fact of pluralism” as a theoretical constraint in working up justice as fairness. Thus, as I have pointed out above, early modern

¹²⁶ See e.g., Rawls’ use of this reasoning in *A Theory of Justice*, 443.

¹²⁷ Jan-Werner Müller, “Rawls, Historian: Remarks on *Political Liberalism*’s ‘Historicism’,” *Revue Internationale de Philosophie* 237 (2006): 327–239.

toleration after the European wars of religion is considered as *the* example of a reluctant modus vivendi between faiths from which liberal constitutional principles emerged, and post-Reformation Europe is taken to be *the* fortunate birthplace of liberalism insofar as it was the cradle for a *reasonable* pluralism.¹²⁸ This historicity coheres with broader features of Rawls' approach to political philosophy. However new, abstract and ecumenical justice as fairness may seem in its presentation, Rawls' explicit aim from the beginning was to engage with the Western political tradition and to make sense of actually existing institutions and ideas in the West.¹²⁹

For the sake of the argument—and taking stock of earlier sections—let us accept that Rawls' model of moral psychology works: that citizens' sense of justice is nurtured in the adequate institutional environment, they progressively become more and more reasonable and open to accept fair cooperation provided others do the same, and so on. Suppose, too, that early modern Europe resembled such an adequate institutional environment: a symmetric choice situation in which the dominant strategy of intolerant religions, constrained by circumstances of balance-of-power, is a reluctant acceptance of toleration. Assuming both premises hold, Rawls is then able to frame the later emergence of political liberalism and stability for the right reasons as a largely non-coercive development; a process chiefly centered on the use of free human reason (to connect it with earlier chapters: in a move typical of the free speech libertarian framework, he sees Western historical development as rooted in doctrines and groups freely clashing with each other in a balance of power, eventually converging in a shared standard of reasonableness).

In the Rawlsian story, then, free reason unleashed by fortunate balance-of-power conditions is the spark that sets liberalism in motion. Thus, we read that “people eventually *came to think*” that intolerance was impractical.¹³⁰ That what settled the further conditions for democratic regimes was the work of “society's public tradition of political *thought*.”¹³¹ “All *thought* the division of Christendom was a disaster (...) toleration *seemed* better.”¹³² Or that the Rawlsian political conception of justice “completes and extends the *movement of thought* that began three centuries ago.”¹³³ This is the sense in which political liberalism claims to be fully justified and adjusted to reasonable pluralism; this is why Rawls, recall, can boast that his project is “itself the outcome of the free exercise of free human reason under conditions of

¹²⁸ See e.g., “The Idea of an Overlapping Consensus,” in John Rawls, *Collected Papers*, ed. Samuel Freeman (Harvard University Press, 1999), 424–25. Also *Political Liberalism*, xxiv–xvi, 159; *Justice as Fairness*, 1, 34; *LHPP*, 11, 24.

¹²⁹ Teresa M. Bejan, “Rawls's Teaching and the ‘Tradition’ of Political Philosophy,” *Modern Intellectual History* 18, no. 4 (2021): 1058–79. Particularly, see *A Theory of Justice*, xviii.

¹³⁰ *LHPP*, 240. My italics.

¹³¹ *Justice as Fairness*, 198. My italics.

¹³² *LHPP*, 240. My italics.

¹³³ “The Idea of an Overlapping Consensus,” in *Collected Papers*, 437; also in *Political Liberalism*, 154. My italics.

liberty.”¹³⁴ And this is the sense, finally, in which political liberalism can ensure stability-cum-legitimacy on moral grounds, presenting itself as something qualitatively different from the endless coercion and threat of punishment to which any other arrangement would be condemned under the same conditions.¹³⁵

My argument, though, is that Rawls opens up a black box just to give us another. On the one hand, he convincingly models how the merely private, prudential, and instrumental reasoning of parties in a *modus vivendi* might turn into reasonable public agreements on liberal principles for the right reasons. On the other hand, not only does he take the existence of the *modus vivendi* as a *fait accompli*—a required game-theoretical premise to build his model upon an allegedly historical rational-choice-like situation. In Rawls’ model, the *causes* behind the *modus vivendi* also remain obscure, and instead we get a new black box: “a series of violent religious wars.” This is a collection of conflicts between intolerant fanatics deemed normatively uninteresting for political liberalism, because their ideas respond to comprehensive views, not to a thin, properly political conception. Yet the output of this black box is marvelous and constitutionally promising, as I have already discussed (§3.3.2).

In contrast to Rousseau’s view mentioned above, Rawls’ model emphasizes spontaneity and naturalness in the historical development of the institutional preconditions that nurture the people’s sense of justice. Where Rousseau conjectured or endorsed a coercive public authority intentionally setting up institutional preconditions for the further development of freedom-promoting arrangements and individuals, Rawls stresses the unprompted emergence of the trigger conditions that release the citizen’s sense of justice or capacity to be reasonable. Put differently, Rawls sees the emergence of the socio-institutional preconditions of political liberalism as a matter of contingent private ordering, that only afterwards gives way to public rules.¹³⁶ Hence his use of the semantic field of luck to describe the early stages before the overlapping consensus: e.g., “historical circumstances so turned out,”

¹³⁴ *Justice as Fairness*, 144.

¹³⁵ I am not endorsing here the reading, answered by Joshua Cohen, that Rawls’ political conception involves a “myth of reason,” that it “arise[s] simply from the work of practical reason within and among traditions” (see Cohen, “A More Democratic Liberalism,” 1534). As discussed above, I accept the *institutional* attributes of the Rawlsian hypothesis of moral learning. That is, comprehensive doctrines get modified and agree on fairness, not merely through the work of reason, but through coexistence within a specifically favorable institutional background. As the following paragraphs show, my complaint addresses the unpolitical account of how such favorable institutional background came into being, not the possibility of Rawlsian political agreement itself, or its idealism, or how institutional mechanisms favor or hamper the processes that nurture the reasonable.

¹³⁶ Thus, one could apply to Rawls’ account of the *modus vivendi* the following observation he made against Nozick’s libertarianism: “One noteworthy feature of this doctrine is that the state is just like any other private association. The state comes about in the same way as other associations and its formation in the perfectly as-if just historical process is governed by the same principles,” *Political Liberalism*, 264.

“fortunate convergence of interests,” “great historical good fortune,” and so on.¹³⁷

María Victoria Costa’s study of Rawls’ view on education points to this exact issue as well. Costa’s aim is to determine the role of education in forming the sense of justice of Rawlsian citizens. In her reading, Rawls does not give an adequate account of how institutions should do this, for he “appeals to some sort of sociomechanical historical processes” in which “shared political institutions play a *non-intentional* educational role” (my emphasis). For Costa, then, the Rawlsian account

ignores the fact that more self-conscious efforts to bring about social transformation may be essential to the production of a deep and wide consensus on the principles of justice. The narrative that Rawls offers appeals to something like an invisible hand.¹³⁸

The creation of national public systems of education is arguably one of those practices—or “self-conscious efforts,” as Costa puts it—for which my argument above is asking. Public education is perhaps one of the most illustrative cases of a state-led effort to shape the character of its citizens—a case in point of non-spontaneous, intentional effort to establish the minimum socio-institutional preconditions for intellectual freedom where they did not previously obtain. A practice, I should add, that illuminates the blind spots of Rawls non-coercive (or reciprocally coercive) story of the raise of reasonableness. Interpreted as struggles to nurture the dominance of the reasonable (i.e., promoting a public political culture as the main, shared source of allegiance), the creation of public systems of education was an arguably unavoidably coercive project, involving much interference with historically dominant religious institutions that did not want to renounce their monopoly over educative systems in many European and Latin American countries.¹³⁹ It must be insisted that the goal of such efforts was not merely to further the citizens’ sense of justice in a context of liberty, but also the previous, necessary step: *liberating* public spheres from the influence of too powerful comprehensive views (i.e., the creation of balance-of-power circumstances for their own sake).

Once we have the Rawlsian emphasis on spontaneous or private ordering in mind (or, alternatively, his lack of emphasis on the intentional, coercive practices that historically set the preconditions of liberalism), it is very telling how his later work compared the making of national-level toleration with the

¹³⁷ *Political Liberalism*, xl-xli, 147; *Justice as Fairness*, 198. Recall how interwar liberals complained about the lack of “historical sense” of their early modern predecessors, and how such “disregard of history took its revenge” when preconditions changed to less favorable circumstances (quotes are John Dewey’s, §2.2.3).

¹³⁸ Costa, *Rawls, Citizenship, and Education*, 37. For her development of this criticism, see *Ibid.*, 56–60.

¹³⁹ Only as a cursory introduction to this issue, see the remarks on educative reform in José Mariano Sánchez, *Anticlericalism: A Brief History* (University of Notre Dame Press, 1972), chap. 8. (See the rest of the book for concrete historical experiences).

rise of a peaceful international order. In this context, Rawls drew on Montesquieu’s notion of “*moeur douces*” (gentle manners) produced by commerce. In Rawls’ account of international relationships, trade becomes the invisible-hand explanatory mechanisms that, shaping unreasonable motivational dispositions under unplanned circumstances, eventually serves to overcome the distrustful compromises of the *modus vivendi*.¹⁴⁰

Interestingly, this later movement toward an international-level account of the route from *modus vivendi* to political liberalism involves a return to the original context from which Rawls must have got the idea of a “*modus vivendi*.” The notion comes, very plausibly, from the conventional view of international relations built on the assumption of a so-called “Westphalian system”—a system of sovereign states in a peaceful self-interested equilibrium based on a rough balance of power from which international rules emerge.¹⁴¹ As it is well known, this view takes its name from the Treaty of Westphalia (1648) that, among other things, put an end to many of the seventeenth-century European wars of religion. Not by chance, recall, these are the conflicts that Rawls identifies as yielding a balance-of-power *modus vivendi* among comprehensive doctrines in his socio-historical model of the rise of reasonableness. Hence, we might say that the peace of 1648 plays a double and very significant role in Rawls’ imaginary.¹⁴² First, it gives historicity to the theoretically convenient balance-of-power choice situation that defines the *modus vivendi*. Second, by doing this, it adds plausibility to his account of how religious toleration and other liberal principles (and reasonableness, more generally) came to be embraced non-coercively: recall, reluctantly and based on group-interest at the beginning; yet paving the ground for allegiance for the right reasons and liberal stability some generations later.

¹⁴⁰ *Law of Peoples*, 45–46. Significantly, Albert O. Hirschman, the author Rawls cites when borrowing Montesquieu’s idea on *moeur douces*, was very critic with the circularity, disconnection from actual history and lack of awareness about coercive preconditions of such a view of trade. See Albert O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* (Princeton University Press, 1997), 115–36.

¹⁴¹ E.g., *Political Liberalism*, 147 (making explicit the connection of *modus vivendi* with international relations).

¹⁴² Although Rawls does not explicitly mention the Peace of Westphalia, he is obviously invoking the conflicts to which it put an end, the parties it affected, and how these conflicts left a reluctant balance of power among religious views (or nations) that his domestic (or international) theory of justice aims to overcome. For example, to the earlier quotes on religious wars, add his mention to “the nation-states of the earlier modern period in Europe. England, France, Spain, Hapsburg Austria, Sweden, and others fought dynastic wars for territory, true religion, for power and glory, and a place in the sun” (*Law of Peoples*, 8); or the explicit goal of his law of peoples as going beyond the view of “political states as traditionally conceived, with their powers of sovereignty included in the (positive) international law for the three centuries after the Thirty Years’ War (1618–1648)” (*Law of Peoples*, 24); “expansionist states like those of the Wars of Religion” (*Collected Papers*, 561), etc. Criticizing Rawls’ lack of connection with the empirical international relations of the late twentieth century, Allen Buchanan observes that “Both of the Westphalian assumptions [i.e., economically self-sufficient actors; politically homogenous, unified actors] are not only present in Rawls’s moral theory of international law; they are also essential to it,” see “Rawls’s *Law of Peoples*: Rules for a Vanished Westphalian World,” *Ethics* 110, no. 4 (2000): 703.

These two consequences of the peace of Westphalia, and the role they play in Rawls' theory, deserve to be challenged.

In the field of international relations, historical scholarship has demonstrated that 1648 acted as a founding myth of a system of sovereignty that only came into being much later, in the nineteenth and twentieth centuries. As such, the "Westphalian system" is an ideological product. Concretely, it is the result of how nineteenth-century historiography integrated seventeenth-century Protestant propaganda around the peace treaties—hence its accent on the decline of imperial rule, princely religious autonomy and the rise of national sovereignty with a balance of power between independent states.¹⁴³ However, historians argue that none of these attributes are historically true: "There is nothing in it about balance of power."¹⁴⁴ In any case, despite its biased assumptions, the Westphalian model became the historical commonsense of modern international relations, accepted both by the advocates and detractors of its normative implications (interestingly, creating an intellectual dynamic similar to the "interpretive conjuncture" on free speech libertarianism discussed in the Introduction, §III.2). And this is the vision that Rawls conveys in his idea of *modus vivendi*, both at the international and at the domestic level.

Importantly, this view of the diplomatic dimensions of the end of the seventeenth-century European wars of religion bears on how practices and theories of toleration came into being. Thus, a quick look at the complex picture elaborated by revisionist historical scholarship on toleration raises even more doubts about Rawls' model. One particular point is specially related with the international relations narrative around the Peace of Westphalia. Far from disappearing in a magma of equally authoritative states, the 1648 peace settlement should be understood as thickening the constitutional structure of the German Empire: "it kept *imperium* much alive."¹⁴⁵ In this sense, institutions dependent on imperial power were primarily responsible for the guarantee of religious freedom, many times against the will of local communities or states.¹⁴⁶ This picture, far from suggesting what Rawls' model intimates—a private order around toleration emerging from a *modus vivendi* among equals—emphasizes the opposite: public imperial authority, vertical relationships, and self-conscious constitutional coercion were fundamental for establishing the preconditions of religious toleration.

There are other historical elements in post-Westphalian religious coexistence that also challenge Rawls' assumptions. War for reasons of religion, if less generalized, persisted during much of the eighteenth

¹⁴³ Andreas Osiander, "Sovereignty, International Relations, and the Westphalian Myth," *International Organization* 55, no. 2 (2001): 251–87.

¹⁴⁴ *Ibid.*, 266.

¹⁴⁵ Stephane Beaulac, "The Westphalian Model in Defining International Law: Challenging the Myth," *Australian Journal of Legal History* 8, no. 2 (2004): 181–214. Quote at 211.

¹⁴⁶ *Ibid.*, 200–201, 204; Osiander, "Sovereignty, International Relations, and the Westphalian Myth," 272–73.

century.¹⁴⁷ Similarly, case studies about German territories suggest that coexistence after the peace treaties transformed rather than ended religious conflict. Some argue that it even unintendedly promoted strife—one reason is what I have already discussed: the Peace of Westphalia relied on imperial-level rules that in some cases imposed confessional parity in territories that had earlier enjoyed certain confessional autonomy according to the principle *cuius regio*.¹⁴⁸ Thus, instead of reconciliation, “post-Westphalian church authorities themselves fostered ministerial discord by nurturing a climate of coercion, distrust, and vengefulness.”¹⁴⁹ In early modern Augsburg, for example, Lutheran celebrations of the peace treaties were deeply confessional and triumphalist reminders of the demise of Catholic power, creating civic traditions that excluded the local majority of Catholics. The war experience was in this case not a lesson of exhaustion and the subsequent acceptance of difference—as the Rawlsian account suggests—but quite the opposite: the memory of war was a memory of persecution and violence, if anything a reminder that coexistence would not have been possible had it not been for the military defeat of Catholicism.¹⁵⁰ Another historian turns it into a general point, even more forceful in the light of contemporary ethnic and religious conflicts: “To the contrary, war left a legacy of bitter feelings—memories of persecution, each side by the other—that sharpened confessional allegiances.”¹⁵¹

In short, assuming, as Rawls does, that the aftermath of the wars of religion was a balance-of-force *modus vivendi* on tolerationist principles that made possible a further stability for the right reasons leaves many loose ends. The cases I have already mentioned point to the multi-layered or multi-level dimensions of toleration (or any other agreement on liberal principles of coexistence). In the most charitable reading, even if we concede to the Rawlsian that, from a European-wide perspective and in the long-term the post-Westphalian context could be construed as a balanced standstill among competing comprehensive doctrines, it must be noted how such settlement entailed completely different patterns of coexistence at lower levels. High-level toleration could be built on regional- or local-level coercive religious unity. This was, for example, the practical consequence of the pre-Westphalian *cuius regio* principle established to solve earlier religious conflicts in the sixteenth century: religious autonomy for “sovereign”

¹⁴⁷ Benjamin J. Kaplan, *Divided by Faith: Religious Conflict and the Practice of Toleration in Early Modern Europe* (Harvard university press, 2007), 73–98, 335.

¹⁴⁸ David Mayes, “Divided by Toleration: Paradoxical Effects of the 1648 Peace of Westphalia and Multiconfessionalism,” *Archiv Für Reformationsgeschichte - Archive for Reformation History* 106, no. 1 (2015): 290–313.

¹⁴⁹ David Mayes, “Discord via Toleration: Clerical Conflict in the Post-Westphalian Imperial Territories,” in *Topographies of Tolerance and Intolerance*, ed. Marjorie Elizabeth Plummer and Victoria Christman (Brill, 2018), 207.

¹⁵⁰ Emily Fisher Gray, “Celebrating Peace in Biconfessional Augsburg: Lutheran Churches and Remembrance Culture,” in *Topographies of Tolerance and Intolerance*, ed. Marjorie Elizabeth Plummer and Victoria Christman (Brill, 2018), 176–200.

¹⁵¹ Kaplan, *Divided by Faith*, 346.

communities meant domestic religious despotism.¹⁵² This was also the experience of toleration *within* comprehensive views—a dimension that Rawls’ story overlooks. As much as, say, Reformed churches could claim or learn to reasonably value peaceful coexistence with other confessions on a local or national context, this lesson need not apply to intra-church practices. Modus-vivendi tolerationist dynamics outside are compatible, and can even foster, internal intolerant practices of coercion—recall on this point the excommunication of Spinoza from the Sephardic community of Amsterdam, persecuted by the inquisition but exiled in the early modern Dutch religious haven.¹⁵³

The case of Poland-Lithuania, to put another example, also offers interesting counterpoints to the Rawlsian model. First, it shows how early modern religious toleration was a legal conquest, requiring the coercive support of public authorities against powerful nobiliary interests.¹⁵⁴ This made Poland-Lithuania one of the most religiously tolerant regions in continental Europe during the sixteenth century. However, this example also illustrates the excessive optimism of Rawls’ socio-historical account of moral psychology. Under the sixteenth-century tolerant modus vivendi, Polish Catholicism suspended their violence and intolerance for prudential, self-interested reasons, just as the Rawlsian story predicts. However, this strategical suspension of disagreement did not pave the way for reasonableness, openness to public justice or a deeper allegiance to liberal principles, but for fiercer intolerance as the counter-Reformation recovered the Catholic lost ground.¹⁵⁵

Lastly, Rawls’ story disregards episodes in which toleration was not a second-best option arising out of necessity and incapacity to dominate others. That is, settings in which enforcing some form of principled toleration was itself part of the war demands or revolutionary goals (therefore, previous to a modus-vivendi situation). In the English-speaking tradition, this was notably the case of significant factions in the Parliamentary side of the English Civil Wars.¹⁵⁶ Not to mention the prerequisite of a supreme civil power to grant religious freedom in the Erastian conception of toleration that shaped

¹⁵² For a discussion of this point, see Forst, *Toleration in Conflict: Past and Present*, 131–34. Capturing a similar problem, see the model of “multinational empires” in Michael Walzer, *On Toleration* (Yale University Press, 1997).

¹⁵³ Steven Nadler, “The Excommunication of Spinoza: Trouble and Toleration in the ‘Dutch Jerusalem,’” *Shofar: An Interdisciplinary Journal of Jewish Studies* 19, no. 4 (2001): 40–52. For a wider description of how early modern Dutch toleration nurtured practices of tighter intra-church discipline, see Joke Spaans, “Religious Policies in Seventeenth-Century Dutch Republic,” in *Calvinism and Religious Toleration in the Dutch Golden Age*, ed. R. Po-Chia Hsia and Henk van Nierop (Cambridge University Press, 2002), 72–86.

¹⁵⁴ Felicia Roşu, “Pluralismo religioso y tolerancia legal en las monarquías electivas del s. XVI,” in *Repúblicas y republicanismos en la Europa moderna (siglos XVI-XVIII)*, ed. Manuel Herrero Sánchez (Fondo de Cultura Económica, 2017), 433–57.

¹⁵⁵ Magda Teter, *Jews and Heretics in Catholic Poland: A Beleaguered Church in the Post-Reformation Era* (Cambridge University press, 2006), chap. 7.

¹⁵⁶ John Coffey, “Puritanism and Liberty Revisited: The Case for Toleration in the English Revolution,” *The Historical Journal* 41, no. 4 (1998): 961–85.

positions across the political spectrum—public authorities had a self-conscious role to play the creation of the balance-of-power conditions, by creating a civil religion if necessary.¹⁵⁷ “Secularization” in these cases should not be misinterpreted as irreligiosity (though it could be mixed with it); it should be understood rather as advancing reforms against the arbitrary power of churches and unchecked religious magistrates.¹⁵⁸ This is, I believe, also the rationale that explains late eighteenth- and nineteenth-century processes of secularization in which toleration was an explicit aim of state building, not an outcome of private parties reciprocally agreeing on liberal terms of coexistence. I am thinking of the strong anti-Catholic thrust of the French Revolution, the unification of Italy against Vatican ambitions, the *Kulturkampf* in Germany, or the republican periods of modern state-building in Spain. What was at stake in these cases, with better or worse results, was what Rawls’ account seems to overlook: the intentional creation of the preconditions for the development of reasonableness and political liberalism—the setting up of the balance-of-power circumstances that allow for the free access to public reason.¹⁵⁹

These are only some counterexamples. They are intended to suggest that what Rawls uses to provide historicity to his feasibility model of political liberalism is not really historical. Instead of a historical account of the viability of Rawls’ project, we get a stylized selection of facts that serves to frame the political-religious situation of early modern Europe as a rational-choice situation—the appropriate circumstance to claim that political liberalism is the fruit of reciprocal reason giving and taking, not coercion.¹⁶⁰ (I am willing to

¹⁵⁷ For an overview of Erastianism, see Nelson, *The Hebrew Republic*, chap. 3. For a study of the influence of this ideas in early modern English republicanism, see Justin Champion, *The Pillars of Priestcraft Shaken: The Church of England and Its Enemies, 1660-1730* (Cambridge University Press, 1992), 77–98, 170–95.

¹⁵⁸ Blair Worden, “The Question of Secularization,” in *A Nation Transformed: England After the Restoration*, ed. Alan Houston and Steven Pincus (Cambridge University Press, 2001), 20–40.

¹⁵⁹ Lisa Dittrich, “Propuestas para una interpretación europea del anticlericalismo en el siglo XIX: historia cultural, identidad y secularización,” *Historia Social*, no. 84 (2016): esp. 127–130 on non-functionalist views of “secularization” that frame it as a conscious political goal. Aside from the well-known case of France and *laïcité*, see also, e.g., Manuel Borutta, “Anti-Catholicism and the Culture War in Risorgimento Italy,” in *The Risorgimento Revisited: Nationalism and Culture in Nineteenth-Century Italy*, ed. Silvana Patriarca and Lucy Riall (Palgrave Macmillan, 2012), 191–213.

¹⁶⁰ It is interesting to compare my exercise with Rawls’ historical self-criticism of his own stability model of a democratic peace (*Law of Peoples*, 51–54)—the theoretical equivalent to the overlapping consensus (i.e., stability for the right reasons) in international relations. After enumerating many counterexamples to his model, his conclusion is not a rejection or modification of the overall narrative itself, but a sort of conceptual entrenchment: if history did not unravel as the model of democratic peace hypothesizes, Rawls argues, then it is because its agents (nations) did not have the necessary attributes to count as suitable elements of the model (constitutional democracies) (*Law of Peoples*, 54). It must be noted, however, that some of his

accept, in any case, that there are historical cases that support, rather than undermine, this Rawlsian account of the rise of liberalism.) But, regardless of the empirical correctness of Rawls' model, what is important is to challenge the overall narrative by uncovering the broader intellectual trends in which it is rooted—which could also help identify its blind spots, its tacit assumptions, or its unstated political commitments. One of those trends is the whiggish view of the history of toleration reproduced by the “free speech libertarian framework” discussed in earlier chapters. In this view, recall, the history of expressive liberties is a history of non-interference, a history of excessive uses of public power rolling back from religious strife, leaving equally powerful private groups to negotiate the fair terms of their coexistence (§III.2, but compare to §IV.1). This is the “ideological construct” identified by the historian of toleration Benjamin Kaplan; in his opinion, a “myth” that “perpetuates our ignorance” about the past and about today's practices of toleration.¹⁶¹ Despite not engaging with Rawls, it is worth noticing that this “myth” has all the elements of the Rawlsian model:

Explicit in textbooks, implicit usually in monographs, the story draws a sharp contrast between an “age of religious wars” that ended around 1650 and a succeeding age in which religious conflict ceased. From the bloody, futile struggles of the first age, it is said, Europeans grew disillusioned with religious dogma. Rulers no longer allowed their decisions to be determined by its dictates, but instead calculated their political and economic interests, following *raison d'état* and enriching their lands through mercantilist policies. Intellectuals redefined toleration as a positive good instead of a grudging concession. As their ideas spread, people of different faiths came to accept one another. Reason advanced and religious passions receded as Enlightenment followed Scientific Revolution. Europe became more civilized.¹⁶²

own counterexamples are very recent: e.g., “US overturned the democracies of Allende in Chile [1973] (...) the Sandinistas in Nicaragua [c. 1979-1990]” (*Law of Peoples*, 53). This brings Rawls' model of democratic peace closer to the rather radical conclusion that the late twentieth-century US in which he lived should not count as a full “constitutional democracy.” Aside from this acceptable political implication, what it is more telling is the epistemological dimension within Rawls' theory: instead of helping to fix his model, acknowledging all this historical and empirical evidence makes him to distance the model even more from reality. Yet at the domestic level of toleration theory and the arguments of *Political Liberalism*, a parallel move against my counterexamples above would not be valid. For the “fact of reasonable pluralism” (i.e., that society is mainly composed of reasonable comprehensive doctrines/groups/individuals) is not a concept or ideal type (as “constitutional democracy” is in *The Law of Peoples*). In *Political Liberalism*, that agents have certain attributes (that reasonableness subordinates the rational) is taken to be actual, civilizational *fait accompli* of modern history, or else the purpose of the model is futile: had the history of the West being different than the Rawlsian model says, then political liberalism is simply not feasible. That is why I insist on the need of challenging the overall narrative.

¹⁶¹ Kaplan, *Divided by Faith*, 356.

¹⁶² *Ibid.*, 334.

3.4.2. *Causes and reasons behind the preconditions of liberalism*

This leads to a further point. To ensure the feasibility of political liberalism—the chances of a democratic political regime only adjusted to “the free exercise of free human reason”—it is not enough to prove that comprehensive doctrines *may* have reasons to adhere to it. The Rawlsian story can in fact provide reasons for why, say, the Catholicism of the II Vatican Council may follow the thin principles of fair cooperation proposed by political liberals.¹⁶³ It can explain, why and how this Catholic comprehensive conception of the good may, if open to the reasonable, be squared with a public political conception of justice—it can explain, put differently, why Catholics may have reasons to honor what Rawls also referred to as the “duty of civility.”¹⁶⁴

However, the Rawlsian account does not provide an adequate explanation for why reasonableness and tolerationist trends had *in fact* ended up being dominant within the twentieth-century Catholic Church. Reasons for toleration have been available since the sixteenth century and arguably before. Reasons may have played a role in shifting the mind of Catholics or in taming inquisitorial tendencies, but this does not explain why such reasons for toleration turned out to be more convincing to bishops in the 1950s than in early modern times. What explains this, as I have already discussed, is Rawls’ model of the rise of reasonableness: the process of socio-historical change starting from a *modus vivendi*. Yet, as I have argued above, the meaningful starting point of this process—the balance of power that allows for reluctant but self-interested cooperation—remains fundamentally unexplained by Rawls, simply framed as a fortunate, unprompted, and unintended historical circumstance (§3.3.3, §3.4.1).

In other words, Rawls’ focus on *reasons* leads him to overlook the *causes* that turned the fact of pluralism into a “reasonable pluralism” suitable for the development of liberalism.¹⁶⁵ Rawls reduces those causes to the historical good fortune that produced a hard reset of power asymmetries among intolerant comprehensive doctrines, producing the appropriate ground for the nurture of reasonableness and the sense of justice. He misses how important these causes are to the point that he takes it for granted that Western societies have learned all the important lessons of *modus-vivendi* coexistence and that, today, we may elaborate political theory simply assuming that “the reasonable has priority over the rational and subordinates it absolutely.”¹⁶⁶ Furthermore, as I also suggested above, even if the causes of the reasonable disappear,

¹⁶³ His discussion of it in *Political Liberalism*, 476 n75; *Law of Peoples*, 19–20

¹⁶⁴ E.g., *Political Liberalism*, 217.

¹⁶⁵ I took this emphasis on causes originally from Barry, “John Rawls and the Search for Stability,” 912. (He is taking up a point raised by Cohen, “A More Democratic Liberalism,” 1530f on “mechanisms.” However, I do not interpret Cohen as giving additional arguments for the Rawlsian position, but simply underscoring the institutional dimension already present in Rawls’ view of moral learning.)

¹⁶⁶ *Justice as Fairness*, 82.

reasonableness will remain there—it will behave hysteretically: surviving its own preconditions (§3.3.2).

Among these causes, granted, there are the institutional results of events such as the wars of religion, in which the weakening of ecclesiastical authority, the subsequent leveling of the public sphere and the rise of constitutional liberties could be counted as unintended consequences of the conflict—I insist I am not arguing that we should rule out the possibility of some cases of unprompted *modus-vivendi* coexistence. But there were other causes, some of them particularly interesting for creating the symmetric social relationships needed for Rawlsian liberalism to develop. I have mentioned, in particular, political processes that explicitly sought to undermine ecclesiastical authority of any kind. My view is that a more tolerant public sphere less dominated by religion or the influence of any other private power was an explicit goal of these efforts; a goal that antedated *modus-vivendi* coexistence. However, Rawls disregards the liberal-political value of these phenomena, for he simply frames them as emanating from yet another comprehensive doctrine. What he overlooks is the fact that the conscious institutional outcomes of, say, what he calls Enlightenment’s “comprehensive liberalisms,” are to be counted among the causes that created the preconditions for the “free use of human reason” that Rawls wants to turn into the yardstick of his political, non-comprehensive liberalism.

The point is then that what Rawls calls the “movement of *thought*” to the reasonable required more elements than thought and ideas. He partly acknowledges this, but tends to depoliticize these additional elements by framing them as unintended consequences or the result of fortunate historical circumstances. However, in many other significant cases, this “movement of thought” was possible due to a series of intentional public interferences that limited private sources of power—which are nothing but one of the roots of pervasive unreasonableness. To recover the earlier example: if, as compared to sixteenth-century Catholicism, the II Vatican Council embraced religious toleration, it was because, besides good moral reasons, the set of opportunities of the Catholic Church was altered after centuries of extensive expropriations, suppression of monastical orders, removal and exclusion from public offices, end of its monopoly in education, and so on. Rawls rightly argues, for example, that “eighteenth century leading writers hoped to establish a basis of moral knowledge independent of ecclesiastical authority.”¹⁶⁷ Yet such a philosophical endeavor could have political implications only in a world where ecclesiastical authority was being steadily challenged beyond the realm of thought and reasons. Republican followers of Rawls, such as Alan Thomas, have made this argument: “The politically liberal state cannot avoid using state action to put in place the preconditions of its own possibility if it is to be legitimate in the right way.”¹⁶⁸ And, interestingly, this was a point also made by one of his earliest conservative critics, the classicist Alan Bloom. He

¹⁶⁷ *Political Liberalism*, xxiv.

¹⁶⁸ Thomas, *Republic of Equals*, 14.

denounced that Rawls’ democratic regime was “forgetful of the harsh deeds that preceded it and made it possible.”¹⁶⁹

By obscuring or, at least, depoliticizing the causal chain up to the *modus vivendi*—the “harsh deeds”—, Rawls removes historically and normatively relevant arguments and practices from the toolkit of political liberalism. Particularly, the ones that actively endorsed the use of public power to create symmetrical positions among competing comprehensive doctrines and the groups that represent them, or to assert the priority of public rules over private ordering (§IV.1). Rawls’ libertarian black box of the history of toleration disregards the arguments and practices, in other words, that made the fact of reasonable pluralism a political goal within reach—not merely a “fortunate” outcome in the face of mutual destruction, but as an explicit civilizational project.

Opening this black box is necessary for at least two reasons. The first is that it allows for a critique of the history of liberalism (including a *liberal* critique of this history). It is the only way liberals can reckon with their past. Not obscured anymore under stylized, whiggish narratives of non-coercion and consensus, opening the black box is a necessary step for the assessment of the often illiberal, violent or prejudiced projects of civilization upon which liberal political philosophy is built today.¹⁷⁰ These are all of them errors that liberals do not want to repeat, or historical wrongs that may be give rise to demands of justice that political liberalism may want to answer.¹⁷¹

The second reason for opening the black box has to do with the stability of political liberalism itself. For the reasons explained above, it should be clear how Rawls denies his thin political theory a say in setting up, reproducing or

¹⁶⁹ Allan Bloom, “Justice: John Rawls vs. the Tradition of Political Philosophy,” *American Political Science Review* 69, no. 2 (1975): 648. My intuition is that Bloom is reminding of those “harsh deeds” not merely to vindicate them for the toolkit of liberal democracies today (i.e., the need to be stricter with what he thought as dangerous cultural and political trends). It was also Bloom’s way of encouraging a critical awareness against what he saw as the excesses of modern liberalism and democracy, past and future. Think of how a conservative reading of the anti-clericalism overviewed in §IV.1 would look like: stressing the coercive nature of modern civilization for crushing traditional sources of authority that were still legitimate, at least for some people. For a contemporary example of this reactionary approach to the history of liberalism broadly understood, see Ryszard Legutko, *The Demon in Democracy: Totalitarian Temptations in Free Societies*, trans. Teresa Adelson (Encounter Books, 2016), esp. 151–172.

¹⁷⁰ An argument along this lines, but specifically applied to Rawls failure to acknowledge racial injustice due to his “historical romanticism” and focus on finding consensus in American public culture, has been made by Brandon M. Terry, “Conscription and the Color Line: Rawls, Race and Vietnam,” *Modern Intellectual History* 18, no. 4 (2021): 976–83.

¹⁷¹ Thus, my argument connects with the criticism that Rawlsian justice does not integrate demands of intergenerational rectification (though it may do, if properly amended). See Juan Espindola and Moises Vaca, “The Problem of Historical Rectification for Rawlsian Theory,” *Res Publica* 20, no. 3 (2014): 227–43. In the conventional historical-rectification critique to Rawls (which is also part of Nozick’s critique), the argument demands an account of how current inequalities came about, a necessary step to adjudicate remedies. My argument demands an account of how egalitarianism came about insofar as that history, albeit with a happy ending, also conceals normatively relevant episodes of coercion (that the Rawlsian may want to avoid in the future, remedy through rectification, or repeat if the preservation of liberalism is at stake).

preserving its own historical, social, and institutional preconditions. Rawlsianism, of course, welcomes and acknowledges that it requires such preconditions: it admits its historicity and contingency. It is also explicitly aware of a “commonsense political sociology” that preserves justice against plutocratic tendencies (§3.2.1), and admits that the basic structure must be vigilant of changing circumstances, “adjusting” to them whenever is necessary (§3.2.2). But if Rawlsianism can claim to be a “political liberalism,” “non-comprehensive,” “political, not metaphysical,” “itself the outcome of the free exercise of free human reason,” it is only by narrowing the scope of political theory to that what happens once its historical “fortunate” “favorable” circumstances are already in place. In short, my point is that if Rawlsian liberals can pride themselves on promoting a feasible non-comprehensive view, it is only because they reap the benefits of what previous “comprehensive liberalisms” sowed. Yet the tools available to those comprehensive liberalisms are deemed outdated by Rawlsians because, in their model, the victory of the reasonable is thought to be definitive.

But what if the preconditions of political liberalism had not taken place? Or, if they did, what if they change, modified by later historical processes? And what about those non-Western places in which Rawlsians themselves acknowledge that these preconditions do not obtain? By disregarding the crafted, politically created nature of the preconditions of the reasonable and liberalism, by taking the processes behind those preconditions as secure or as not important anymore once the sense of justice has developed, and by discounting the ideas that played a role in creating such preconditions as “comprehensive” doctrines (i.e., excluded from the Rawlsian, thin, political conception of liberalism), how should Rawls’ political theory deal with processes of liberalization or preservation of liberalism under growing unfavorable circumstances?¹⁷²

3.4.3. Deteriorating preconditions and politics as a “public facility”

The problem of preserving liberalism under new, unfavorable circumstances brings us again to the opening section of this chapter (§3.1). Recall, it was about Rawls’ assimilation of First Amendment constitutionalism: how, on the one hand, he embraced the free speech libertarian spirit of interwar jurisprudence and its mid-century renovation; yet how, on the other hand, he problematized the late effects of First Amendment libertarianism when

¹⁷² Arguably, as I discussed earlier, some of these problems are addressed by the basic structure. This is, as we saw, especially true when it comes to institutions that coercively stabilize when unreasonableness and self-interest challenges public liberties (on the particular case of minimal public coercion sustaining “toleration,” see *TJ* §35). Thus, it is clear in his early treatment of stability in *A Theory of Justice* that the basic structure contributes, for instance to preserve liberalism against illiberal groups (recall also, e.g., the lesson from §3.3.1). However, Rawls himself left out such intuitions out of political liberalism proper since, as he put it, “*A Theory of Justice* was a comprehensive doctrine” (“Commonweal Interview with John Rawls by Bernard Prusak,” in *Collected Papers*, 617).

freedom of expression became the Supreme Court’s pretext to invalidate campaign expenditures regulation.

What Rawls witnessed during the 1970s was, precisely, the breakdown of the favorable mid-century circumstances upon which his normative philosophy was built.¹⁷³ In *A Theory of Justice*, this was already considered as a possibility (it was a historical lesson, in fact): “inequities in the economic and social system may soon undermine whatever political equality might have existed under fortunate historical conditions.” But the thought was immediately put aside as a matter of “political sociology,” with the remark that “our discussion of the theory of justice (...) must not be mistaken for a theory of the political system.”¹⁷⁴

As Stephan Eich puts it, the Rawlsian project was “uncomfortably dependent on a number of historical preconditions—not least the growth-based political economy of the postwar years—that entered crisis just as Rawls’s theory ascended.”¹⁷⁵ These preconditions and their trickle-down distributional effects were a central but implicit element in Rawls’ early account of stability, which assumed away disruptive motivational dispositions such as envy.¹⁷⁶ Yet, as Eich also points out, when Rawls confronted the vanishing of such preconditions in his later work (i.e., the lectures that would become *Political Liberalism*), he did not revise his views “in the face of the original empirical grounding having disappeared”—instead, he “doubled down on the virtues of philosophical abstraction and the promise of philosophy as reconciliation”; now the project was purely one “of hope and reasonable faith.”¹⁷⁷

I want to expand Eich’s concerns chronologically. My argument is that Rawls’ experience of American politics and the Supreme Court in the late 1970s also proved the remodeled project of “reasonable faith” to be a failure as well. His disenchantment with the unleashed free speech libertarianism mobilized by the Court in *Buckley*, in which the First Amendment served to

¹⁷³ See e.g., the general thesis in Forrester, *In the Shadow of Justice*, esp. 101-103. That is, economically speaking, the postwar period in which Rawls developed his theory of justice was an anomaly that fostered a particular kind of liberal optimism; see David Singh Grewal and Jedediah Britton-Purdy, “Inequality Rediscovered,” *Theoretical Inquiries in Law* 18, no. 1 (2017): 61–82. On the rise and fall of mid-century favorable circumstances, I am much indebted with Antoni Domènech, “Prólogo,” in *Exhortación a la desobediencia*, by Xosé Manuel Beiras (Laiovento, 2015). See also Julio Martínez-Cava, “¿Qué fue el Pacto de postguerra? El debate sobre la propiedad en el socialismo británico,” *Res Publica* 27, no. 2 (2024). I want to acknowledge as well Mike Davis’ account, written from the point of view of the American labor movement; see his *Prisoners of the American Dream: Politics and Economy in the History of the US Working Class* (Verso, 1986). On how the late 1970s new economic conditions were reflected in areas of free speech jurisprudence other than campaign finance regulations, see Soley, *Censorship, Inc.*, chaps. 6 and 7.

¹⁷⁴ *A Theory of Justice*, 199. Note this was not added later, it was already included in the first edition, *A Theory of Justice* (1st ed.), 226–227.

¹⁷⁵ Eich, “The Theodicy of Growth: John Rawls, Political Economy, and Reasonable Faith,” 986.

¹⁷⁶ *Ibid.*, 998–1000.

¹⁷⁷ *Ibid.*, 1007–1008.

attack the most basic fairness in democratic elections, embody the crisis and limits of Rawls' own political liberalism. The Court's verdict was not the only "dismaying" thing. Justice as fairness and its new depiction of the public sphere could no longer be read as a rationalization of existing institutions: "Formal equality is not enough."¹⁷⁸ Now, the application of the principles of justice involved, for instance, a harsh criticism of a phenomenon Rawls found in "imperfect and oligopolistic markets dominated by relatively few firms": a ubiquitous reality of our societies, "market-strategic advertising." A "well-ordered society," he warned, "would seek reasonable ways to limit" this "socially wasteful" practice.¹⁷⁹ It was a vicious cycle, moreover: once the malfunction of the Supreme Court's sense of justice let the unrestricted use of money in politics, things would only worsen as the public awareness of living under a just regime and a fair democratic process begins to deteriorate: citizens will tend to "become resentful, cynical, and apathetic"—a breeding ground for "uncontrollable" corruption.¹⁸⁰

Later texts only raised the stakes. In the late 1990s revision of these arguments, Rawls declared that "public deliberation *must be made possible*," as if its preconditions demanded something other than historical good fortune. He was rather specific: deliberation must be

set free from the curse of money. Otherwise politics is dominated by corporate and other organized interests who through large contributions to campaigns distort if not preclude public discussion and deliberation.¹⁸¹

That liberal stability required a certain institutionally created distribution of power was made clearer in later formulations of the ideas that had structured the lectures of *Political Liberalism*. The suitable institutional environment for the free public use of reason thickened or became more explicit: "all citizens must be assured the all-purpose means necessary for them to take intelligent and effective advantage of their basic freedoms."¹⁸² This meant that "without widespread education" and "without a public informed about pressing problems" deliberative politics were unworkable—"social decisions simply cannot be made."¹⁸³ Similarly, the "political system is simply unable to function" when there was a "constant pursuit of money to finance campaigns."¹⁸⁴ All this was "simple" to the extent that being aware that a feasible political liberalism required this sort of arrangements was a mere "application of common sense political sociology."¹⁸⁵ A just regime must remove "the obvious temptations to corruption": when "great wealth [is] in

¹⁷⁸ *Political Liberalism*, 361.

¹⁷⁹ *Political Liberalism*, 364–365.

¹⁸⁰ *Political Liberalism*, 363.

¹⁸¹ "The Idea of Public Reason Revisited" (1997), in *Political Liberalism*, 449. My italics.

¹⁸² "Introduction to the Paperback Edition" (1995), in *Political Liberalism*, lvii.

¹⁸³ "The Idea of Public Reason Revisited" (1997), in *Political Liberalism*, 449–450.

¹⁸⁴ *Ibid.*

¹⁸⁵ "Introduction to the Paperback Edition" (1995), in *Political Liberalism*, lv.

the control of corporate economic power, is it any wonder that congressional legislation is, in effect, written by lobbyists, and Congress becomes a bargaining chamber in which laws are bought and sold?”¹⁸⁶ So much for a philosophy that allegedly seeks to “calm our frustration and rage against our society,” “reconciling” us with the world as it is!¹⁸⁷

But was it all that “simple,” “obvious” or “commonsensical”? In Rawls view, the guarantee and the development of institutions in their relationship with the ideal of justice was largely based on “a supreme court.” As the “exemplar of public reason,” this constitutional court must cultivate society’s background assumptions about political justice—embodied in a “higher law”—in the right, political-liberal direction. As it is well known, this is a typically anti-majoritarian institution, which Rawls welcomed: “By applying public reason the court is to prevent that law from being eroded by the legislation of transient majorities.” Yet, significantly for our purposes, the court was for him an anti-plutocratic device as well: “or more likely,” he added, the court was to prevent the law from being eroded “by organized and well-situated narrow interests skilled at getting their way.”¹⁸⁸ A sidenote already warned that the justices may fail to effectively carry this role.¹⁸⁹ But it was, as we saw, the late episodes of First Amendment jurisprudence and the actual Supreme Court of the late 1970s that empirically confirmed the failure.

The “exemplar of public reason” in the United States had in fact failed resoundingly against those “organized and well-situated narrow interests.” First Amendment constitutionalism in the Court was incapable of integrating what was for Rawls was “simply” “common sense.” It was not that some minority groups still practiced an unreasonableness typical of early modern times; it was not that America lacked a public democratic culture and traditions from which to draw non-comprehensive ideas of justice. Coming from the “exemplar of public reason,” what Rawls was facing in *Buckley* was a failure of reasonableness itself: either of the assumption that it was “dominating and controlling” in modern Western societies, or of its actual power to shape the motivational set and reasoning of Supreme Court justices. Who, if not an assembly of wise deliberative jurists, protected from “transient” mass politics, was to be molded by the constraints of reasonableness?¹⁹⁰ In any case, if the reasonable collapses, nothing much is left of Rawls’ socio-historical model of moral learning and his account of a feasible and stable political liberalism.

Put differently, the late 1970s were evidencing that the reasonable did not exhibit hysteresis; just the contrary to what Rawls’ model suggested (§3.3.2). The shift in the socio-economic preconditions of liberalism—the decline of

¹⁸⁶ *Law of Peoples*, 24, 24 n19.

¹⁸⁷ *Justice as Fairness*, 3.

¹⁸⁸ *Political Liberalism*, 233.

¹⁸⁹ *Political Liberalism*, 233; n18 on his view of the historical failures of the Supreme Court in doing this.

¹⁹⁰ See e.g., Rawls’ early definition of a “competent moral judge” in *Collected Papers*, 2–3; and how the 1970s Supreme Court would be failing to fulfill characteristics (ii) and (iv).

postwar regulated capitalism and the rise of plutocratic trends, especially the translation of economic power into political power—was also shifting the basis of common sense and the reasonable. These changes had, for Rawls, far-reaching consequences, as shown for example by his radical charges against the US expansionist foreign policy of the last third of the twentieth century: “covert operations against [democracies] were carried out by a government prompted by monopolistic and oligarchic interests without the knowledge or criticism of the public.”¹⁹¹ Could he be even doubting that the preconditions of liberalism still obtained in the US? An unconvinced footnote in *Justice as Fairness* may be read accordingly: “One might say” that “reasonably favorable conditions” exist in the “United States today, if one decides our constitutional regime is largely democratic in form only.”¹⁹² In other words, perhaps the hope of stability “with respect to changes in the distribution of power” was not workable at all, or at least not in American society.

It was becoming evident that America’s democratic public culture and traditions no longer pointed to fairness in the political process or to the fair value of liberty, as Rawls thought they might have done during the interwar years.¹⁹³ Now, at least for the majority of people among the “exemplars of public reason” in the Supreme Court, American traditions pointed in the opposite direction. Free speech libertarianism as it was incorporated in First Amendment jurisprudence was evidently one of those traditions. The Court was doing exactly what Rawls expected a constitutional court to do: interpret a society’s traditions and background values according to what its members think reasonable. However, the Court was interpreting tradition in the wrong direction, ignoring that free speech does not mean absolute freedom from regulation, that citizens must enjoy a fair value of political liberties, and that the public use of reason is impracticable without background justice limiting social and economic inequalities. By ignoring all this, the Court was turning the American tradition of political liberty into a useless or, better, dangerous device, for the Court was able to undermine free speech in the name of free speech. Without guaranteeing the fair value of political liberties, Rawls argued, constitutional rights “are an impoverished form of liberalism.” To which he added: “indeed not liberalism at all but libertarianism.”¹⁹⁴

In the face of the late 1970s exhaustion of liberalism, of its incapacity to mobilize the American public political culture toward a just society, of its degeneration within the Supreme Court into full-blown libertarianism, how could Rawls make sense of his normative project? He needed, particularly, to

¹⁹¹ *Law of Peoples*, 53.

¹⁹² *Justice as Fairness*, 101 n23.

¹⁹³ I am assuming, for the sake of argument, that Rawls’ normative project had a better empirical grounding in earlier times (interwar and mid-century US), as he seems to think it did. However, there are important reasons to doubt these earlier times were more favorable for reconciliation and consensus, especially once we are aware of the pervasiveness of other vectors of social exclusion such as race or gender.

¹⁹⁴ “Introduction to the Paperback Edition” (1995), in *Political Liberalism*, lvi; also, *Law of Peoples*, 49. On what Rawls meant here by “libertarianism” (i.e., the political position associated with Nozick), see *Political Liberalism*, §VII.3.

make sense of the very contentious idea (and not at all commonsensical, so it seemed) that inextricably linked political liberties with the socioeconomic structure and fairness. This connection of free speech with what I have been calling its “political economy” led Rawls to advocate a set of policies aimed at achieving a more egalitarian distribution of the chances that individuals must have to effectively express ideas and address their fellow citizens by using public reason. And he did all of this, not in the name of equality or liberty trade-offs, but in the name of the priority of liberty.

In a nutshell, this contentious ideal is captured by a metaphor that Rawls used occasionally: “the political process as a public facility.”¹⁹⁵ This image evokes rather anti-libertarian values if compared to the dominant understanding of the marketplace-of-ideas metaphor at the times Rawls was writing (§2.1.2). It suggests that the political process (i.e., all the moments, spaces, and resources that constitute democratic decision-making, including those concerning freedom of expression) is a field of society subjected to the intense distributive demands that characterize the ideal functioning of public infrastructures in a just Rawlsian society: fair and equal access to a limited space, safeguards against private appropriation, laws that ensure it fulfills its public purpose, shielding from dynamics of profit-maximization, etc.

To make sense of this ideal, Rawls needed a clearer view of state power. As Alan Thomas has suggested, the problem of capitalist democracies in recent years has not been so much the oligarchic control of government, but the effective “rolling back” of the scope of state action so that those who wield private power can exercise “unhindered by state regulation.” “Rather than contest[ing] this or that policy” oligarchic interests “make the argument that policies of general kind extend the interests of the state beyond its ‘proper’ sphere.”¹⁹⁶ Recall, the argument for a general “roll back” of the state is just what libertarian First Amendment jurisprudence made possible in US constitutionalism since the late 1970s.

From the socioeconomic point of view, explicitly rejecting welfare capitalism, the late Rawls found in democratic socialism and property-owning democracy two alternative models that gathered many of these anti-libertarian insights.¹⁹⁷ This model was, strictly speaking, preliberal: it was rooted instead

¹⁹⁵ *Political Liberalism*, 328; see also 296. The same lines can be found in the later *Justice as Fairness*, 111, 150.

¹⁹⁶ Thomas, *Republic of Equals*, 107.

¹⁹⁷ Antoni Domènech argued that even Rawls’ anti-capitalist endorsement of property-owning democracy on a par with democratic socialism still betrayed an insufficient sense of history about the circumstances of justice. Had Rawls being truly aware of how capitalist dynamics threatened his model of justice, he would have been led to the conclusion that most European democratic republicans reached by the late nineteenth-century (and some even before). Namely, that a decentralized property-owning democracy, though desirable in the past, was no longer feasible in modern societies. See Antoni Domènech, “¿Qué fue del marxismo analítico? (En la muerte de Gerald Cohen),” *Sin Permiso*, no. 6 (2009): 66 n59.

in the older Jeffersonian and agrarian republican traditions.¹⁹⁸ The same applies to many of Rawls' ideas about the public sphere discussed above, including "the assurance of a more even access to public media; and certain regulations of freedom of speech and of the press."¹⁹⁹ Here, again, there was a debt to "civic republicanism" that both he and Dworkin acknowledged.²⁰⁰ The intuitions that structured the Rawlsian critique of the unleashed free speech libertarianism of *Buckley*, could not be, to reword Rawls sentence above, an enriched form of liberalism—thus they were indeed not liberalism at all but civic republicanism.²⁰¹

Just where Rawls left it, we pick up the baton. Republicanism as an alternative to the free speech libertarian framework will be the main concern of the second part of this thesis.

¹⁹⁸ "Preface for the Revised Edition" (1999), in *A Theory of Justice*, xiv–xv; *Justice as Fairness*, §41. Alan Thomas, in presenting his own take on Rawlsian property-owning democracy, presents the project as a republican addition to political liberalism. He thinks a self-conscious effort to establish property-owning democracy answers "the [liberal] problem of tacitly assuming those very conditions in a wider political culture that makes itself possible," and that would explain "why political liberalism needs supplementation (not replacement) by themes usually taken to be definitive of a competing tradition of republicanism," *Republic of Equals*, 9 (see generally, chap. 1). On republicanism and property-owning democracy, see Ben Jackson, "Property-Ownning Democracy: A Short History," in *Property-Ownning Democracy: Rawls and Beyond*, ed. Martin O'Neill and Thad Williamson (Wiley-Blackwell, 2012), 33–52; Stuart White, "Property-Ownning Democracy and Republican Citizenship," in *Property-Ownning Democracy: Rawls and Beyond*, ed. Martin O'Neill and Thad Williamson (Wiley-Blackwell, 2012), 129–46. On the political economy of Jefferson's and Robespierre's republicanism, see Bru Lán, "Del derecho natural al pacto fiduciario: gobierno y propiedad en la economía política republicana," *Isegoría*, no. 62 (2020): 9–34.

¹⁹⁹ *Justice as Fairness*, 149.

²⁰⁰ *Political Liberalism*, 205; *Justice as Fairness*, 146 n16, 150; Dworkin, "The Curse of American Politics." Note, however, that both Rawls and Dworkin made efforts to distance themselves from what they understood as communitarian or perfectionist (i.e., "comprehensive") understandings of republicanism that value civic virtue and political participation for their own sake, not as instrumental in the safeguard of liberty. See Dworkin, *ibid* and *Freedom's Law*, 29–30; Rawls, *Political Liberalism*, §IX.3 and 5. On the instrumental acceptance of civic republicanism by Rawls, see Félix Ovejero, "Republicanism: el lugar de la virtud," *Isegoría*, no. 33 (2005): 99–125. On the reconstruction of the late Rawls as a republican, see de Francisco, "A Republican Interpretation of the Late Rawls."

²⁰¹ Rawls anxieties since the late 1970s about the unleashed libertarianism of the Court parallel the concerns of many other left-of-center constitutional lawyers in the US that were part of his intellectual networks. As Rawls, many of them thought that the civic republican tradition uncovered by historians was a promising path to strengthen a forgotten constitutional commonsense—if not explicitly framing themselves as republicans, they developed related themes. I have mentioned Dworkin, but this is also the time of major contributions by Michelman, Fiss, or Sunstein. See Owen Fiss, "Why the State?," *Harvard Law Review* 100, no. 4 (1987): 781–94; Morton J Horwitz, "Republicanism and Liberalism in American Constitutional Thought," *William & Mary Law Review* 29, no. 1 (1987): 57–74; Cass R. Sunstein, "Beyond the Republican Revival," *The Yale Law Journal* 97, no. 8 (1988): 1539–90.

3.5. CONCLUSION: UNDERTHEORIZING THE PRECONDITIONS OF LIBERALISM

John Rawls was an attentive reader of First Amendment scholarship and jurisprudence. Much in line with American left-of-center liberals in the last third of the twentieth century, he embraced the protective legacy of interwar free speech libertarianism (§3.1.1, §3.1.2). But the jurisprudential legacy left by the early heroes of free speech libertarianism turned out to be a double-edged sword in the late 1970s (§3.1.3). Its principles and rationale could be put into the service of “dismaying” Supreme Court opinions, in Rawls words. In particular, the libertarian inheritance was proven to be problematic insofar as it was unable to capture two ideas: first, that speech regulations and rules of order were not the same as the limitations of free speech; that there cannot be excessive inequalities in the “worth” of basic political liberties. The second idea suggests that enjoying a formal right is worth little or nothing if the capacity to effectively exercise such a right is very unequally distributed. This is what occurred in Rawls’ view, when there are no limits to expenditure in political campaigns: the supposedly equal capacity to co-determine the public rules of co-existence gets perverted, for those who have more money and resources can use their free speech rights in ways that factually silence others, turning their free speech rights into valueless liberties. If the political process is a “public facility” with “a limited space,” then freedom in such process needs to be constituted by rules and regulations that ensure equal access. In the late 1970s, Rawls wondered why the Supreme Court was not able to see this; how could they declare campaign expenditures regulations unconstitutional in the name of freedom of speech?

A series of intuitions built into Rawls’ construction of justice as fairness explain the reasoning behind this disenchantment with the unleashed free speech libertarianism of the late 1970s Court: a “commonsense political sociology” that warns against the risk of plutocracy; a materialist conception of freedom that demanded the “fair value”; or the awareness that, no matter how well-ordered a basic structure is, there are “continually required adjustments” that update it to the always unpredictable outcomes of social interaction that may end up undermining justice (§3.2.1, §3.2.2). My view is that these ideas put Rawls at odds with the normative and descriptive assumptions about society and history characteristic of the free speech libertarian framework, especially to the extent they capture the reality of private power—namely: how it distorts deliberation, freedom and justice, and what the public conception of justice and its institutions might do to prevent it.

Things get a bit more complicated when Rawls considers the problem of stability. On the one hand, his description of the conditions upon which political liberalism is to be built—the modern historical circumstances of democratic societies—acknowledge the “fact of pluralism.” This, I have argued, can be interpreted as a Rawlsian account of what the classics called the risk of faction (§3.2.3). On the other hand, the quest of political liberalism

is not suppressing these comprehensive views and groups—that people rationally pursue their own conception of the good, forming associations to do this, is for Rawls not only a factum that modern champions of liberty must accept, but part of a moral conception of the person they must treasure. For this reason, in *Political Liberalism* the goal of stability is interconnected with the issue of legitimacy. A stable liberal regime is a legitimate regime, and vice versa. This is because the kind of stability that Rawlsian liberalism and his “overlapping consensus” want is stability “for the right reasons”—a stability that stems from the willing, non-coerced, reasoned allegiance of diverse reasonable comprehensive doctrines. This means that political liberalism seeks stability “with respect to changes in the distribution of power.” Hence, Rawls argues, in an overlapping consensus stability is not a matter of self- and group-interested reluctant compromises that characterize a “modus vivendi”—a balance-of-power coexistence (§3.3.1).

However, although Rawls’ theory wants individuals and groups to develop their own public reasons to respect and reproduce justice, the modus-vivendi coexistence still plays an important theoretical function. It plays, concretely, a historical role; for the passage from modus vivendi to overlapping consensus explains the feasibility of the Rawlsian project. This is the process by which the citizens’ “sense of justice” is nurtured—their capacity to be *reasonable* (i.e., open to arguments for arrangements that do not necessarily maximize their private interests or comprehensive views of the good). In an important sense, then, the historical explanation of why political liberalism is feasible is the historical explanation of why reasonableness became in the West, in Rawls’ words, “dominant and controlling.” I have argued that Rawls’ understands reasonableness as exhibiting hysteresis: the moral learning ignited by the suitable modus-vivendi preconditions endures the demise of such preconditions. Therefore, an overlapping consensus can claim to be stable for the right reasons, with citizens pledging allegiance for public reasons, regardless of the balance of power between comprehensive views (§3.3.2).

My view is that his model overlooks the causes and the self-conscious efforts behind the balance-of-power modus-vivendi preconditions he finds essential for the development of political liberalism. This results in a kind of libertarian understanding of the origins of liberalism: its preconditions are the unprompted result of private ordering, of different private groups reciprocally and non-coercively reaching fair compromises that, after being enjoyed through generations, can be justified as the result of the free use of free human reason (§3.3.3).

I have tracked these problems to Rawls’ view of early modern wars of religion and his understanding of their balance-of-power freedom-promoting results as fortuitous, unintended consequences. I have argued that this betrays a black-box understanding of the preconditions of liberalism (§3.4.1). We know why these preconditions are important, what they look like, and what their effect may be in shaping the motivational sets of present and future citizens (i.e., how they nurture the reasonable). But we know nothing about

how these preconditions were achieved, how we can reproduce them where they do not obtain, or what political liberalism can do if they are undermined. Instead, we get a black box: very messy inputs (wars of religion) are transformed into a private-order output (a pluralism of religions in a balance of power) with eventually liberal public-order results (the *modus vivendi* on toleration paves the ground for constitutional agreement and, if everything goes well, an overlapping consensus).

All this, as I have suggested, results in Rawls’ overlooking and undertheorizing of how we might achieve and preserve the preconditions of liberalism (§3.4.2). On the one hand, it disregards actual historical processes in which toleration or a balanced public sphere were self-conscious efforts, valued as such, even before *modus-vivendi* circumstances were in place. It disregards, in other words, all political thought and practices that have to do with what we might call “liberalization”—in which the first political goal is the creation of a socio-institutional setting that allows for a balance of power among views and groups, a setting in which no private power is able to dominate others. This is important not only for the purposes of strengthening the policy toolkit of political liberalism, but because it is the only way that liberals may reckon with their history. The preconditions of liberalism upon which the Rawlsian builds its theory may be “favorable” and “fortuitous” from a contemporary point of view, but acknowledging the often completely misguided forms of coercion, violence and state interference involved in creating such preconditions is a necessary step not to repeat those errors .

On the other hand, undertheorizing its own preconditions leaves political liberalism vulnerable to socio-historical change. As Rawls himself acknowledges, even a perfect and well-ordered society will need adjustments that revise its procedures according to everchanging circumstances. However, political liberalism is built on the assumption that the lessons learned from early modern and modern circumstances are learned for good. This is what I have called the “hysteresis” of the reasonable—once it develops under the right circumstances, it stays even when the original inputs that nurtured it disappear. In this sense, Rawls’ theory is not self-contradictory, it simply is overly optimistic about the irreversibility of achieved institutional and moral victories. Both his explicit disenchantment with the free speech libertarianism of the Supreme Court in the late 1970s and the “civic republican” accent he put to his thicker view of the requirements of public reason bear witness to the fact that the late Rawls, far from ignoring the questions asked in this chapter, was willing to confront them by enriching his liberalism with older ideas that embedded the analysis of expressive freedoms in its political-economic context (§3.4.3). Following this insight, the next chapters will do just this. Departing from a neorepublican conception of freedom, what can the political economy of communication tell us about the guarantee and exercise of free speech?

Part II

Republicanism, free speech,
and the political economy of
communication

CHAPTER 4

Liberties appear only when liberty is lacking

A neorepublican view of free speech libertarianism

He was a gay and impudent and satirical and delightful young black man—a slave—who daily preached sermons from the top of his master’s woodpile, with me for sole audience. (...) To me he was a wonder. I believed he was the greatest orator in the United States (...) One of his texts was this:

“You tell me whar a man gits his corn pone, en I’ll tell you what his ‘pinions is.”

(...) The black philosopher’s idea was that a man is not independent, and cannot afford views which might interfere with his bread and butter. If he would prosper, he must train with the majority; in matters of large moment, like politics and religion, he must think and feel with the bulk of his neighbors, or suffer damage in his social standing and in his business prosperities. He must restrict himself to corn-pone opinions—at least on the surface. He must get his opinions from other people; he must reason out none for himself; he must have no first-hand views.

Mark Twain¹

The Introduction and Part I identified, historized, and discussed the limits of what I have called the “free speech libertarian framework.” This label intends to capture a set of widespread intuitions about what expressive freedoms are or have been in modern Western political thought, about the conceptual and institutional nature of toleration, freedom of the press, free speech, freedom of thought, and so on. I showed that the fundamental feature of the free speech libertarian framework is the idea that expressive liberties are negative rights: freedoms from state interference. As I pointed out, this commitment is sometimes expressed as a normative liberal-libertarian goal: to further expressive freedoms, one must limit state interference. But, more intriguingly, this commitment to negative liberty is often independent of a libertarian normative agenda. Many non-libertarian historians, theorists or political advocates also accept the conceptual, explanatory, or interpretive potential of

¹ Mark Twain, “Corn-pone Opinions” in *The Complete Essays of Mark Twain*, ed. Charles Neider (Doubleday, 1963), 583–84. A “corn pone” is a type of corn bread or pancake.

negative liberty in the field of expressive freedoms—even if their prescriptive goals strongly differ from this ideal, and even if in other policy areas they disregard pure negative freedom as a political chimera, ideology, or outdated institutional design. Thus, while the negative conception of expressive liberties has been extensively criticized on a normative basis, its explanatory and descriptive worth, in both a conceptual and a historical-interpretive sense, has not been questioned that much. In this sense, the lessons of Part I point to at least two interrelated reasons for testing the free speech libertarian framework on explanatory grounds. The first is that it tends to overlook threats to expressive liberties that come from actors other than the state or public sources of political coercion (social movements, if regarded as “private” threats to free speech, may be an exception to this point, as I will discuss below). The second is that the free speech libertarian framework fails to account for the active role that state interferences play in the establishment and maintenance of expressive freedoms.

This chapter has two main goals. It examines neorepublicanism, especially in the shape given to it by Philip Pettit, as another promising way out of the free speech libertarian framework (Rawlsian liberalism being the first I considered in the last chapter). Here, I also want to take the opportunity of considering more nuanced depictions of free speech libertarianism in concrete policy issues. Notwithstanding the critical thrust of the chapter—and, as the reader may predict at this point, although neorepublicanism finally emerges victorious—in this chapter I attempt to avoid straw-manning the antagonist of this thesis, considering plausible responses and limit cases. This may tarnish my overall case against the free speech libertarian framework and its pernicious effects, but I hope it will fortify my aim of using neorepublicanism on mostly descriptive and conceptual terms to make the point that expressive freedoms require coercive institutions. Of course, the more normative dispute about what institutions in particular are needed is also present in this and the following chapters. But I would happily settle for a question mark on those normative issues if my descriptive and conceptual points against the free speech libertarian framework are accepted.

Neorepublicans insist that negative freedom or freedom understood as non-interference is part of the contemporary commonsense of liberty. As such, they maintain that the conception of freedom as absence of interference is shared across different perspectives in political philosophy and the social sciences, allowing neorepublicans to identify a continuum that goes from left-of-center liberals to right-wing libertarians with regard to their conception of liberty (the target of Part I of this research, in fact, owes a lot to this reading, §III).² However, as Pettit points out, such a dominant conception of freedom is flawed, because it is not able to grasp certain kinds of “grievances” that might be framed as normatively significant losses of liberty.³ Thus, the neorepublican critique of non-interference is not just about developing a

² Pettit, *Republicanism*, 9–10; Pettit, *On the People’s Terms*, 10.

³ Pettit, *Republicanism*, 4–5.

different conception of freedom but, in the first place, about developing a wider account of *unfreedom*.

The chapter proceeds as follows. First, I consider one of these wider forms of unfreedom, the so-called “dispositional” nature of power: the idea that arbitrary power undermines liberty even when such power is not actually used. (§4.1). By examining the case of state-affiliated media, I show that when it comes to *public* sources of power, the free speech libertarian framework is indeed aware of how mere dependence challenges liberty.

Secondly, I consider the neorepublican distinction between *imperium* and *dominium*—respectively, public and private sources of unfreedom (§4.2). I discuss the neorepublican suggestion that the contemporary commonsense about liberty (in which I include the free speech libertarian framework) is often unaware of *dominium* and only focuses on *imperium*. However, one of the most heated free speech discussions in the last decade seems to indicate the opposite: free speech libertarian intuitions have been mobilized to criticize “cancel culture” and similar phenomena in which what seems to be at stake are non-state sources of censorship.

These two discussions about unfreedom lead me to another point that the free speech libertarian framework was not able to address: the constitutive relationship between state interference and freedom (§4.3). In the neorepublican view, liberty is carved out through suitable non-arbitrary interferences by political institutions. However, the intuition that liberty requires a legal order, including regulatory policies, pervades the thought of thinkers significant in the development of the free speech libertarian framework, such as Friedrich Hayek.

4.1. THE DISPOSITIONAL NATURE OF POWER

4.1.1. Neorepublican freedom from dependence

According to neorepublicans, freedom as non-interference fails to see situations in which, while individuals are not actually being interfered with their choices, they are nevertheless subject to the arbitrary power of others—they are affected by somebody’s mere *capacity* to interfere with them.⁴ In a classical trope of the republican tradition, this is the sort of grievance suffered by unhindered slaves.⁵ They might be cunning enough to dodge interferences, or fortunate enough to enjoy substantial non-interference in their choices thanks to the kindness or indifference of their master. Hence, from the point of view of freedom as mere non-interference, such a slave would be free. But

⁴ Ibid., 23. In his late work, Pettit changed the terminology from “arbitrary/non-arbitrary” interference to “uncontrolled/controlled” interference, a move to shield his view from accusations of perfectionism and a moralized view of freedom. On this change, see Samuel Arnold and John R. Harris, “What Is Arbitrary Power?,” *Journal of Political Power* 10, no. 1 (2017): 55–70.

⁵ Pettit, *Republicanism*, 31–35; Skinner, *Liberty Before Liberalism*, 38–41.

this absence of interference, republicans pointed out, is contingent on their master’s arbitrary will—were the slaves slow-witted and less likeable to their master, or less fortunate in some other way, then the slaves would most likely suffer interference. Put differently, historical republicans contended that not to suffer interference as such is perfectly compatible with the subordination to the power of others, with living at the mercy of others: there is no freedom under a master, even if he is benevolent and non-interfering. Recovering this intuition, neorepublicanism points out that the liberal and libertarian ideal of maximizing non-interference for everyone is blind to many politically relevant losses of liberty based upon relationships of arbitrary power. For neorepublicans, the sort of “freedom” enjoyed by a non-interfered slave is uncertain, because those who have the power to interfere arbitrarily with his life can change their mind at any time and put to an end the precarious non-interference the slave previously enjoyed.

Moreover, Pettit argues, the bare subjection to an arbitrary power of interference (whether it is used against us or not) makes choices under this condition less valuable from the point of view of freedom. Non-interfered slaves are wary of their master’s power; thus, the fear of potential interference makes them behave strategically, producing flattery and self-censorship, vitiated choices, etc.⁶ As I will discuss below, expressive freedoms in contemporary societies often suffer from circumstances of this sort, in which there are arguably relevant losses of liberty even though there is no interference—in our terms, losses of liberty that are not properly grasped through the conceptual lens of the free speech libertarian framework.

The reasoning above leads to my first point: one of the core strategies at work in the neorepublican critique of freedom as non-interference consists in emphasizing the dispositional nature of power.⁷ Arbitrary power refers to the capacity to interfere at will. According to neorepublicans, such a capacity to interfere may or may not actually be exercised, but its mere existence endangers liberty. The simple fact that someone is able to modify, misrepresent, or remove my available choices, even when they do not use this power, undermines my freedom.⁸ Consequently, from the neorepublican point of view liberal-libertarian non-interference is not a good test of freedom to the extent that it can be enjoyed contingently. In contrast, freedom in a republican sense must be held “robustly or resiliently,” in a way that it is not subject to the arbitrary power of others (i.e., to their mere capacity of arbitrary

⁶ Pettit, *Republicanism*, 85–89; Skinner, *Liberty Before Liberalism*, 79–87; Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Oxford University Press, 2001), 137.

⁷ Authors often refer to this attribute differently, e.g., Domènech, “Individuo, comunidad y ciudadanía,” “republican liberty (...) is a dispositional concept,” 30; Pettit, *On the People’s Terms*, non-domination being “modally demanding,” 124; Christian List and Laura Valentini, “Freedom as Independence,” *Ethics* 126, no. 4 (2016): “the robustness question”; Dorothea Gädeke, “From Neo-Republicanism to Critical Republicanism,” in *Radical Republicanism*, ed. Bruno Leipold, Karma Nabulsi, and Stuart White (Oxford University Press, 2020), “dispositional account of power,” 30.

⁸ Pettit, *On the People’s Terms*, 60–62.

interference).⁹ In Pettit's words, republican freedom, which he calls "freedom as non-domination," means to "enjoy the absence of interference by arbitrary powers, not just in the actual world, but in the range of possible worlds where contingencies (...) have a different, less auspicious setting."¹⁰

The kind of "grievances" that, according to Pettit, go unnoticed within the frame of freedom as non-interference are very relevant when we consider contemporary threats to expressive liberties. Consider, for example, how in most Western democracies owners of private mass media do not enjoy a formal right of censorship over their employees. Once a journalist is hired to work for a TV channel, she might enjoy freedom of choice regarding what she can write about or how she wants to do it. She enjoys, in other words, a relevant degree of non-interference; in principle, no one tells her what to say (at least within the scope of specific tasks for which she has been hired). Aside from defining these tasks, the owners and managers of the TV channel have, however, an important power over her: they can fire their employees or not hire them again if they are independent journalists. Even if one optimistically assumes that media owners in Western democracies tend not to exercise their capacity to interfere with the journalistic work of their employees, they are able to legally do so, indirectly, most of the time. Media owners and managers can threaten to rescind labor contracts, demoting unruly employees, altering their working conditions in harmful ways, not hiring them again, and so on. Alternatively, they might put a premium on self-censorship and compliance, rewarding more submissive journalism.

Hence, it should be clear why the analysis of free speech in Western democracies must be able to see that a journalist's amount of non-interference is a very poor index of her expressive freedom, especially in contexts marked by media oligopolies, high unemployment in the sector, weak labor laws, predominance of freelance jobs and employment at will, or absence of strong professional associations (all of them growing economic trends which are not only self-reinforcing, but typical of media labor markets worldwide in the past 60 years).¹¹ It is no secret that in these settings of precarious work the free speech of many journalists is uncertain, contingent on not stirring important interests at stake, at odds with their career prospects, and so on. In other words, their free speech is, to an important degree, at the mercy of media owners and managers. It should not be surprising, then, if the news reporting or the

⁹ Pettit, *Republicanism*, 24.

¹⁰ *Ibid.*, 24–25.

¹¹ Mirjam Gollmitzer, "Employment Conditions in Journalism," in *Oxford Research Encyclopedias: Communication* (Oxford University Press, 2019). For historical overviews of these labor trends with a focus on journalistic freedom, see e.g. John Nerone, "The Labor History of Newswork from Industrialization to the Digital Age," in *Newswork and Precarity*, ed. Kalyani Chadha and Linda Steiner (Routledge, 2022), 31–53; Lebovic, *Free Speech and Unfree News*, 88–110.

harshness of these journalists’ interviews are spoilt by the position of economic dependency in which they live.¹²

Yet a similar thing could be said of media owners themselves. The economic viability of media outlets nowadays usually depends on sources of funding other than the subscriptions or support of its consumers (and many recent attempts to recover that business model are not clearly successful). The sustainability of a media outlet may well be based on advertising. It is reasonable to assume that the freedom of expression of the media becomes more uncertain—more subject to the arbitrary will and ability to interfere of others—as its economic viability rests on fewer sources of income. It does not matter whether advertisers make conscientious, explicit efforts to not determine the editorial decisions of the media outlets they hire: the greater the financial reliance on an advertiser’s money, the greater will be this advertiser’s capacity to interfere with editorial choices. The mere fact that the economic sustainability of a media outlet is dependent on an arbitrary will should be reason enough to have concerns about its freedom of expression, even if advertisers never use such arbitrary power. Some media owners vis-à-vis advertisers are in a position that arguably vitiates what they choose to say, having very good reasons to not publish anything that makes their major advertisers look badly, and good reasons to compliment them or defend their interests in their news reporting (see below §6.3.1 for a more specific discussion and examples).¹³

The European Council echoed these concerns when, in 2016, it reminded member states of “the importance of adequate labour and employment laws to protect journalists and other media actors from arbitrary dismissal or reprisals, and from precarious working conditions that may expose them to undue pressures to depart from accepted journalistic ethics and standards.”¹⁴ Or take, more recently, the proposal for the 2022 European Media Freedom Act, which points out that “financial sustainability is a key element for protecting editorial independence from external and market pressures.”¹⁵

¹² Mirjam Gollmitzer, “Precariously Employed Watchdogs?: Perceptions of Working Conditions among Freelancers and Interns,” *Journalism Practice* 8, no. 6 (2014): 826–41; Pierre Bourdieu, *On Television*, trans. Priscilla Parkhurst Ferguson (New Press, 1998), 6, 15–18, 25. On labor relationships and precariousness as undermining republican freedom see David Casassas, *Unconditional Freedom* (Pluto Press, 2024); Alex Gourevitch, “Labor Republicanism and the Transformation of Work,” *Political Theory* 41, no. 4 (2013): 591–617; Rebecca E. Zietlow, “The New Peonage: Liberty and Precarity for Workers in the Gig Economy,” *Wake Forest Law Review* 55, no. 5 (2020): 1087–1142.

¹³ For an overview of how commercial pressures affect journalists and media owners in today’s Europe, see CMPF, *Monitoring Media Pluralism in the Digital Era: Application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia and Turkey in the Year 2021* (European University Institute, 2022), 67–72.

¹⁴ Committee of Ministers, CM/Rec(2016)4, “Recommendation on the protection of journalism and safety of journalists and other media actors” (2016), Appendix, §I.2.

¹⁵ European Commission, COM/2022/457, “Proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU” (2022),

By conceiving free speech as mere non-interference in making speech choices, these situations could not be framed as politically problematic or as losses of expressive liberty. In many cases, the goodwill and integrity of the media owner with respect to their journalists may leave ample room for non-interference. The same can be said of upright advertisers with respect to the editorial decisions of the media they pay to run their commercials. Neorepublicans seem right in criticizing the liberal and libertarian commonsense and its ideal of non-interference as unable to account for the dispositional nature of the threats to expressive liberty involved in these and other cases. The free speech of a journalist with a temporary or unprotected employment contract in an unforgiving labor market depends on the will of their employer, regardless of whether the employer actually uses this power. Similarly, the free speech of a media owner whose business is based on a single advertiser depends on the will of that other corporation, regardless of whether the advertiser actually uses this power.

4.1.2. State-affiliated media: libertarianism and dispositional power

Now I want to give a rejoinder to the neorepublican point of the earlier section. The problem with the paradigmatic status of non-interference in the field of expressive freedoms is not that negative liberty theorists are incapable of grasping the dispositional nature of power. To put it in our terms, the issue is not that the free speech libertarian framework is unable to see that the mere capacity of arbitrary interference undermines freedom. On the contrary, advocates of non-interference often argue in a dispositional manner as well. Since this is a point that often goes unnoticed when neorepublicans criticize non-interference, I hope it may contribute, first, to elaborating a more equitable picture of their political-philosophical opponents. These opponents, I will suggest, are not as unacquainted with dependence and the dispositional nature of power as is usually intimated in the neorepublican literature. Second, more generally, I hope this rejoinder and discussion may help to clarify which are the meaningful normative variables in policy decisions that, at least at first sight, are dominated by free speech claims and appeals to the good functioning of the democratic public sphere. Concretely, the goal is to discern whether the guarantee of expressive freedom is truly the main value under discussion, or just a rhetorical cover, purely instrumental of what is truly at stake (e.g., national security, geopolitical ambitions, private economic profit, partisan interests, and so on).

The rejoinder, then, is that liberal and libertarians engage with dispositional accounts of power. My reply, in turn, will be that they do this only partially. In the well-founded libertarian suspicions against state-affiliated media, even when expressive liberties are intuitively modeled along the lines of non-interference, the dispositional analysis of power comes clearly into play; only provided the would-be interferer holds state power (i.e., when the capacity of interference comes from government or its agencies, a public

official, an elected politician, and so on). This dispositional analysis is not that clear when it comes to other, non-public sources of unfreedom.

Despite the alleged blind spots of non-interference revealed by neorepublicans, it is clear that the notion that mere dependence of an arbitrary power vitiates and erodes expressive freedoms is a major concern for anyone holding liberals and libertarian intuitions about free speech. Think of a journalist with a precarious employment contract, but this time working for a publicly owned TV channel under the unchecked political control of government. Or think of an owner of a private media outlet that, instead of relying on private advertising, survives on public subsidies granted by the caprice of elected officials. Indeed, despite the neorepublican critique, liberals and libertarians care about something else than plain *actual* interference.¹⁶

As I said, this issue becomes apparent when liberals and libertarians look for threats to expressive freedom coming from *public* arbitrary power. It would be unfair to suggest that the mere possibility of interference and its adverse consequences for speaking freely have not been a classic concern of advocates of “negative liberty.” Take for instance the thoughts on free speech of one of the usual culprits in the neorepublican critique of non-interference, Jeremy Bentham. Condemning the repressive practices of the Spanish legislature of 1820, he suggested a “test.” If Spaniards want to discern whether they are under the rule of despotic magistrates, “notwithstanding everything that is to be found in your constitutional code,” they will do well to verify that they “have no more to fear from speaking and writing *against* them, than from speaking and writing *for* them.”¹⁷ Here, the normative force of Bentham’s test must rely on something other than a concern for actual interference. Fear of critique and the other side of the coin, flattery, are both behaviors produced in response to the mere fact of arbitrary capacity of interference, regardless of

¹⁶ This has been one of the earliest systematic points against the neorepublican critique of liberalism, see Ian Carter, *A Measure of Freedom* (Oxford University Press, 1999), 237–45; Robert E. Goodin, “Folie Républicaine,” *Annual Review of Political Science* 6, no. 1 (2003): 60–61; Matthew H. Kramer, “Liberty and Domination,” in *Republicanism and Political Theory*, ed. Cécile Laborde and John W. Maynor (Blackwell, 2008), 31–57.

¹⁷ “Jeremy Bentham to the Spanish People. Letter II,” in *The Collected Works of Jeremy Bentham: On the Liberty of the Press, and Public Discussion, and Other Legal and Political Writings for Spain and Portugal*, ed. Catherine Pease-Watkin and Philip Scholfield (Oxford University Press, 2012), 29, 32. Original italics. Benjamin Constant, another usual foe in neorepublican accounts, also made this argument for a free press, see Bryan Garsten, “The ‘Spirit of Independence’ in Benjamin Constant’s Thoughts on a Free Press,” in *Censorship Moments*, ed. Geoff Kemp (Bloomsbury, 2014), 120–21.. Remarkably, this was the central idea of one of Pettit’s earliest takes on free speech: Philip Pettit, “Enfranchising Silence: An Argument for Freedom of Speech,” in *Freedom of Communication*, ed. Tom Campbell and Wojciech Sadurski (Dartmouth, 1994), 45–56.

whether it is used or not—they were, for this reason, traditional targets of the republican analysis of expressive liberty.¹⁸

But this should come as no surprise. Many liberals and libertarians naturally disapprove of the precarious free speech enjoyed by journalists at the mercy of government officials who can fire them at will—even if those government officials decide not to use their power to regulate content, or even if those journalists are smart enough to bypass regulation. This is a liberal and libertarian concern, for that matter, that applies to any citizen vis-à-vis public officials. The fact that journalists working for government media benefit from a situation of non-interference today will not prevent the liberal or libertarian from rightly questioning the slight political value of that freedom if it could easily vanish at any moment due to economic dependence. Of course, the same will be said of a private media owner whose business depends on public money given by elected officials or government agencies on an arbitrary basis. This is what Friedman was hinting at when he condemned public ownership of media in a socialist society. In his argument against state ownership, it is not only actual government interference over content that generates unfreedom, but dependence produced by a lack of alternative content providers, employers, and means providers.¹⁹ In other words, we might add, Friedman's critique was pointing to a previous and more basic fact that betrays a certain sensibility to the dispositional traits of arbitrary power: dependence on it generates unfreedom even if it is not used against someone. Hayek, to put another example, revealed the same dispositional (and materialist, for that matter) account of power when he wondered "how the freedom of the press is to be safeguarded when the supply of paper and all the channels of distribution are controlled by the planning authority."²⁰

Hence, much of the normative reflection developed within the free speech libertarian framework is prepared to identify circumstances like the abovementioned, in which regardless of the absence of interference expressive freedoms are at risk due to relationships of dependence. I think this point might contribute to clarify the conceptual overlapping of republicanism, liberalism, and libertarianism, especially when it comes to the recovery of past

¹⁸ Lack of criticism and flattery in the face of merely potential use of arbitrary power were indeed two typical concerns of the classical republican reflection on expressive freedoms from Ancient Athens to the eighteenth-century English commonwealthmen. See e.g. Leticia Flores, "Amor civil: los límites de la parresía," in *La vigencia del republicanismo*, ed. Ambrosio Velasco, Elisabetta Di Castro, and María Julia Bertomeu (UNAM, 2006), 87–102; Daniel J. Kapust, *Republicanism, Rhetoric, and Roman Political Thought* (Cambridge University Press, 2011), 3–4, 112–13; David Colclough, "Parrhesia: The Rhetoric of Free Speech in Early Modern England," *Rhetorica. Journal of the History of Rhetoric* 17, no. 2 (1999): 177–212; Colclough, *Freedom of Speech in Early Stuart England*, 12–76; Skinner, *Liberty Before Liberalism*, 89–93. On the neorepublican view of Bentham as one of the most influential non-interference theorists, see Pettit, *Republicanism*, 43–50; Skinner, *Liberty Before Liberalism*, 82–83, 97–99.

¹⁹ Friedman, *Capitalism and Freedom*, 15–21; Friedman, "The Economics of Free Speech," *ORDO: Jahrbuch Für Die Ordnung von Wirtschaft Und Gesellschaft* 30 (1979): 221–27.

²⁰ Hayek, *The Road to Serfdom*, 89. Similarly, see his criticism of propaganda at 158–159.

intuitions about liberty and dependence.²¹ In any case, what must be clear is that when the capacity to interfere arbitrarily is based on some form of public power, the commonsensical, free speech libertarian intuitions about expressive liberties are much more nuanced than the neorepublican critique would seem to suggest. Contrary to the neorepublican depiction of non-interference, the conventional liberal and libertarian analysis of freedom also involves an awareness of the risk of dependence, correspondingly engaging in a dispositional analysis of power and its consequences: a modal view of freedom that considers what might happen in other possible worlds. In this sense, the mere possibility of suffering arbitrary interference is thought to jeopardize liberty. However, there is an important caveat: for free speech libertarians, this only applies when the would-be interferer holds public power.

As an example of how commonsense views of free speech work in these cases, think of the worldwide measures taken against Russian state-affiliated media outlets and freelance journalists collaborating with them in the wake of the 2022 Russian invasion of Ukraine. In many places around the world, outlets such as Russia Today and Sputnik have been for years considered instruments of disinformation and propaganda—that is, subservient to the interests of their owner, the Russian Federation.²² Thus, for instance, some social media platforms have been flagging journalists that used to work for these outlets, and warning labels mark accounts or posts that share links to these media’s websites.²³ In the European Union, the managers of these outlets have been economically sanctioned and, more recently, the free speech of some of these news organizations has been regarded as worthless by the European Council, approving measures to forbid them to broadcast through any means.²⁴ My interest is not whether these measures are sufficient (or effective at all, or legitimate) to protect the public sphere from powerful means of disinformation and democracy-undermining news reporting. I simply want to call attention to the fact that the normative reasoning behind such measures

²¹ On the normative and historical intersection between republicanism and liberalism, see e.g., Sunstein, “Beyond the Republican Revival,” 1567–68; Daniel T Rodgers, “Republicanism: The Career of a Concept,” *The Journal of American History* 79, no. 1 (1992): 36–38; Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (Oxford University Press, 1997), 11–24; Alan Gibson, “Ancient, Modern and Americans: The Republicanism-Liberalism Debate Revisited,” *History of Political Thought* 21, no. 2 (2000): 261–307; Thomas, *Republic of Equals*, chaps. 1 and 4; Helena Rosenblatt, *The Lost History of Liberalism: From Ancient Rome to the Twenty-First Century* (Princeton University Press, 2018), chap. 1. On republicanism intersecting (or at least inspiring) positions associated with contemporary libertarianism, see my discussion of Hayek below (§4.3.2).

²² Mart Susi et al., “Governing Information Flows During War: A Comparative Study of Content Governance and Media Policy Responses After Russia’s Attack on Ukraine,” *GDHRNet Working Paper*, 2022, 1–31.

²³ Samuel Benson, “Twitter to Label All State-Affiliated Russia Media,” *Politico*, February 28, 2022.

²⁴ See e.g., European Council, “Regulation 2022/350 amending Regulation 833/2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine,” *Official Journal of the European Union*, L 065 (March 2, 2022), 1–4.

precisely responds to a preventive, dispositional analysis of arbitrary state power in its relation to expressive liberties. In a political culture in which the promotion of liberty is a core value—as it ostensibly is the case in the European Union, or for most owners of social media—to curtail or condition the free speech of individuals and corporations is justified only to the extent that they are thought to be in a position that makes their liberty dependent on the arbitrary will of a sovereign power that can interfere with their choices.

A similar point could be raised about another recent, but slightly different, example: the situation of TikTok in the past few years. This social media platform for sharing short videos has been the only real market competitor of similar private platforms from the United States, such as Instagram or Snapchat. In 2020, TikTok was the most downloaded app in the world. Although it has been subject to the same criticisms as other popular social media (e.g., excessive market power, privacy issues, content moderation policies, social biases translated into algorithms, pernicious cognitive effects...), TikTok has been the target of particularly aggressive regulatory attempts by public officials in several places, including the United States. However, in contrast with the Russian state-affiliated outlets mentioned just above, TikTok is privately owned by a corporate group named ByteDance. This company was founded in China, where it is known to have monitored users of its apps following Chinese government instructions. But in the US market, there is no compelling evidence that TikTok's content policies or data harvesting strategies serve China's interests. There is no confirmation that the Chinese government or the Chinese Communist Party actually interfere with TikTok.²⁵ In spite of this, many US officials have questioned TikTok's independency and the value of its expressive rights and those of its users (officials, it must be said, who otherwise accept and support analogous forms of corporate power).²⁶ Even in the context of growing misgivings about the excessive influence of private social media on the public sphere (including in the conservative, conventionally corporate libertarian camp), the proposed measures and charges raised against TikTok would be inconceivable in the case of other privately owned platforms.²⁷

²⁵ Joanne E. Gray, "The Geopolitics of 'Platforms': The TikTok Challenge," *Internet Policy Review* 10, no. 2 (2021): 1–26.

²⁶ See e.g., Brendan Carr from the FCC, "Letter to Tim Cook and Sundar Pichai," 24 June 2022 (republican commissioner asking Apple and Google to remove TikTok from their app stores); James Comer and Cathy Morris from the US Congress, "Letter to Shou Zi Chew," 14 July 2022 (republican congresspersons requesting information from TikTok's CEO about alleged Chinese access to user's data, Chinese shares of ByteDance, and pointing to earlier cases of surveillance); Mark R. Warner and Marco Rubio from US Senate, "Letter to Lina Kahn," 5 July 2022 (republican senators asking the Federal Trade Commission to investigate TikTok).

²⁷ On the growing suspicions against social media in the traditionally pro-corporate conservative camp, see evelyn douek and Genevieve Lakier, "First Amendment Politics Gets Weird: Public and Private Platform Reform and the Breakdown of the Laissez-Faire Free Speech Consensus," *University of Chicago Law Review Online*, June 26, 2022.

It seems that in the eyes of some sectors of public opinion, media regulators, and many national security experts, the proven or alleged association of TikTok and Russia Today with despotic state power is enough to question their enormous freedom of communication as plausibly threatened by an arbitrary power behind the scenes. Yet, in the meantime, other equally powerful private corporations enjoy a more accepted status just because they are thought to merely act on the interest of private capital and their shareholders—which, in turn, is supposed to be compatible with public freedom. This was my point: dependence on the government’s capacity for arbitrary interference is rightly identified as freedom-undermining, while the same dependence on a private capacity for arbitrary interference is not. Note that Friedman’s pro-market argument that the problem with state ownership is the lack of alternatives does not hold in either of these examples. Actions against Russian and Chinese media are taken in the context of capitalist communication markets and media pluralism; audiences and users could go to other outlets if they want.

The weakness of such an incomplete detection of relationships of dependence (i.e., only grasping certain sources of arbitrary power while disregarding others) comes to the fore once we realize that corporate profit-seeking is only a contingent and very weak ally of freedom and civil rights, even when established in democratic regimes. Google and Microsoft have collaborated with the Chinese government in developing systems of mass surveillance and information control for purposes of repression: from associating phone numbers to internet searches, to political filtering of search engine results.²⁸ Facebook and Twitter, to name more recent examples, complied with requests from the Indian government to eliminate posts considered to be too critical of the Prime Minister’s management of the Covid-19 crisis.²⁹ These corporations’ access to foreign markets unsurprisingly relies on accepting local law, even when it entails making a profit thanks to human rights violations through privacy concessions, censorship, or cooperation with dictatorial police forces.³⁰ But even when acting in home markets within democratic states, the delicate harmonization of profit-seeking, the capacity of arbitrary interference accumulated in private hands, and expressive freedoms is not easy to achieve either—the Facebook-Cambridge Analytica scandal of microtargeting of political ads during the US presidential elections of 2016 is the best known example of this.³¹ These examples are only intended to show that, assuming it exists, the corporate commitment to free speech and to a democratic public sphere is rather weak, and most of the times combined

²⁸ See e.g., Amnesty International, “Undermining Freedom of Expression in China: The Role of Yahoo!, Microsoft and Google,” 2006, 19–30; Hamza Shaban, “Google Employees Go Public to Protest China Search Engine Dragonfly,” *The Washington Post*, November 27, 2018.

²⁹ Shirin Ghaffary, “A Major Battle over Free Speech on Social Media Is Playing out in India during the Pandemic,” *Vox*, January 5, 2021.

³⁰ Ian Brown and Douwe Korff, *Digital Freedoms in International Law: Practical Steps to Protect Human Rights Online* (Global Network Initiative, 2012), chap. 1.

³¹ Alex Hern, “Cambridge Analytica: How Did It Turn Clicks into Votes?,” *The Guardian*, June 5, 2018.

with playing along with powerful and undemocratic geopolitical actors. In short, the contemporary guarantee and well-functioning of expressive freedoms is, in a very basic sense and to an important degree, at their mercy. This is the case regardless of pure private ownership, state-affiliated media, or public-private collaborations; this is as true, in other words, for TikTok and Russia Today as it is for Google, Microsoft, or Facebook.

The flawed intuitions about the matter should have become clear. If we accept a dispositional view of the nature of power (i.e., the mere capacity to interfere threatens liberty), all these corporations should be the subject of strong normative concerns. The ways in which they amass vast audiences, act as broadcasters and gatekeepers of information, and collect data from their users make them able to distort the public sphere in many subtle (and usually legal) ways.³² From the perspective of expressive liberties, the factual or perceived loyalty of these platforms to specific geopolitical interests should not make a difference, as this loyalty is not what creates their position as potentially huge sources of unfreedom and dependence. It is their mere capacity, used or not, to polarize society at will, to serve as biased gatekeepers of information, or to function as tools of undue electoral influence or as systems of mass surveillance, that makes them a threat to liberty in the public sphere. To conclude, it is the mere existence of these accumulations of power that must be regarded as detrimental to expressive freedoms—whether this power is used or not, and whether it is in the hands of a foreign autocratic state or a board of shareholders.

For clarification, this argument need not lead to the view that all power in society should be administered by public institutions, to a sort of dissolution of all corporate private power in favor of the state and its agencies. On a more moderate analysis, we can still think of private media corporations as (at least theoretically) subordinated to democratic lawmaking. This involves seeing modern democracies as able to limit private economic power according to robust human rights standards at home and abroad without the need of letting civil servants run these companies. But note that reaching this modest conclusion itself speaks volumes in favor of looking for conceptual alternatives to the free speech libertarian framework. This is because it puts the burden of compliance and enforcing of expressive freedoms not in the hands of markets (or spontaneous private agreements, or mutually coercive relationships among equals, or benevolent corporations nurturing a civic agenda) but fundamentally in the hands of state sovereignty and legislation, including the checks and balances offered by the legal system.

Indeed, regardless of how far we want to go in dissolving private economic power, the very notion of judging corporate commitment to freedom of

³² On how digital platforms, search engines and social media are able to do this, see e.g., Frank Pasquale, “Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power,” *Theoretical Inquiries in Law* 17, no. 2 (2016): 487–513; Cathy O’Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Crown, 2016); Cass R. Sunstein, *#Republic: Divided Democracy in the Age of Social Media* (Princeton University Press, 2019).

expression in terms of where such a corporation is legally established already requires a move beyond the libertarian framework. This is what should be emphasized when Instagram is thought to be a better option than TikTok for a democratic public sphere because the company owning the former is based in the United States rather than in China. The same applies when the BBC is more trusted than Russia Today for analogous reasons. Leaving aside whether there is empirical evidence to support the grave allegations against TikTok and Russia Today, in all these objections against them the guarantee of expressive freedoms is already being framed as a matter of non-arbitrary freedom-promoting state interferences and laws—and not as the absence of them, as the libertarian framework suggests. Regardless of concrete normative solutions to concrete circumstances, this descriptive-conceptual point against negative liberty is precisely the aim of my argument.

4.2. PUBLIC AND PRIVATE SOURCES OF UNFREEDOM

4.2.1. Neorepublican freedom against *imperium* and *dominium*

Then, despite the alleged blind spots of non-interference revealed by neorepublicans, the criticism deserves qualification. The view that mere economic dependence of an arbitrary power vitiates and erodes expressive freedoms is also a major source of unease among liberals and libertarians. The free speech libertarian framework, put differently, can come to terms with, and even integrate, the dispositional account of arbitrary power endorsed by neorepublicanism. However, as I pointed out, this seems to be only the case when public sources of power are under consideration: dependence on the same power but held by a private corporation is not framed as problematic from the point of view of liberty. If my argument holds, then one of the main problems with widespread free speech libertarian intuitions does not have to do so much with identifying dependency as such, as with discriminating *which* sources of dependence are considered dangerous to freedom.

This question has also constituted one of the main neorepublican lines of attack against the non-interference common sense. Thus, Pettit restored a historical conceptual distinction to capture the twofold nature of threats to freedom: *imperium* and *dominium*.³³ The first points to the idea of public institutions that, instead of promoting freedom, turn against the will, interests, and freedom of those subject to it. The second accounts for private relationships of dependence not directly imputable to state sources (e.g., domestic authority, economic dependence, or dependence caused by cultural norms).³⁴ The threat of *imperium* is a well-established concern within the free

³³ Pettit, *Republicanism*, 36.

³⁴ Jean-Fabien Spitz, “The Twilight of the Republic?,” *Critical Review of International Social and Political Philosophy* 6, no. 1 (2003): 51; Cécile Laborde, “Republicanism,” in *The Oxford Handbook of Political Ideologies*, ed. Michael Freeden and Marc Stears (Oxford University Press, 2013), 526–27.

speech libertarian framework that shapes conventional intuitions about the public sphere. As we have seen in earlier chapters, the idea that political intervention of any sort might make things worse was a widespread insight in the discourse on expressive liberties. However, what Pettit calls *dominium* (i.e., private capacity of arbitrary interference) often goes unnoticed, or it is not thought to be politically troublesome from the point of view of liberty.

By abstracting and thinning out the empirical, socio-institutional contexts in which speech is produced and distributed, issues of expressive freedom in the libertarian framework are usually decided on a conflict between two variables on an inverse relationship: speech choices of private agents and public capacity of political coercion—if one grows, the other shrinks, and vice versa. There is little or no conceptual space here for how *dominium* also puts expressive liberties at risk: private agents controlling the speech of other, less powerful private agents, private agents able to challenge legal and legitimate instances of political coercion, unequal distribution of access to speech choices among private agents, private agents turning their legitimate power in one sphere into the power of censorship in another, etc.

The systematic disregard of *dominium* as a threat to expressive liberty also has interpretive consequences for the study of the past. As I pointed out earlier (§III.2), even contemporary thinkers willing to reframe free speech against the conventional libertarian mold tend to accept libertarianism as a valid hermeneutical framework for the past. Thus, contemporary anti-libertarian views of the public sphere are often presented against the out-of-date views of early modern and modern thinkers, assuming that when they elaborated Western canonical ideas on toleration, free speech, and freedom of thought they were struggling only against *imperium*, against despotic uses of public power.

The republican ideal of freedom as non-domination, and the distinction between *imperium* and *dominium*, can help the historian to ask the right questions as well. Instead of assuming that past thinkers defended (or wanted to defend, but failed to apply) a principle of non-interference (recall §IV.2), it is more appropriate to ask against which sources of unfreedom they developed their ideas of liberty, or what were the threats that their institutional proposals intended to counteract. In their opposition to absolutist monarchy and religious persecution by public officials, it is clear how the likes of Milton and Locke wanted to prevent *imperium*. Does this mean that, due to a flawed personal character or historical prejudice, they failed to go along with their own concerns against *imperium* when they excluded Catholics from toleration? My answer would be negative; and the revival of republicanism as an influential early modern language of freedom helps to explain the reason. For many early moderns, as we saw, limiting Catholic power was about the politics and the guarantee of freedom, not something to be dismissed as

exceptional or prejudiced. Their take on toleration was strongly built around the danger of *dominium* (§IV.1).³⁵

I believe this historical lesson bears on how contemporary political questions are framed, on why our analysis of expressive liberties should care about *dominium* too. It is true that we no longer live in feudal times anymore—a period in which, if it were to be simplistically described in terms of our distinction, “that tension was resolved on the side of *dominium*.”³⁶ The processes of modern state-building that created the political life of Western democracies as we know them have been classically and correctly characterized as turning the scales in the other direction, this time against *dominium*. I refer to institutional developments in which public power centrally imposed itself, with greater or lesser success, violence and legitimacy, in a process that Weber called the “levelling of the ruled.”³⁷ It is partly due to the fact that these ambitions were accomplished that modern liberals and libertarians can mostly focus on *imperium* (§IV.3): on questions of the legitimacy and fine-tuning of public power with the purpose of prevent despotic excesses. This is, in contrast with the early moderns, the *zeitgeist* in which Rawls’ views on toleration examined earlier are to be framed: a hope on an overlapping consensus is only possible once the dangers of illiberal

³⁵ One may rightly argue whether the perception of those threats of *dominium* is empirically accurate, and thus justified. Here, historical prejudice and personal bias may indeed play a role (e.g., a typical early modern protestant upbringing and the memory of past persecution plausibly led many thinkers to exaggerate the actual power that Catholicism and its agents had in their own times, perhaps leading them to exclude Catholics from toleration on false grounds). But my point is that this does not make Locke or Milton’s anti-Catholic arguments less relevant to comprehend their ideas on civil and religious freedom—in any case, it is the historian that, second-guessing their texts and empirical views, decides whether their anti-Catholicism or anti-clericalism is well-founded enough and should be made part of the Lockean and Miltonic theories of freedom. To illustrate this point, think of the twentieth-century right-wing libertarian Ayn Rand (§III.1). One could argue that her deep distrust of state power in Western democracies was exaggerated and empirically inaccurate, plausibly cultivated by Cold War historical prejudices, not least by her parents’ and her personal memories of Soviet Communism (she grew up in Russia, from 1905 to 1925). However, should this lead us to separate Rand’s criticism of state overreach from her broader reflections on freedom? It is clear it should not.

³⁶ Wood, *Citizens to Lords*, 24. She is relying on Perry Anderson’s idea of the “parcellization of sovereignty,” *Passages from Antiquity to Feudalism* (NLB, 1974), 148–53. On the history of *dominium* and *imperium* up to early modern times, associating *dominium* to feudal (private) power, see Blandine Kriegel, *The State and the Rule of Law*, trans. Marc. A. LePain and Jeffrey C. Cohen (Princeton University Press, 1995), chap. 2. Against this view, Habermas understood premodern *dominium* as “public” in part, insofar as it relied on public privileges and statuses (as compared, allegedly, to modern property-based private power); see his *The Structural Transformation*, §I.2.

³⁷ Weber, *MWG*, vol. I/22,4: 204; see generally 197–213 (on bureaucratization as centralization of resources and levelling of the ruled), and 300–351 (on “patrimonial” communities and their dependence on local elites integrated but in tension with upper-level power, including here church officials). In Habermas’ narrative of the public sphere this view also plays a role, see *The Structural Transformation*, §II.4 and §II.7. The idea of an “emancipatory state” has been connected with neorepublican discussions by Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford University Press, 2008), 103–8. See also §V.

private powers can be theorized away thanks to modern historical change and experience (§3.4.1, §3.4.2).³⁸

However, my contention is that the dangers of powerful private actors cannot be disregarded by an empirically aware normative study of the contemporary public sphere. Despite successful experiences of modern state building and despite the always pressing risk of *imperium, dominium* still matters in contemporary societies. In this sense, it is worth mentioning that the informational and communicative transformations of capitalist economies in the past 60 years have generated a rather old-fashioned vocabulary to capture both the accumulation of power in private hands and the shrinking of state capacity. Hence, critical analysts of political economy write about the “refeudalization” of the public sphere, about “techno-feudalism,” “neo-feudalism,” or “hinterlandization”—all of them suggesting premodern power dynamics in which private agents compete face to face with public sovereigns.³⁹ In a parallel backward-looking fashion, Marxists speak of

³⁸ Rawls stresses that it was a legitimate concern with public order, not faith, what explains Rousseau and Locke’s exclusion of Catholics. It is in this sense that he adds: “Presumably a greater historical experience and a knowledge of the wider possibilities of political life would have convinced them that they were mistaken, or at least that their contentions were true only under special circumstances,” *A Theory of Justice*, 190. Still, Rawls clearly sides with the argument for an intolerant-if-necessary public order that Locke and others developed (*A Theory of Justice* §35, esp. 192–193). Hence, it is not principle, but only modern historical circumstances and greater experience about the motivational effects of liberal coexistence that makes Rawls tolerant with Catholicism while Locke was not. We may say that is Catholicism that has changed (its power in society, its persecutory tendencies, etc.), not the argument for toleration. However, the historical separating Rawls from his early modern predecessors can contribute to blur the past. Perhaps there is no better proof of this than Rawls’ repeated consideration of the medieval and early modern Catholic Inquisition as mainly a problem of public power—of totalitarian state overreach (*Political Liberalism*, 37, 476; *LP* 21; *Collected Papers*, 621). To reconsider this view, consider a very powerful transnational private corporation nowadays, say, Google. Imagine it infiltrates public institutions thanks to its wealth and influence, placing allies in critical administrative and regulatory offices, using lobbyists to turn legislatures in its favor, taking advantage of its dominant position over the flows of information to distort public opinion according to its interests. After a long history of successful attempts, this private corporation is able to use state coercion arbitrarily to further its interests, keeping its acquired power through propaganda, patronage and repression. Now, in the end of this imaginary story of course there is, from the point of view of liberal legitimacy, what we may call state overreach. But it should be clear that from a historical and institutional point of view (also important for constructing and preserving liberal legitimacy), the problem is somewhat the opposite: lack of suitable and resilient public infrastructures has allowed state power to be co-opted by more powerful private interests. A faction has taken over the state, to put it in traditional terms. Locke et al. thought Catholicism and other churches as dangerous in this latter, more dynamic and institutional sense: even if religious coercion required the power of civil magistrates, this was due to a usurpation of public power—the lesson could not be, for this reason, a mere retraction of public power, but a qualified strengthening of public institutions.

³⁹ Habermas, *The Structural Transformation*, 195, 200–201, 231–32; Shoshana Zuboff, *The Age of Surveillance Capitalism* (PublicAffairs, 2020), chaps. 2, §II and §IV; Jodi Dean,

revamped processes of “primitive accumulation,” not to mention the explicit reconnection of socialist thought with its democratic-republican roots and its critique of *dominium*.⁴⁰ In contrast to the badly-aged communication utopias of an egalitarian public sphere envisioned by the technological optimism of the early 2000s (§IV.3), today’s descriptions evoking premodern times point out the pernicious effects, from the point of view of liberty, of too much power accumulated in private hands.⁴¹ Thus, they underscore the pervasive risk of *dominium* in contexts of economic inequality typical of nineteenth-century capitalism, growing monopoly and monopsony powers, reliance on predatory and politically-driven methods of appropriation, transnational corporations challenge public power escaping the traditional constrictions of modern national sovereignty, and so on.

I will not address here the important debate of whether all these trends are constitutive of the capitalist mode of production since it came into being or whether they are later, fixable disturbances that betray the original promise of capitalist markets.⁴² What interests me is that this vocabulary aims to capture (new, old or refurbished) forms of *dominium* or what Elizabeth Anderson

“Neofeudalism: The End of Capitalism?,” *Los Angeles Review of Books*, May 12, 2020; Yannis Varoufakis, “Capitalism Is Dead. The New Order Is a Techno-Feudal Economy, Interview by Miguel Ángel García,” *El País*, October 11, 2023. For a critical discussion of this trends, also pointing to examples from the right, see Evgeny Morozov, “Critique of Techno-Feudal Reason,” *New Left Review* 133/134 (2022): 89–126.

⁴⁰ David Harvey, “The ‘New’ Imperialism: Accumulation by Dispossession,” *Socialist Register* 40 (2004): 63–87. On socialist thought reconnecting with the republican critique of private power, see e.g., Domènech, *El eclipse*; Stuart White, “The Republican Critique of Capitalism,” *Critical Review of International Social and Political Philosophy* 14, no. 5 (December 1, 2011): 561–79; Gourevitch, “Labor Republicanism and the Transformation of Work”; William Clare Roberts, *Marx’s Inferno: The Political Theory of Capital* (Princeton University Press, 2017); Manjarín, “Marx y la tradición iusnaturalista en un mundo industrializado”; Bruno Leipold, “Marx’s Social Republic: Radical Republicanism and the Political Institutions of Socialism,” in *Radical Republicanism*, ed. Bruno Leipold, Karma Nabulsi, and Stuart White (Oxford University Press, 2020), 172–93; Tom O’Shea, “Eugene Debs and the Socialist Republic,” *Political Theory* 50, no. 6 (2022): 861–88.

⁴¹ Manuel Castells, *Communication Power* (Oxford University Press, 2009), 61–71. It is frustrating that, more than two decades later, Habermas’ late reflections on the public sphere still reproduce the same innocent modelling of “horizontal,” “equal” and “spontaneous” communication through the internet, in Jürgen Habermas, *Un nou canvi estructural en l’esfera pública i la política deliberativa*, trans. Lola Figols (Edicions 62, 2023), 45–55, 61; although this optimism is tempered once he considers the economic side of new media in 62f. For a review of early optimism about the internet from the point of view of a critical political economy of digital media, see Robert W. McChesney, *Digital Disconnect: How Capitalism Is Turning the Internet against Democracy* (New York: The New Press, 2013), 1–22.

⁴² On this debate, see Morozov, “Critique of Techno-Feudal Reason” (against the rupture or refeudalization thesis, pointing out the continuity of capitalist dynamics). To put another example: with less ominous (and radical) implications than denouncing a new “feudalism,” other progressive thinkers have compared contemporary capitalism with the late nineteenth-century “laissez-faire” economies that interwar and postwar reformers wanted to bridle (recall §2.2). Thus, the criticism of a “new Gilded Age” in the United States has generated antitrust views that explicitly recover Justice Brandeis’ legacy. See e.g., Lina Khan, “The New Brandeis Movement: America’s Antimonopoly Debate,” *Journal of European Competition Law & Practice* 9, no. 3 (2018): 131–32.

termed as “private government”—forms that would have gone unnoticed or underestimated in the conceptual frameworks of much liberal political theory.⁴³ And, even more to the point of this thesis, a very significant part of the transformations sustaining the biggest accumulations of private power today have to do with technological change in telecommunications, computer engineering, and the massive usage of social media coupled with the growing commodification of information and user-data. All of it was buttressed, precisely, by legal innovations in the field of expressive freedoms and the closely related field of intellectual property—a “Lochnerized” First Amendment and libertarian ideals of free speech have played (and still do) a distinct justificatory role of private power.⁴⁴

In light of these circumstances, the normative examination of expressive freedoms today cannot frame them as legal devices simply ordering the relationship between individuals and the state, as mere protections against *imperium*. That would mean playing along with the powerful libertarian rationale that sees in free speech an argument for rolling back the state: not merely when it comes to prevent government censorship, but also when it comes to prevent regulation of social media, legitimize the market power of online platforms, or argue against algorithmic transparency. As this thesis proposes, expressive freedoms are ideals that also speak to the relationships among private individuals, groups, and organizations, not just to our relationship with the state. Hence, considering the risk of *dominium* besides that of *imperium* in our normative reflection, just as neorepublicans recommend, is an important step to overcome the limits and dangers of the free speech libertarian framework.

4.2.2. Cancel culture: libertarianism criticizes private power

My main contention in subsection §4.1.2 was to stress the one-sidedness of the free speech libertarian framework. That is, I wanted to emphasize that the crux of the matter when it comes to filling the gaps of the free speech libertarian framework is not about liberal and libertarian ideals of freedom being unable to account for *any* relationships of dependence—as one could infer from the neorepublican criticism of non-interference as unaware of the dispositional nature of power. Rather, my contention against the free speech libertarian framework has been about *which* relationships of dependence are considered politically problematic from the point of view of liberty and what

⁴³ Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)* (Princeton University Press, 2017), chap. 2.

⁴⁴ Pasquale, “Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power”; Kapczynski, “The Lochnerized First Amendment”; Genevieve Lakier and Nelson Tebbe, “After the ‘Great Deplatforming’: Reconsidering the Shape of the First Amendment,” *LPE Project* (blog), March 1, 2021. On First Amendment constitutionalism being “Lochnerized,” that is, free speech serving as a rationale for economic libertarianism, recall §2.3.3. Also recall Rawls’ criticism of these trends in §3.1.3 and §3.4.3.

is required to overcome them or to keep them in check. I have shown, put differently, that the kind of “grievances” of dependence and unfreedom that neorepublicans want to denounce is indeed already covered by the usual liberal and libertarian reflection on expressive freedoms, but only in some cases: only when these grievances are ascribable to public sources of power, particularly state interferences. Against such one-sidedness in the detection of sources of unfreedom §4.2.1 examined a further neorepublican critical tool against the free speech libertarian framework: the distinction between public and private threats to liberty, and how the guarantee of expressive freedom is explicitly established against both.

This subsection wants to discuss, again, another possible rejoinder to the neorepublican critique. When acting as normative guide, is it true that the free speech libertarian framework is that one-sided? Does it really make its tacit or explicit followers to not care about the private powers of interference that hinder expressive freedom? These questions are remarkably relevant if we think of one of the most heated free speech issues during the last decade: the discussion raised around the interrelated phenomena captured by terms such as “political correctness,” “cancellation” or “woke” morals and politics (hereafter, “cancel culture”).⁴⁵ Broadly speaking, I am referring to the perceived rise of strategies that prevent uses of language, speech choices, and other cultural expressions that may offend and/or further disadvantage particular social groups.⁴⁶ The libertarian commonsense on free speech has

⁴⁵ I will not question whether these practices are incompatible with a principled commitment with free speech. Most media coverage and attention from academics (which should not be mistaken as scholarly attention) pit cancel culture and the like against free speech. In my reading, most of the times this comes from a simplistic understanding of expressive freedoms (much in line with the “libertarian framework” this thesis criticizes) and cherry-picking of local cases extrapolated as a description of generational attitudes. Yet there are recent exceptions. I have found useful sociological or philosophical treatment of many of these issues, problematizing cancel culture while displaying complex understandings of free speech and being open to give social movements and activists a fair say in the following works: Mary Kate McGowan, “On Political Correctness, Microaggressions, and Silencing in the Academy,” in *Academic Freedom*, ed. Jennifer Lackey (Oxford University Press, 2018), 135–50; Robert Mark Simpson and Amia Srinivasan, “No Platforming,” in *Academic Freedom*, ed. Jennifer Lackey (Oxford University Press, 2018), 186–210; Eve Ng, *Cancel Culture: A Critical Analysis* (Springer, 2022), chap. 2; Sigal R. Ben-Porath, *Cancel Wars: How Universities Can Foster Free Speech, Promote Inclusion, and Renew Democracy* (University of Chicago Press, 2023), chap. 3. For an empirical study on political science academia, see Pippa Norris, “Cancel Culture: Myth or Reality?,” *Political Studies* 71, no. 1 (2023): 145–74.

⁴⁶ The practical consequences and coercive features of these phenomena vary a lot (e.g., it is not the same to complain on social media about lack of diversity on a TV show than to cancel a director due to sexual harassment accusations). And, contrary to what is sometimes implied by critics, the substantive claims at play also vary a lot (e.g., it is not the same to collect signatures to ban Darwinism from school curricula than to ban an outspoken white supremacist lecturer at a university). Part of the conundrum is caused by taking all these phenomena together, as if the normative stakes were the same in all cases: a negative conception of

been particularly unforgiving and active in this conversation. And, precisely against what I suggested earlier, this case exemplifies a libertarian concern with *private* sources of unfreedom: social movements that ostensibly limit freedom of expression by enforcing exacting moral standards.

All along the political spectrum, critics of cancel culture focus their attention on the undue threat to expressive freedom generated by these approaches to the pernicious effects of speech, which not only achieve their goals by ex-post punishment of cultural creators and intellectuals, but by generating a corrupting atmosphere of fear that vitiates expressive freedom.⁴⁷ If they do not submit to the social pressure, they will suffer the consequences: their publishing house might rescind their book contract, their newspaper editors might drop offers for future pieces, sponsors might stop funding their work, they might suffer harassment in social media or in public events, and so on. Critics of cancel culture, then, portray these practices as a grave menace to expressive freedom: it conditions and punishes the authors' speech choices whenever these choices are framed as harmful for vulnerable groups, creating a stifling climate of repression. Thus, the argument goes, authors must adapt their creation process to changing social demands to avoid further outrages. Interestingly for our purposes, here we find the liberal-libertarian commonsense prepared to condemn *private* power, but also practicing a *dispositional* analysis of how power threatens free speech: cancel culture is thought to produce a chilling effect, upsetting liberty regardless of actual interference.⁴⁸

Although these ideas and practices have in some cases reached state power (e.g., "hate speech" legislation), the enforcement of cancel culture is most of the time carried through campaigns in social media, demonstrations, or consumer boycotts with the aim of obstructing or altering the making of a certain cultural expression—a film or TV show, a book, a newspaper piece, the recruitment of a speaker, and so on. That is, cancel culture is usually enforced by actors lacking the coercive means that mark traditional public state power. Especially in the minds of their critics, these are cases of non-

expressive freedom threatened by diverse interferences. For the purpose of my argument, though, I am consciously reproducing this narrow view: putting in the same basket less and more substantive claims about cancel culture, less and more coercive actions, etc. This is because my aim is not to propose a solution to concrete situations of cancel culture but to use it as a sort of limit case—to show the conceptual pitfalls of looking at these issues from the point of view of negative freedom. I want to thank Andrea Pérez for pushing me on this point, with whom I have wrote on this topic in "Reino de España: cultura cancelada y cultura de la cancelación," *Sin Permiso*, July 9, 2023.

⁴⁷ For a recent example of this cross-ideological alliance emphasizing the "intolerant climate" see "A Letter on Justice and Open Debate," *Harper's Magazine*, July 7, 2020. On this letter, see David Guerrero, "Contra las malas justificaciones de la libertad de expresión," *Sin Permiso*, July 19, 2020. For more elaborated arguments and cases see also the contributions to the collective volume Akeel Bilgrami and Jonathan R. Cole, eds., *Who's Afraid of Academic Freedom?* (Columbia University Press, 2015).

⁴⁸ Another example that could fulfill this role (i.e., libertarians caring about private power) is labor unions. See, for instance, the critique of Hayek in Robert S. Taylor, *Exit Left: Markets and Mobility in Republican Thought* (Oxford University Press, 2017), 104–7.

public sources of interference—an expanding, illegitimate, and mob-like pressure that constrains expressive choices. In fact, what for some critics makes cancel culture especially dangerous and illegitimate is its private or non-public character, because it detaches this form of interference from the proper institutional channels of democratic sovereignty.⁴⁹ Thus, this and related phenomena have been systematically identified as sources of unfreedom albeit not being instances of state interference. Mark Twain’s opening quote does exactly this: starting from the view that economic dependence on others endangers the ability to speak your mind, he ends up drawing a general complaint against the influence of “public opinion.”⁵⁰ Of course, Mill’s *On Liberty* is itself a notable precedent for this idea:

Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct (...) There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.⁵¹

So, isn’t cancel culture a counterexample to my previous arguments? After all, the free speech libertarian framework—the widely shared intuitions that conceive expressive freedoms as purely negative liberties against state interference—would not be as blind to private power as I argued above.⁵²

⁴⁹ For example, political correctness is given several fair thoughts in this sense in J. P. Messina, *Private Censorship* (Oxford University Press, 2023), chap. 2. Critics have also stressed that social movements (regardless of their private or public nature), often rely on private actors (universities, social media...) to enforce cancellation. See Raman Maroz, “The Dilemma of Private Censorship,” *University of Toledo Law Review* 53, no. 3 (2022): 424–39.

⁵⁰ Twain, “Corn-pone Opinions,” 584.

⁵¹ Mill, *CWJSM*, vol. XVIII: 220.

⁵² To call the authority, interests, and actions of a social movement “private” is not exempt of problems—especially if by this we mean the same as when I earlier said that the CEO of a big corporation or the Catholic Church may act as “private” sources of unfreedom. Here, “private” is simply opposed to the “publicness” of the state. As I suggested before, the problems are especially important if we care to look not only to the power these actors hold, but how they justify their interests within society. Recall that Rawls (*Political Liberalism*, 220 n7) used the idea of “nonpublic” to contrast the kind of moral legitimacy and reasoning valid within associations (e.g., churches, private clubs...) as opposed to the “public” reasons expected of reasonable citizens of a liberal society. From the point of view of how they justify themselves to society as a whole, many social movements seem to me to be “public” in this Rawlsian sense: they act on “public” reasons appealing to a shared conception of justice (or at least they try), even if, from an internal point of view, they discuss strategy and program on “nonpublic” terms. Incidentally, there is evidence to think that Rawls saw some social movements of his time as “public” in this sense; or at least that their demands (e.g., against the Vietnam War, against the

My answer is that, even if the free speech libertarian framework is prepared to identify some non-state sources of unfreedom, its analysis of unfreedom is still incomplete and biased, leaving important threats to expressive freedom undertheorized. Concretely, by merely putting the focus of interference and censorship in “politically correct” social movements (or the “tyranny of the prevailing opinion”) other more powerful players in the process are left unexamined.⁵³ One of the things that go unnoticed in conventional analyses of cancel culture is that it is not the consumer who has the last word over an author—it is their publisher, their editor, their producer (their financial sponsors, in a broad sense).⁵⁴ It is them who, supervising the funding of a cultural product, decide whether to convey consumer pressure to authors, in a similar sense that media owners decide whether to convey the pressure and complaints from readers, advertisers or politicians to their journalists. In other words, what often goes unnoticed in the conventional critique of cancel culture is another source of unfreedom: the dependence of many authors on the profit-seeking of those who fund their work. For example, increasing attention to consumer pressure on content has overshadowed the worsening of contract conditions offered by publishing houses. A recent labor trend in the publishing sector is the so-called “moral clauses” that allow publishers to terminate contracts on extremely vague and broad criteria—including any public condemnation of the writer that may affect sales, or the reputation of the work or the publishing house. By being able to rescind contracts more cheaply (and sometimes even receiving compensation for it) publishers legally expand their authors’ dependence on them by reinforcing their economic high ground.

draft, for the expansion of civil rights, for the right to abortion...) could be construed in terms of public reason by the theorist, other citizens or Supreme Court justices. However, as my arguments intimated in earlier chapters, I think it is truly difficult to find actual societies composed of a majority of reasonable Rawlsian citizens. Social movements often fail at giving “public” reasons as Rawls expected them to do. Sometimes is their fault, sometimes is due to their detractors’ obstinacy, or to repression and society’s unwillingness to listen to its own declared principles of justice. What is clear to me is that from the point of view of their detractors—and this is notably the case of cancel culture—social movements are usually framed as attempting to outwardly force “nonpublic” reasons on others (i.e., to impose comprehensive views of the good out of their inner club). Thus, in a section addressed to recognize the point of view of the detractors of cancel culture, it makes sense to assimilate social movements to a “private” threat when considering the power they have to enforce their demands.

⁵³ In this sense, the overemphasis on cancel culture as one of the most urgent dangers to free speech recalls the biases of nineteenth-century liberals and later fears of democratization in the context of mass society (recall §2.3.2). On the “intellectual elitism” of Tocqueville and Mill, and how it generated blind spots about other private sources of unfreedom, see MacGilvray, *The Invention of Market Freedom*, 150–59.

⁵⁴ It might be argued that consumers still have the last word, because it is their purchasing power oriented by their preferences that ultimately controls what a publisher/sponsor publishes. In this view, the preferences of consumer are previously given—they enter the market with an already formed set of preferences. However, there are reasons to think that in many markets, especially in ones with powerful economic actors, consumer preferences are externally induced by market actors themselves. The direction that “consumer power” takes, in other words, is a direction to which the publishing houses could have contributed to shape through advertising, public relations, and so on. I want to acknowledge Lisa Herzog for this point. These problems are discussed in her *Citizen Knowledge*, §VII.2.2-3.

Similar trends affect journalists, scriptwriters, filmmakers, and celebrities in general.⁵⁵

This increasing capacity for arbitrary interference sustained by the growth of asymmetric contract conditions should be at least as worrisome from the point of view of expressive liberties. However, it is repeatedly neglected in most criticisms of cancel culture and related issues. Regardless of consumer taste and consumer political preferences, publishing houses and other sponsors of cultural work exert a higher degree of control over authors, making their creations dependent on profit estimations. And even when a publisher cancels a book based on, say, sinking sales estimates and reputational damage due to an author’s racist comments, or due to the transphobic nature of a work, the decision ultimately rests with the publisher, not with angry consumers who are not willing to buy anymore.

To be sure, well-established authors are more protected against capricious scandals of cancel culture, and the same applies to big publishing houses, with more financial muscle to resist drastic changes in sales prospecting than smaller sponsors. The point is that this is not just because they might happen to be unflinching freethinkers unafraid of mobs, but because they have much more bargaining power against their sponsors, employers, producers, or publishers. In the face of abusive contract conditions or a fearful publisher that vicariously censors them following consumer tastes, well-established creators might get many other offers to distribute and earn money with their work, they might be so successful that they are always profitable, etc.

Then, it is arguably true, as Milton Friedman and others have suggested, that markets can be conducive to expressive freedom inasmuch as they can offer alternatives: options to exit freedom-undermining relationships, with the consequent breeding of voice within preexisting relationships.⁵⁶ But note how this only affects a small subset of cultural creators: those who already have a name, whose “market value” is high enough as to find viable alternatives. For the most part of the cultural sector, however, their reliance on markets does just the opposite: it endangers their capacity for meaningful expression, either because they are at the mercy of sponsors or at the mercy of consumer power. Put differently, my contention against Friedman is as true for creators—who must condition their success on what they see as capricious consumer tastes and impositions—as for their sponsors—who must also adapt their hiring and producing decisions to keep their business sustainable. I concede that markets can be useful mechanisms to foster expressive liberties, yet my point is that their freedom-enhancing properties are not distributed evenly: the alternatives

⁵⁵ Elizabeth A. Harris, “How Getting Canceled on Social Media Can Derail a Book Deal,” *The New York Times*, February 11, 2021. For a recent legal overview, see Matthew Fulton, “Frustrating Morals: Is There an Implied Reverse Morals Clause in Publishing Agreements?,” *Brooklyn Journal of Corporate, Financial & Commercial Law* 17, no. 2 (2023): 205–34.

⁵⁶ Friedman, “Free Markets and Free Speech,” 6. This view of markets as being able to give exit options and thus freedom-promoting alternatives has also been elaborated by neorepublicans; see Philip Pettit, “Freedom in the Market,” *Politics, Philosophy & Economics* 5, no. 2 (2006): 131–49; Frank Lovett, *A General Theory of Domination and Justice* (Oxford University Press, 2010), 53; Taylor, *Exit Left*. I will examine their arguments below (§6.2, §6.4).

they offer only work for well-established players in such markets, be they creators (e.g., prominent writers) or sponsors (e.g., major publishing houses). If communication and culture markets are to be justified in terms of how well they do in the guarantee of expressive freedoms, as in Friedman's argument, then we must conclude that their outcome is erratic, protecting at best only a small subset of already powerful agents.

Considering all the players and plausible sources of domination involved should help us to assess the real and politically relevant consequences (if any) of cancel culture itself, aside from the hyperbolic framing of the phenomenon in mass media and some academic writing. It is not surprising that recognized cultural celebrities and prominent intellectuals, arguably the most frequent targets of bottom-up citizen and consumer attempts to control speech, are among the most outspoken critics of these experiences. However, we should not forget that they are also the ones that suffer fewer material consequences associated with censorship (unemployment, termination of projects, or loss of future opportunities to communicate their work to a broad audience). I think any critical analysis of cancel culture should take this into consideration, to wit: the political-economic conditions in which these phenomena occur.

At a time when citizen and consumer political awareness grows and when, thanks to social media, their capacity for collective pressure increases, the fact that access to means for meaningful expressive freedom depends on markets invites a change of focus: from blaming consumers and citizens' "intolerance" to questioning the institutions that turn "intolerant" preferences into censorship mechanisms. After all, if the guarantee of expressive freedom is the final aim (or, alternatively, to minimize arbitrary interferences with expression), the conclusion may be that markets and willingness to pay are not, per se, be the best mechanisms to allocate speech opportunities. If anything, the gloomy analyses that depict younger generations of consumers organizing boycotts through social media as a mob-like threat to freedom should be more open to a critique of the commodified nature of most cultural production and distribution. That is, in the face of consumers that supposedly disregard free speech, the only answer should not be the moralistic critique that, usually with nostalgic overtones, demands more virtuous and freedom-loving consumer-citizens. The lesson could, and should, be institutional as well: if culture markets are the driving force by which consumers turn their mob-like coercive preferences into cancel culture, why not modify or substitute markets as distributive mechanisms compatible with a free culture? Should not stronger labor rights or decommodification of culture be part of the solution too?

In the right-wing libertarian field, this proposition would require, of course, a deep rethinking of other commitments. For a long time, markets were considered the ideal institutional arrangement to bypass discussions about virtue, a way of avoiding the need to oppressively impose standards of moral

character to solve coordination problems.⁵⁷ Compared to a public allocation of resources, markets were seen as the thin, non-comprehensive, non-perfectionist institutional solution par excellence, for they prevented public officials and regulatory agencies from second-guessing citizen and consumer preferences—a practice thought of as contrary to freedom.⁵⁸ Thus, ideas of “consumer sovereignty” underpinned the connection between economic freedom, markets and political freedom in general. In the context of the calculation debate, for Hayek other mechanisms than markets were unfeasible because “every passing whim of the consumer is likely to upset completely the carefully worked-out plans.”⁵⁹

Yet, today, any cursory study of the actual workings of cancel culture will find that this alleged new kind of unfreedom is grounded, precisely, on the fact that too much power rests on the hands of freedom-hating “woke” consumers. In the case of culture, then, the prospects of critical consumption practices do not seem as promising as in other fields, such as sustainability and consumer-based transitions toward green capitalism—say, where the end of carbon-intensive products must wait for conscious consumers to make them unsaleable. In contrast, in our case, what “woke” consumers turn into unsalable or less profitable (e.g., the novels of a transphobic author, the films of a sexual offender) are also valid, some would say valuable, cultural expressions—it is in this sense that expressive liberties are seen by many as the major casualty of cancel-culture consumption practices.

This is why libertarian critics of cancel culture should think about the political economy of it. If they do, they will realize that their anxieties also point to questioning the commodification of culture. Critics of cancel culture are proving that markets seem to fail just at what many libertarians argued they would succeed: at promoting expressive freedom. Hence, it is almost ironical to realize that, instead of thinking of alternative institutional arrangements, most critics of cancel culture point precisely to the sort of issues that they wanted to avoid in the first place: morality and virtue. Now that, to paraphrase Hayek above, “every passing whim of the consumer is likely to upset completely the carefully worked-out plans” of markets, the difficulties are located in consumer preference, in their alleged lack of preference for a free and open culture. If cancel culture is true, if one wants to keep consumer sovereignty while saving the freedom-promoting properties of markets, then

⁵⁷ E.g., Hayek, *The Road to Serfdom*, 94–97 (arguing that economic planning undermines the possibility of individual choices); Friedman, *Capitalism and Freedom*, chap. 7 (free markets solving the need of anti-discrimination regulations). This view of markets can be linked with the broader methodological commitments developed during the emergence of modern economics as a positive science separated from moral philosophy; see Eric Schliesser, “The Separation of Economics from Virtue: A Historical–Conceptual Introduction,” in *Economics and the Virtues: Building a New Moral Foundation*, ed. Jennifer A. Baker and Mark D. White (Oxford University Press, 2016), 141–64.

⁵⁸ For a critical history of this argument, see Niklas Olsen, *The Sovereign Consumer: A New Intellectual History of Neoliberalism* (Springer, 2019), chap. 4.

⁵⁹ Hayek, “The State of the Debate” (1935), *Individualism and Economic Order*, 148.

society requires consumers with a distinct fondness of free speech—an attachment that markets themselves do not seem to provide.

Then, regardless of the wide range of possible solutions to this problem and how well they would do from the point of view of free speech (e.g., a democratically controlled allocation of relevant speech opportunities, well-protected employment conditions of cultural creators, an unconditional basic income to self-fund cultural projects, caps to audience accumulation, break-ups of media oligopolies, a complete decommodification intellectual work...); regardless of solutions, examining cases of alleged mob censorship without considering the political-economic conditions in which they take place leads, again, to misguided and one-sided accounts of how private power endangers expressive liberty. How is it that profit-seeking and expected sales turned out to be an unproblematic mechanism for restraining speech as compared to the justice-based demands by social movements and consumers addressed to cultural creators? Why are consumer tastes and political preferences (even when they are shaped by organized social movements and sometimes backed by democratic legislative efforts) so intuitively considered a threat to free speech, while this is not the case with the narrow self-interest of publishers leaving authors in the lurch?⁶⁰ When authors' fears deform their cultural products, are they fearing only *social* pressure, or also *economic* pressure? Do not these authors' precarious contracts or fear of economic losses have a share in what weakens their expressive freedom?

I am not suggesting that citizen and consumer social pressure is not a threat at all, or that their demands of interference with speech are always correct and legitimate (though I think these threats have been overstated). Even for someone who accepts that social movements creating a cancel culture and shunning abusive speakers and ideas are a threat to expressive liberty, my point is rather about the flawed intuitions on the matter cultivated by the free speech libertarian framework. This is the tendency to disregard that, at least, there are two private sources of arbitrary power endangering expressive liberty in most cases concerning cancel culture. First, social or consumer pressure toward certain content. Second, abusive, profit-maximizing contract conditions caused by the market dependence of creators and their sponsors. By making a thorough, dispositional analysis of only the first threat, the commonsensical, free speech libertarian framework tends to ignore threats of the second kind. It ignores, in other words, that sometimes the focus of our concerns (in this case, "cancel culture") is embedded in, and works in conjunction with, specific material and institutional conditions that facilitate or create additional mechanisms of unfreedom (in this case, abusive business practices generated by market pressure). Protecting cultural creators against

⁶⁰ If we were to evaluate them under a Rawlsian criterion of public reason, for example, it is clear how social movements may construe their demands according to a public conception of justice, preserving the priority of the first principle of justice (basic liberties). However, after a publishing contract has been signed, suppression of speech grounded on a new assessment of lack of profitability generated by angry consumers will hardly meet the demands of public reason.

these mechanisms should be the goal of free speech advocates as well—be they liberal, libertarian, or republican.

Again, as with the earlier counterexample in §4.1.2, the free speech libertarian framework is self-defeating when it has to face concrete issues. Against the real or perceived threat to free speech by social movements, it becomes clear that expressive freedom must be something carved out through political interference and regulation (i.e., legal organized coercion). Campus policies to prevent no-platforming actions, content and moderation rules on social media, deliberative guidelines that allow to channel disagreement into conversation instead of cancelation, enforceable standards of professional integrity for editors and publishers, or the claim of constitutional free speech rights in public spaces against a violent multitude, are all the outcome of certain institutional settings hardly subsumable under the idea of non-interference. In the face of private arbitrary powers of any sort, be it a group of “politically correct” students, “woke” social media users, or an abusive publisher, it becomes clear that expressive freedom cannot be just freedom *from* interference. In the *absence* of appropriate interferences, expressive liberty is at the mercy of multifarious threats and never guaranteed fairly and equally (as every civil and political right is supposed to be).

To address these concerns, the next section introduces a further neorepublican tool: the notion of freedom *by* the law. This is the idea that liberty is something achieved not through the absence of interference, but thanks to suitable interferences that structure coercion in order to shape a common world where everybody can speak their minds without fear. This thesis acknowledges that not everyone agrees on how exactly to shape that common world; that there is much dissensus, politically speaking, on what are the suitable interferences and which of them are needed to constitute freedom. The scope of concrete rules, forms of legal coercion, and incentives are topics in which, for instance, a feminist will hardly agree with someone who denies that gender socialization plays a role in how we speak and listen to others. In the same vein, I would expect staunch anti-socialists to disagree with some of my criticisms above, especially when it comes to decreasing the role of markets in cultural production: they will rightly point out that if we have freedom-hating consumers hampering free speech through their purchase power, democratic alternatives will have similar results—freedom-hating citizens hampering free speech with their political power. Yet my hope has been to address the shortcomings of the free speech libertarian framework at a more fundamental and conceptual level: that the subjective and social experiences we call expressive freedoms are the outcome of controlled structures of coercion. The next section intends to move to this level too.

4.3. PUBLIC POWER AND THE CONSTITUTION OF FREEDOM

4.3.1. Neorepublican freedom by the law

Using the examples of Milton and Locke, I have mentioned earlier that, for many historical republicans, the guarantee of religious freedom was not merely about separating church and state, but about hierarchically and coercively subjecting the former to the normative standards defined by the latter (§4.2.1, §IV.1, and §3.4.2). The ideal was, in other words, that no private agent should be able to challenge the minimal rules of coexistence settled by the civil sovereign. This view goes well beyond the politics of religious toleration, and it parallels the general republican (and neorepublican) argument that freedom, rather than a minimization of public power, requires a qualified defense of it. Elaborating on a republican *locus classicus*, Pettit argues that the ideal of freedom as non-domination is not framed as liberty *from* the law, but liberty *by* the law—it is a political ideal of freedom constituted by non-arbitrary state interferences.⁶¹

Yet emphasizing how private power might undermine freedom, and how that requires certain institutionalization of public power, does not entail giving a *carte blanche* to the state. Precisely because *imperium* remains in the equation, the neorepublican optimistic outlook towards the emancipatory potential of public power is always tamed by the chances of an arbitrary sovereign turning the state against freedom. This is especially the case of neorepublicans that, contrary to much of their historical tradition, are theoretically committed to democracy. State power needs to be non-arbitrary if it is to establish and maintain republican freedom, that is, it must be checked as much as possible through institutions of democratic accountability and participation, constitutional constraints, and so on.⁶²

The neorepublican notion that non-arbitrary arrangements of public power are needed to deal with the unfreedom produced by asymmetrical relationships of dependence between private agents is a suggestive explanatory framework for contemporary expressive liberties. Concretely, it serves to counter again the libertarian view that pits personal autonomy against politics, negative rights against state interference, liberty against any instance of coercion, etc. The neorepublican ideal of freedom as non-domination, put differently, serves to account for the varied ways in which public power contributes to the establishment and maintenance of freedom.

The set of ideas, laws, and policies that constitute “net neutrality” are a good example to show the explanatory virtues of non-domination with respect to non-interference. As it is well known, the infrastructure that makes internet communication possible is partially based on hardwired and wireless technologies that transmit information—fiber optic cables, satellites,

⁶¹ Pettit, *Republicanism*, 35–41.

⁶² *Ibid.*, 206–40.

antennas, and so on.⁶³ Much of this infrastructure is privately owned or managed by companies known as internet service providers. Net neutrality is the regulative principle that guarantees that companies cannot discriminate the data that is carried through their infrastructure. Despite controlling or owning the material basis of the network, internet service providers are not allowed to prioritize, block, slow down, or boost specific data.⁶⁴ Under net neutrality rules, service providers are not allowed to, say, fast-track Netflix against other video-streaming platforms, make it free to access Netflix within your mobile data plan, or prevent you from accessing it at all. Net neutrality ensures that providers cannot decide what and how information travels through their cables or antennas.

Net neutrality rules and the legal regulations they entail are an essential part of how expressive freedom is guaranteed in the context of digital communication. They determine what internet service providers can and cannot do with their assets. Expressive freedom on the internet is, in this sense, clearly not a freedom *from* the law, but freedom *by* the law; it is liberty of expression granted *by* the prearranged state interferences that constitute net neutrality. This case makes clear the *imperium*- and *dominium*-side of unfreedom elaborated in the previous section. Besides constitutional protection against despotic uses of public power, freedom on the internet is something carved out by specific state interferences that limit what powerful private actors can do when their position and ownership rights would make them able to condition the speech choices of others.

In the absence of these rules that grant equal treatment of information, internet service providers that control the basic infrastructure of the network would be able to modify access to content at will. Given that the market of internet service providers tends to be monopolistic, the power of discriminating what and how is communicated through their networks would be a *de facto* power of censorship. Providers are, of course, interested in enjoying arbitrary power over the information traveling through their pipes for their own commercial purposes, at the expense of economic competition in other fields: imagine a provider forcing Netflix to pay an extra fee if it wants its content to stream as fast as other websites; or imagine Netflix consolidating its market position by making a deal with major internet service providers so that they offer faster access to Netflix streaming products. This is just what the project Google Free Zone attempted to do in South Africa, Thailand, or Nigeria.⁶⁵ The same could be said of Facebook’s several attempts to grow its base of consumers in many parts of the world, from Facebook Zero to Free Basics. With the express purpose of extending internet connectivity to poor and rural areas as a “human right” (in Mark Zuckerberg’s words), Facebook

⁶³ For a recent critical overview, see Tarnoff, *Internet for the People*, Preface and chap. 1.

⁶⁴ Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (Alfred A. Knopf, 2011), 321–22; Victor Pickard and David Elliot Berman, *After Net Neutrality: A New Deal for the Digital Age* (Yale University Press, 2019), chap. 1.

⁶⁵ Arturo J. Carrillo, “Having Your Own Cake and Eating It Too: Zero-Rating, Net Neutrality, and International Law,” *Stanford Technology Law Review* 19, no. 3 (2016): 373–76.

struck deals with several internet service providers to offer for-free access to handpicked websites considered as “basic” by Facebook—a text-only version of Facebook itself included. Communication regulatory agencies in India and Chile, for example, concluded that these initiatives violated net neutrality principles: with the pretext of expanding universal access to internet, they created an insulated, limited internet whose boundaries were defined by powerful gatekeepers with economic interests at stake.⁶⁶ For the users of these services, all the expressive freedoms rooted in internet connectivity were at the mercy of technological gatekeepers.

But the consequences of not enjoying enforceable net neutrality principles could affect expressive freedoms in much more explicit ways—think of governments that use internet service providers as proxies in their tasks of censorship and information control: from arranging internet shutdowns to filtering of content.⁶⁷ Yet, notably, the absence of exhaustive net neutrality rules is troublesome even in countries that can boast of democratic credentials, as Canada could do in 2005. During that year, one of the biggest Canadian internet service providers, Telus, prevented its subscribers from accessing a website that supported the activities of the Telecommunications Workers Union. This was a trade union that had decided to go on a strike against the company after failed negotiations in a labor dispute. Simply put, Telus took advantage of its oligopolistic control of Canadian internet infrastructures to arbitrarily restrict the expressive freedoms of its customers (who could not access specific information) and many of its workers (who could not use Telus’ infrastructures to convey their message).⁶⁸ Similar situations have been reported in the United Kingdom and the United States.⁶⁹

4.3.2. Communication infrastructures: libertarianism and legal order

Is the free speech libertarian framework able to make sense of net neutrality as a freedom-enhancing institution? If one delves into some of the sources that contributed to shaping the libertarian framework of free speech, there are good reasons to answer this question in the affirmative. The devil is in the institutional aspects of so-called “negative freedom.” The libertarian position has always been intimately tied to the idea of legal order and the rule of law: “The consistent liberal,” as Friedman put it, “is not an anarchist.”⁷⁰ Thus, if libertarians of various stripes are committed to a state that “rolls back” its capacity to interfere and administer social life, this commitment usually

⁶⁶ Subhayan Mukerjee, “Net Neutrality, Facebook, and India’s Battle to #SaveTheInternet,” *Communication and the Public* 1, no. 3 (2016): 356–61.

⁶⁷ Ethan Zuckerman, “Intermediary Censorship,” in *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace*, ed. Ronald Deibert et al. (The MIT Press, 2010), 71–85.

⁶⁸ Neil Barratt and Leslie Regan Shade, “Commentary Net Neutrality: Telecom Policy and the Public Interest,” *Canadian Journal of Communication* 32, no. 2 (2007): 295–305.

⁶⁹ Pickard and Berman, *After Net Neutrality*, 41f.

⁷⁰ Friedman, *Capitalism and Freedom*, 34.

involves submitting state power to a (public) legal framework that restrains it, not simply abolishing state power. Hence, strictly speaking, the public power “rolls back” only by means of self-imposed legal constraints, such as constitutional provisos, internal separation of power in different branches of government, and so on.

The case of Hayek comes up again in this regard. One of his specific contributions to American libertarianism is the idea that freedom presupposes a certain legal order.⁷¹ As Sean Irving has demonstrated, in developing this juridical conception of freedom, Hayek was inspired by the same historical tradition that, in the last third of the twentieth century, served as the basis for the revival of republican liberty in political philosophy.⁷² Thus, from a conceptual point of view and when it comes to its relationship with law, Hayek’s conception of freedom overlaps with republicanism. For him, there is no doubt that the legal order constitutes freedom—legal, predictable coercion monopolized by the state is necessary to prevent arbitrary coercion detrimental to freedom.⁷³ This Hayekian-republican intuition about liberty, in turn, helps to explain two issues I had mentioned in earlier chapters. First, how many of the early- and mid-twentieth-century forefathers of libertarianism saw their normative projects as a substitute rather than a continuation of nineteenth-century laissez-faire liberalism (this was true even of “neoliberals” located on the political right, recall §2.1.2). And second, how, as a consequence of this, many of these thinkers kept a specific role for the state to regulate economic and political competition.⁷⁴

Why is this important for expressive freedoms and the regulation of information channels involved in the idea of net neutrality? Note, first, how Hayek connected the notion of a non-dominated flow of information with liberty. “Free action,” he wrote, means that “a person pursues his own aims by the means indicated by his own knowledge.”⁷⁵ This observation evidently concerns the knowledge that this person is able to get from the world surrounding him—hence his republican-like conclusion that free action

⁷¹ It should be noted that Hayek found the term “libertarian” as artificial and unattractive. But accepted that in the US of his time, due to the particular deformations of the meaning of “liberal” since the early twentieth century, “libertarian” was the political trend that better represented his values. See Hayek, *The Constitution of Liberty*, 530.

⁷² Sean Irving, “Hayek’s Neo-Roman Liberalism,” *European Journal of Political Theory* 19, no. 4 (2020): 553–70.

⁷³ Hayek, *The Constitution of Liberty*, chaps. 1 and 9.

⁷⁴ I have developed more explicitly how this was the case of free speech libertarians with left-of-center sensibilities in the interwar United States; that is, friendly to the “progressive” movement broadly understood (§2.2). For some European “neoliberals” such as Hayek, the root of their anti-laissez-faire stances, and how that shaped a more active role of the state constituting and protecting economic competition, had a distinct source: the “ordoliberalism” developed by German thinkers of the time (some of them associated as well to the Colloque Walter Lippmann). See Stefan Kolev, “When Liberty Presupposes Order: F. A. Hayek’s Contextual Ordoliberalism,” *Journal of the History of Economic Thought* First View (2023): 1–24.

⁷⁵ Hayek, *The Constitution of Liberty*, 71.

must be based on data that cannot be shaped at will by another. It presupposes the existence of a known sphere in which the circumstances cannot be so shaped by another person as to leave one only that choice prescribed by the other.⁷⁶

That is, the data about the world that grounds our freedom of action cannot be at the mercy of the arbitrary will of others, including powerful market actors. Something else than non-interference and laissez-faire is required in this regard, as Hayek hinted at when observing that “most nineteenth-century liberals were guided by a naïve overconfidence in what mere communication of knowledge could achieve”—that is, “as though the dispersion of knowledge would solve all major problems.”⁷⁷ For this reason, albeit with proper vigilance and distrust, “the state can do a great deal to help the spreading of knowledge and information.”⁷⁸ This statement gives theoretical context to a Hayekian reflection on communications I quoted earlier, which he shared with many free speech libertarians of his time. I refer to the concession he made in his most anti-statist pamphlet that some “channels of information” “can never be adequately provided by private enterprise.”⁷⁹ This position is consistent with his broader views at the time:

The successful use of competition as the principle of social organisation precludes certain types of coercive interference with economic life, but it admits of others which sometimes may very considerably assist its work and even requires certain kinds of government action. (...) In no system that could be rationally defended would the state just do nothing. An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other.⁸⁰

Here, we may find the rudiments for a Hayekian (“libertarian”) argument for net neutrality. In contemporary societies, internet connections play a role not

⁷⁶ Ibid., 71. My italics.

⁷⁷ Ibid., 500.

⁷⁸ Hayek, *The Road to Serfdom*, 89 (note in this quote he is referring specifically to the labor market). For a specific application of this principle other than Hayek’s well-known support for general education funded with taxes (*The Constitution of Liberty*, chap. 24), see for example his thoughts on agrarian policy and government-promoted farming and technological knowledge in *ibid.*, 487–488. In the context of Hayek’s wider economic opinions, we may say that although in his view markets and the price system had marvelous epistemic properties, he also thought that not every human epistemic need could be delivered by these mechanisms in all circumstances. Interestingly, this awareness about the need of public provision of the essentials for intellectual autonomy has been called as “Jeffersonian” by some of Hayek’s followers, who extend the logic of this reasoning rather far from Hayek’s political interests, but interestingly closer to ours: to a critique of commodified contemporary media. See Gus diZerega, “Toward a Hayekian Theory of Commodification and Systemic Contradiction: Citizens, Consumers, and the Media,” *The Review of Politics* 66, no. 3 (2004): 445–68. For a Hayekian case against the censorship power of digital platforms with a monopolistic position, see Maroz, “The Dilemma of Private Censorship,” 446–50.

⁷⁹ Hayek, *The Road to Serfdom*, 39.

⁸⁰ Hayek, *The Road to Serfdom*, 38, 40.

unlike roads or telephone lines in earlier periods: they are infrastructures requiring regulation (if not direct provision) by public authorities to the extent that they are essential for the development of other economic activities or for a standard level of freedom of action. In this view, state-enabled fairness in internet connectivity could be assimilated also to the public funding and regulations associated with the postal service since the early years of the American republic, where periodicals got mail privileges that were instrumental for their expansion and economic sustainability.⁸¹ That is, the Founders—to name a historical inspiration of both libertarians and neorepublicans in the lessons against *imperium*—understood that government subsidies through the Post Office were essential for the development of a plural and free press.⁸²

None of this means, of course, that every advocate of negative liberty, or every self-proclaimed libertarian, will necessarily support net neutrality and the like—arguably most “libertarian” think-tanks today oppose net neutrality. In fact, given Hayek’s later views on broadcast policy, he would probably have opposed it as well. His change of views is a sign of the changing times: if one compares the passages quoted earlier, written during the 1940s and 1950s, with his views from the late 1970s, the emphasis on state regulation of communication infrastructure is much more circumstantial, regarded as a second-best that governments must be open to substitute for market distribution whenever possible, and in some cases downright dangerous for freedom, as in the case of public monopolies in broadcasting.⁸³ In the late nineteenth and early twentieth centuries, the regulatory lesson of industrial technological improvement was the need to create and preserve economic competition with the help of state power if necessary, especially in those sectors that tended to concentration (communications was one of them, as the industrialization of the press, the telegraph, news agencies, or the early radio had demonstrated). It is interesting, for instance, that Max Weber, solely for descriptive purposes, considered in his *Economy and Society* that telegraph lines had to be administered by public institutions due to technical factors—they were, he said, “pacemakers of bureaucratization.”⁸⁴ This view, the view

⁸¹ Joseph M. Adelman, *Revolutionary Networks: The Business and Politics of Printing the News, 1763-1789* (Johns Hopkins University Press, 2019), 43–45, 118–25, 200–202. Of course, this was not a model exempt of risks. Until the twentieth century, major instances of federal censorship involved despotic uses of the postmaster’s authority to deny certain publications mail privileges, thus making them economically unsustainable.

⁸² Kielbowicz, “The Press, Post Office, and Flow of News in the Early Republic.” Note that even the views against flat-rate or free mail privileges for all periodicals were argued on the grounds of preserving plurality against the foreseeable effects of creating a competitive national market of newspapers. Some congressmen argued that if all papers enjoy the same mail privileges, then the bigger, more efficient and cheaper city newspapers would outcompete rural media, eventually hampering the nation to access deliberatively important rural viewpoints (see *ibid.*, 259).

⁸³ Hayek, *Law, Legislation, and Liberty*, vol. III: 47–48, 60–61, 147–148. My analysis coheres with the periodization of Hayek’s wider social theory in Kolev, “When Liberty Presupposes Order.”

⁸⁴ MWG, I/22,4: 184.

of technology-driven oligopolies and the demand for public power and the law to do something about them, was accepted by Hayek in his dismissal of laissez-faire economics (if with qualifications).⁸⁵

Yet, in the last third of the twentieth century, the lesson of technological improvement pointed in the opposite direction, especially in the field of broadcasting. The prospects of more people broadcasting and receiving information within the same radio spectrum thanks to technical innovations undercut the basic economic argument behind the regulatory rationale in telecommunications. Technological change, in this case, eventually challenged the common view that, in contrast to newspapers, new media such as radio, television or wireless telegraphy were based on an inherently public and unmistakably scarce prime matter in need of state regulation—the airwaves.⁸⁶ By supporting more stations and channels, technological progress eradicated the problem of scarcity of frequencies and, therefore, the need of substantive government policing of what radio and television managers did with their broadcasting licenses. Envisioning the commodification and privatization of public television monopolies of the 1980s, Hayek also embodied this new view of technology-driven competition and the obsolescence of state regulation. “Wireless broadcasting” could have been “an instance” in which “only government is in fact able to supply particular services”; to which he added: “But technical advance might well open the possibility of (...) making the operation of the market possible.”⁸⁷ It is in this sense, as I suggested before (§IV.3), that the advent of internet was for many the final blow to the typical twentieth-century rationale for regulating communications. Internet could be the basis of a libertarian technological utopia, making possible peer-to-peer connectivity and cheap sharing of ideas with potentially global audiences, all in a digital space regarded as practically non-physical and therefore beyond the reach of private or public regulatory gatekeepers and their usual arguments—scarcity was no longer thought of a problem.

Let me turn to my original question. Bearing in mind this Hayekian sensibility concerning the unavoidably juridical nature of freedom and the (circumstantial) need of a state-supported framework to create and preserve economic competition, is the free speech libertarian framework prepared to support or explain net neutrality (or other communication infrastructure regulation)? My view is that free speech libertarianism will either explain net neutrality by entering a baroque argument at odds with conceiving negative

⁸⁵ Hayek, *The Road to Serfdom*, chap. 4. See esp. 50f.

⁸⁶ See the example of the Fairness Doctrine in the US in Sunstein, *Democracy and the Problem of Free Speech*, 48–51. It is still very instructive to read contemporaneous commentaries on the normative ambivalence of the scarcity argument (it left the press unregulated, it could militate against government interference in other cases, etc.). See Lee Loevinger, “Free Speech, Fairness, and Fiduciary Duty in Broadcasting,” *Law and Contemporary Problems* 34, no. 2 (1969): 278–98.

⁸⁷ Hayek, *Law, Legislation, and Liberty*, vol. III: 47.

freedom as a core value to maximize, or as something unrelated to expressive freedom.

In the first case, net neutrality could be said to be about restricting negative freedom in some areas (or to some people) to improve it in some other areas (or to some other people). For example, the internet service providers’ freedom to intervene in the flows of information of its network is traded off for the customers’ freedom to surf the web. Despite all his otherwise sound reasoning on the issue, this is what is behind Hayek’s oxymoronic dictum that: “Liberties appear only when liberty is lacking.”⁸⁸ But even if these calculations were practicable and could be justified as fair, the conceptual salience of “negative” liberty would be completely devaluated (on this point, see also below §5.4.3). For to exchange—through public policies, one assumes—the negative freedom of the powerful to advance the negative freedom of the disempowered makes the second and ostensibly more valuable instance of “negative” freedom, as far as it goes, already the byproduct of specific, “positive” state intervention. In other words, the idea that expressive freedom on the internet is a “negative” freedom would only make sense very locally, so to speak—at the level of the experience of concrete internet users enjoying net neutrality. But, strictly speaking, from an institutional or more global point of view, such “negative” space of freedom has been carved out by interferences that, far from leaving the world as it is, change it in specific ways. Hence the baroque nature of the free speech libertarian rationale I mentioned above; “baroque” in the sense of avoidably non-parsimonious: what is the point of arguing for a “negative” freedom that requires much more than “negative” measures? Here, the focus on the idea that expressive liberties are “negative” (a focus Hayek maintained), although it may serve to advocate for net neutrality and analogous legal frameworks, it actually obscures the institutional nature of what is being advocated for: a set of predictable and general coercive arrangements.⁸⁹

A second route could be the least rhetorically powerful option of saying that net neutrality realizes something different than expressive liberty. This makes the central point of the argument much less convincing: that it is worthwhile to trade off a bit of the service providers’ freedom to get some other important thing (e.g., security in communications, background rules of fairness for economic competition, dispersion of knowledge...). I believe when Rawls held that basic liberties should only be limited for the sake of other basic liberties he was not simply positing a political-philosophical principle; he was capturing a well-established intuition that structures much public reasoning in Western democracies. Thus, in societies in which the power of control associated with property rights is often considered a fundamental freedom of property-owners, the idea that I should limit this freedom for the sake of some secondary, less important value will not get

⁸⁸ Hayek, *The Constitution of Liberty*, 70.

⁸⁹ E.g., Hayek, *Law, Legislation, and Liberty*, vol. II: 103-106 (on anything other than negative rights leading to the end of free society).

much traction. As I discussed in Chapter 2, this is part of what happened with media reform in mid-century America (§2.3.2, §2.3.3). By separating the issue of fair access to means of communication from the issue of constitutionally protected free speech, media reform was framed as just another economic policy: at best instrumental to expressive freedom but not constitutive of it. This made media reform (i.e., the substantive guarantee of free speech) vulnerable to the changing preferences of legislative majorities. According to this view, the policies necessary to materialize fair and equal free speech rights are not a matter of constitutional law and, in consequence, they are unrelated to the government's constitutional duties toward its people. Thus, equality in the enjoyment of one of the most basic political rights is hardly enforceable in constitutional courts (a result that Hayek welcomed, of course, in the name of negative freedom).⁹⁰

In any case, this second argument, like the previous one, should bear in mind the institutional nature of what is suggested to be traded off—namely, the “negative” freedom possessed by service providers to choose what they want to do with the data traveling through their pipes. Yet to assume that such a capacity of control enjoyed by private corporations is the result of an absence of interference is truly misleading. This is so not merely because of the basic juridical fact that, within the rule of law, private power over infrastructures is based on state-sanctioned coercion, that is, property rights.⁹¹ Most of the time, internet service providers manage assets that are easily traceable to a former history of extensive state intervention: investment in technological research and infrastructure, public works, reliance on submarine wiring in international waters, concessions of exclusive access to national resources (including land and airwave frequencies), and so on. Not to mention that many internet service companies are themselves the result of privatizing previously public corporations created by the state. The abovementioned case of net neutrality in Canada, for instance, responds to this common pattern: Telus was created in 1990 by the government of Alberta to denationalize Alberta Government Telephones (a reality that some libertarians point out to prove, in our terms, that many instances of *dominium* are actually ascribable to a previous act of *imperium* or to *imperium* activated through rent-seeking).⁹²

Hence, to elaborate a normative argument that conceptualizes the arbitrary power of Telus (or any other company, for that matter) as a negative freedom in the management of their property obscures, as I suggested above, much of the historical and institutional reality of actual cases. Additionally, it gives these powers a layer of acceptability by blurring them under the rubric of “liberty,” presenting the status quo as a non-interfered-with, unintentional condition (perhaps the outcome of spontaneous evolutionary processes) that serves as a benchmark to judge further political intervention—anything that

⁹⁰ Hayek, *Law, Legislation, and Liberty*, vol. II: 103-106.

⁹¹ For a classic exposition of this view, see Morris R. Cohen, “Property and Sovereignty,” *Cornell Law Review* 13, no. 1 (1927): 8–30.

⁹² E.g., Hayek, *The Road to Serfdom*, 48–50; Epstein, “Property, Speech, and the Politics of Distrust.”

departs from it is considered as an intentional interference with the world, and thus subject to a much more exacting scrutiny than the status quo.

Perhaps I have not convinced the proponents of what I call free speech libertarian framework to champion net neutrality as a liberty-promoting institution. Or perhaps, if they already supported net neutrality, I have shown that their insights about expressive liberties offer an unstable guide to make such an argument. What I hope to have achieved is to make a case for institutional and conceptual clarity about how public institutions (i.e., state interferences, including here the law understood as a general framework) are required to support the range of subjective and legal experiences we call expressive liberties. It is a different question whether one decides it to take it from here—as I will do in the next chapters—to a defense of net neutrality and similar infrastructural regulations of communication or—as the late Hayek would plausibly do—to an attack on such institutions as hazardous pretexts for state overreach. Such questions would require examining, for example, whether internet connectivity should be part of free speech, whether despotic service providers in a competitive market would involve any real risk to expressive freedom, or whether net neutrality do not prevent the truly concerning *dominium* in the cyberspace—large platforms and content providers that use the network without owning its physical infrastructure and that are benefited by net neutrality, often lobbying for it.⁹³ With regards to those that in these and many other issues have different intuitions than I, I am content with having convincingly elaborated what the prior common ground should be; a common ground addressed to allowing as clear a discussion as possible about what is institutionally at stake.

4.4. CONCLUSION: STATE INTERFERENCE AS CONSTITUTIVE OF FREEDOM

This chapter started with a neorepublican complaint: the contemporary commonsense on liberty is unable to capture certain “grievances” that defenders of freedom should care about. The first of these complaints relates to the dispositional nature of power (§4.1.1). This is the old republican idea that arbitrary power undermines liberty even when such power is not actually used. For neorepublicans, mere dependence on, or subjection to, an arbitrary power should count as unfreedom. However, I have argued that the free speech

⁹³ Wu, *The Master Switch*, 446–50; Pickard and Berman, *After Net Neutrality*, 6, 72–83. Without platform regulation, any freedom created by net neutrality will be embedded in the monopolistic power dynamics of content providers—that is why Google or Facebook often favor net neutrality in the West. However, as I have discussed above, the best proof that this commitment is purely contingent on their economic interests is that when these *content* providers act as *service* providers in other (usually poorer) countries, they take advantage of lack of net neutrality regulations to buttress their market position and lobby against it. The conclusion should be similar as the one discussed in §4.1.2—private corporations may have contingent interests in freedom-promoting institutions (and this is good, and they may be powerful allies in building them), but their commitment only goes so far; it is not enough to guarantee freedom robustly, against their will if necessary.

libertarian framework is not really blind to the dispositional nature of power, as a neorepublican analysis could suggest (§4.1.2). My reading relies on, and agrees with, the neorepublican criticism but qualifies it. This is what the discussion of state-affiliated media has shown. When it comes to *public* sources of power, the free speech libertarian framework is indeed aware of how mere dependence challenges liberty.

The second set of “grievances” that neorepublicans claim goes unnoticed by the liberal-libertarian commonsense on freedom are those produced by private (i.e., non-state) threats to freedom (§4.2.1). In developing this point, neorepublicans clearly distinguish between *imperium* and *dominium*: public and private sources of unfreedom. They argue that the traditional republican ideal of liberty is explicitly constituted against both threats. Yet it is not that clear that the free speech libertarian framework is completely unaware of *dominium*. After all, one of the most heated debates around free speech in the last decade has been about a *private* power of censorship: the diverse phenomena that are often included in the notion of “cancel culture” (§4.2.2). Still, I have offered reasons to thicken the libertarian lens with neorepublicanism. *Dominium* is not only held by mob-like masses and consumers that disregard free speech and censor or cancel cultural products. The actual working of cancel culture involves other private actors that decide to arbitrarily enforce their own interests: publishers and cultural sponsors of diverse kind who, in the light of decreasing sales expectations or reputational risks, decide to terminate contracts with creators, in consequence taking away their previously acquired means for expression.

These two discussions about unfreedom lead me to another neorepublican point: the constitutive relationship between state interference and freedom (§4.3.1). In the neorepublican view, as I have shown, liberty created through suitable non-arbitrary interferences by political institutions. In the absence of them, there cannot be liberty. I have discussed whether this gives neorepublicanism a higher ground when it comes to account for the institutional processes that guarantee expressive freedoms. The case of net neutrality and other communication infrastructures has been instructive in this sense (§4.3.2). Although the free speech libertarian framework fares better than expected, especially after considering the Hayekian insights on the juridical nature of freedom, the commitment with negative liberty obscures the empirical and institutional reality of freedom and its constitutive relationship with legal coercion.

Notwithstanding all these benefits, neorepublicanism may also be said to generate distinct problems when it comes to study the political economy of free speech. This will be the focus of the next chapter, the problem of “structural” domination within the neorepublican camp: what if what threatens expressive freedom is not clearly attributable to the will or power of specific agents?

CHAPTER 5

The fault is in the system

Neorepublicanism, free speech and structural domination

The lesson is that any ideal of freedom ought to regard interpersonal restrictions on a person's freedom as more serious than the impersonal restrictions that arise non-intentionally from the natural order or from the way things are socially organized.

Philip Pettit¹

The critique developed in the previous chapter was intended to move mostly on a descriptive and explanatory level. My goal until now has been to pose a problem of framing, that is, to challenge what I have called the free speech libertarian framework. Put differently, the main research questions have been this: In what sense can we say that the negative conception of expressive freedoms tends to forget, misrepresent, or undertheorize some of the fundamental variables at play in the public sphere? Should we elaborate an alternative framework that is able to account for the corrupting effects that the mere existence of certain accumulations of power have on speech choices (e.g., nurturing flattery or self-censorship)? That is, an alternative framework that points out how the interests and actions of powerful non-state actors might undermine expressive freedom (e.g., corporations controlling essential communication infrastructures or individuals with the upper hand in certain speech contexts). Furthermore, is there a notion of liberty that accounts for the political and institutional background, including legally organized coercion, that establishes and maintains what is commonly valued as expressive freedoms?

To do this, this chapter moves from the earlier critique to a more positive elaboration of expressive liberties by discussing Pettit's neorepublican account of free speech. In extending the neorepublican ideal of freedom as non-domination to the realm of expression, Pettit proposes the notion of "protected speech," which he compares with what he calls "unhindered speech"—the liberal-libertarian or non-interference common sense on the matter (§5.1). I argue that although Pettit's "protected speech" offers a very compelling alternative to the free speech libertarian framework, it fails to identify significant sources of unfreedom in the public sphere. Then, I briefly consider three of these sources of structurally produced unfreedom, important

¹ Pettit, *A Theory of Freedom*, 132.

for contemporary purposes, but also traceable to historical republican concerns (§5.2): lack of access to speech choices, misrepresentation of speech choices, and failed performance of speech choices.

In discussing whether the neorepublican ideal of “protected speech” is blind to some of these grievances, I consider the problem of “structural domination.” Recently, some critics of neorepublicanism have pointed out its lack of attention to instances of domination that are not easily traceable to the will, intentionality, actions, or power of specific dominating agents. In other words, these instances of domination are mainly attributable to the effects of “social structures.” I discuss two neorepublican strategies for facing this criticism (§5.3). The first is to thicken the republican ideal of freedom by focusing on its positive requirements. The second consists of reframing the relationship between social structures and unfreedom to identify instances of domination beyond agent-level relations.

After that, I propose two interpretations of neorepublican “structural domination” (§5.4): as a special case of agent-level domination, or as potential agent-level domination. I conclude that the neorepublican model of structural domination can be understood as a descriptive hypothesis about how social structures might potentially facilitate agent-level domination. I further argue that, from a normative point of view, the neorepublican view of structural domination is subsidiary of agent-level instances of domination, which remains the real concern. This means that neorepublican policymaking against social structures must either wait for structurally produced agent-level domination to breed, or to probabilistically estimate its future occurrence. If my reading is correct, when it comes to fighting against structural domination, this would cause neorepublicanism to slip into the kind of status quo deference they hold against liberals.

5.1. PHILIP PETTIT’S “PROTECTED SPEECH”

Compared to other specific freedoms and sources of domination, those concerning expressive liberties have not received much attention by neorepublicans. For example, a paper published last year by Matteo Bonotti and Jonathan Seglow could still say that “[n]either Pettit nor other republican theorists have done much to consider the implications of their theory for freedom of speech.”² Philip Pettit has only very recently developed the

² Matteo Bonotti and Jonathan Seglow, “Freedom of Speech: A Relational Defence,” *Philosophy & Social Criticism* 48, no. 4 (2022): 524. The most notable exception is the very recent monograph by Whitten, *Critical Civility*. But see also Coromoto Power Febres, *Liberalism, Feminism and Republicanism on Freedom of Speech: The Cases of Pornography and Racist Hate Speech*, PhD Thesis, Sup. Richard Bellamy and Cécile Laborde (University College London, 2010); Matteo Bonotti, “Religion, Hate Speech and Non-Domination,”

systematic implications of his work for the case of free speech, drawing on his earlier opposition—discussed in the last chapter—between the liberal-libertarian intuitions around the ideal of freedom as non-interference and the neorepublican ideal of freedom as non-domination. In the realm of expressive liberties, these positions take, respectively, the name of “unhindered speech” and “protected speech.”³

Unhindered speech, Pettit notes, “has become more popular in jurisprudence and politics,” and he construes it as the correlate of the traditional negative view of expressive liberty—outlining much of the same concerns as what this thesis calls the free speech libertarian framework.⁴ In a first Hobbesian reading, this ideal of unhindered speech only measures the absence of frustration in the choices some actually makes as a speaker; that is, pure preference-satisfaction of speech choices. In a more charitable interpretation, following Isaiah Berlin, Pettit reads unhindered speech as entailing absence of interference with my speech choices, regardless of what someone chooses to say or speak about.⁵ To exemplify these two readings, think of the members of the editorial board of a newspaper, *The Washington Post*. Assume that we know they have not been obstructed when publishing their last editorial article. Assume, further, that this article happens to be a somewhat adulatory piece about the economic success of Amazon and its founder, Jeff Bezos—who also happens to control the media conglomerate owning the *Post*. Does the editorial board of the newspaper enjoy free speech in this situation? In the Hobbesian reading of unhindered speech, they clearly do, for they were able to express themselves unobstructed, as they wished, in this case praising their boss. In the Berlinian reading of unhindered speech, however, we must go further. We must examine whether the editorial board would have been as unobstructed, had they decided to remain silent, or publish a critical piece on Bezos instead of the adulatory one they finally chose to publish. In this second, more demanding reading, the editorial board enjoys

Ethnicities 17, no. 2 (2017): 259–74. In US constitutional law, “republicanism” has been an important interpretive approach at least since the 1980s, inspired by the republican revival in American historiography and the recovery of “Madisonian” views of the First Amendment. However, as a theoretical view this perspective is rather independent from neorepublicanism in political philosophy and the ideal of non-domination. See e.g., Lahav, “Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech”; Sunstein, “Beyond the Republican Revival”; Sunstein, *Democracy and the Problem of Free Speech*; Sunstein, *#Republic*. For a critique of this perspective in US constitutionalism, see Martin Redish and Gary Lippman, “Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications,” *California Law Review* 79, no. 2 (1991): 267–311; Brandon K Lemley, “Effectuating Censorship: Civic Republicanism and the Secondary Effects Doctrine,” *The John Marshall Law Review* 35, no. 2 (2002): 189–225.

³ Philip Pettit, “Two Concepts of Free Speech,” in *Academic Freedom*, ed. Jennifer Lackey (Oxford University Press, 2018), 61–84. For an earlier view on a related topic, see his “Enfranchising Silence.”

⁴ Pettit, “Two Concepts of Free Speech,” 61

⁵ *Ibid.*, 63–64. For a more detailed elaboration of these two readings of negative liberty without reference to free speech, see Philip Pettit, “The Instability of Freedom as Noninterference: The Case of Isaiah Berlin,” *Ethics* 121, no. 4 (2011): 693–716.

unhindered speech only if they had been similarly unobstructed in the speech options not chosen.

Protected speech, on the other hand, conveys the ideal of non-domination to expressive liberty: it is about enjoying a status, about the conditions that protect my choices as a speaker. This means not only enjoying the absence of interference regardless of which option I prefer—as Berlinian unhindered speech requires—, but also regardless of what others think about my power of choice. It asks, connecting with the earlier discussion in §4.1.1, whether expressive freedom is enjoyed in a dispositional or modal manner: robustly across any settings, not by chance or contingently at the will of others.⁶ To stick with the example, assume now that the members of the editorial board of *The Washington Post* happen to be similarly unobstructed when publishing their pieces on Bezos, be they critical or flattering—thus, enjoying unhindered speech also in the more exigent, Berlinian reading. But do they enjoy protected speech? As an ideal of expressive freedom, protected speech is even more demanding than unhindered speech since it requires us to push our normative inquiry a step further. Do the editorial board enjoy this absence of interference because Bezos is not able at all to obstruct the publication? Perhaps he was not aware of the piece? Or is it because, not caring or being benevolent, he simply decides not to use the power of interference with editorial choices that he otherwise holds as the owner of the newspaper? And if he has this power, is it conditioning the editors’ speech choices albeit being an unexercised power (e.g., forcing the editors to adapt their articles out of fear)?

As a status that aims to protect me against what others might think about my capacity for expressive freedom, the ideal of protected speech requires “erecting obstacles to the interference of other people in any scenarios, however improbable, where they might choose to try to interfere.”⁷ Importantly, notice that this protective apparatus assembled to defend my capacity to choose speech options against the uncontrolled power of others involves some kind of interference. For Pettit, these desirable and protective interferences come mainly in the form of laws that, supported by social norms, are created and enforced by a democratically and constitutionally controlled public authority.⁸ Hence, engaging with the normative and descriptive concerns elaborated earlier (§4.2.1 and §4.3.1), Pettit’s protected speech invites us to frame expressive freedom itself as a status derived from specific instances of social and legal coercion that protect against *dominium* and *imperium*. In his words: “law is part of what creates free speech: part of the infrastructure necessary for people to share in the enjoyment of that ideal.”⁹

In *The Washington Post* example, the arguments above demand the following minimal requirements: first, to identify what is generating the editorial board’s capacity to publish independently of Bezos’ whim; and

⁶ Pettit, “Two Concepts of Free Speech,” 66, 74–75.

⁷ Ibid., 64.

⁸ Ibid., 65. On this point see Pettit, *Republicanism*, chaps. 6 and 7; Pettit, *On the People’s Terms*, chaps. 4 and 5.

⁹ Pettit, “Two Concepts of Free Speech,” 68.

second, to evaluate the loci of enforcement of that capacity and up to what point they provide robust and effective barriers against Bezos' power. Is editorial independence simply created by the contingent professional stubbornness and bravery of the editorial board or some of its members? Are there, in turn, procedures that separate the power involved in ownership rights from the editorial decision-making? If so, are these rules the result of an informal pattern of behavior established over the years (say, reliant on legacy employees attached to a self-governing "old way" of working, or thanks to a more secure job)? If, on the contrary, these rules are formalized, do they depend on internal sources of authority (e.g., corporate guidelines or hired consultants) or external ones (e.g., public law)?¹⁰

To focus on any of these issues suggests a stark contrast with the free speech libertarian image. Taking into account the socially and legally constituted nature of expressive freedoms, Pettit's protected speech can go beyond the conventional premise of unhindered speech in which absence of regulation is the default option. As I pointed out before and will insist later on, the free speech libertarian framework can be considered as a self-defeating position for anyone willing to accept the need for a minimum degree of political and institutional action in the public sphere, even when free speech libertarianism is rejected as a desirable policy aim and is only accepted for descriptive or explanatory purposes (Introduction §III.2, §4.3.2, §5.4.3). This is because unhindered speech puts the burden of justification on the very idea of institutional regulation, rather than on the conversation about which institutions better promote liberty—assuming that there are always some institutions or social norms in force conditioning the performance of expressive liberty. Therefore, any attempt to make sense of political action within the free speech libertarian framework is forced to adopt, to put it in Pettit's words, the "talk of taking one step backwards in order to take two forward," formally and practically overruling its own ideal of absence of hindrance.¹¹ From the point of view of unhindered speech, any institution is framed as a hindrance and, therefore, as restrictive of liberty and "hostile in

¹⁰ From the point of view of institutional design, it seems that the neorepublican framework can lead to the right kind of questions rather than to answers. When it comes to address the latter, neorepublicans disagree. For instance, Pettit and Frank Lovett have suggested that codes of *noblesse oblige* (i.e., external non-coercive constraints to my own power shaped by peer-pressure and desire for recognition) are not indicative of domination and might be even positive, counteracting it. That is, in their view, peer-pressure among the powerful might make hierarchical relationships non-dominating. See Philip Pettit, "Freedom as Antipower," *Ethics* 106, no. 3 (1996): 586; Lovett, *A General Theory*, 206. Yet in the case of power relations within capitalist firms, internally enforced corporate policies may not be enough to guarantee non-domination—what Marx mocked in a rather republican language as a "factory code in which capital formulates, like a private legislator, and at his own good will, his autocracy over his workpeople, unaccompanied by that division of responsibility, in other matters so much approved of by the bourgeoisie, and unaccompanied by the still more approved representative system," *Capital*, vol. I, in *MECW*, vol. XXXV: 427. Tom O'Shea has emphasized this point as well in his defense of socialist view of non-domination, see Tom O'Shea, "Socialist Republicanism," *Political Theory* 48, no. 5 (2020): 11–12.

¹¹ Pettit, *Republicanism*, 35–36.

itself to the ideal,” even by those who think that specific institutions could do better in the promotion of unhindered speech overall.¹² Protected speech, on the other hand, takes the fact of institutional regulation—of some social, political and legal structures of organized coercion—as unavoidable in the promotion of expressive freedom, leading to an “entirely plausible” and “not politically problematic” ideal.¹³

5.2. THREE BLIND SPOTS OF “PROTECTED SPEECH”

Borrowing a metaphor from Berlin to illustrate some of these interpretive and normative issues about expressive freedom, Pettit compares unhindered speech with protected speech in terms of “open doors.” This is part of a thought experiment in which the decision of what to say or to remain silent is represented by choosing a door. According to unhindered speech (i.e., if Berlinian non-interference frames the ideal of expressive freedom), I am free as a speaker if I enjoy absence of interference in the door I choose, regardless of which option I choose. On the other hand, protected speech (i.e., if non-domination frames the ideal of expressive freedom) requires the absence of interference in the door I choose, regardless of which option I choose, *and* that this capacity I enjoy is not at the mercy of the uncontrolled power of a “doorkeeper.”

As Pettit has it, “the fact that all your speech options are open doors does not rule out the presence of doorkeepers with the power, should they wish, to deny you passage.”¹⁴ The focus of protected speech, in other words, bears on the status of the choosing subject rather than the properties of the choices available. Recall the *Washington Post* example: it is about creating the conditions that make the editors free choosers, that is, the circumstances that allow them to choose robustly across different contingencies, independently from the uncontrolled power of others (i.e., of “doorkeepers,” such as, potentially, Bezos). For this reason, non-domination has been construed as a “chooser-based” freedom—the normative focus is on the conditions in which I choose, not merely in the made or desired choices.¹⁵ It is in this sense as well that protected speech can be said to be a more demanding ideal, because it puts under the spotlight the circumstances that make me able to select doors unhindered. It asks which sources of freedom and domination are at play. And if it happens to be a doorkeeper able to condition the passage or to open and close doors for me, then the ideal of protected speech calls for a deeper inquiry into that door-keeping power and how it is exercised. This is because choosing

¹² Pettit, “Two Concepts of Free Speech,” 66–67.

¹³ Ibid., 67. For an earlier elaboration of this argument on the self-defeating nature of liberal justifications of state interference, see Philip Pettit, *The Common Mind* (Oxford University Press, 1996), 320–22.

¹⁴ Pettit, “Two Concepts of Free Speech,” 69.

¹⁵ On the distinction between “chooser-based” and “choice-based” freedom, see Pettit, “Freedom in the Market.”

among doors is valuable from the point of view of republican freedom only if I can choose in a non-dominated manner (see §4.1.1).

Now, let us suppose that I enjoy the capacity to choose between the relevant open doors and that such a capacity is modally robust in the neorepublican sense of not being dependent on the uncontrolled will of others. In keeping with the historical republican tradition, imagine all doorkeepers have been discharged from their positions of control or their tollbooths confiscated. Thus, the polity has successfully eliminated the power of doorkeepers or at least counteracted their capacity of uncontrolled interference with my choices, reducing it to an influence harmless to my door-picking freedom. Assuming that these conditions hold, and expanding Pettit's reformulation of Berlin's thought experiment, consider now these three alternative scenarios:

1. My circumstances prevent me from reaching all the open doors, or at least some of them, or not on equal terms with my fellow citizens; say, I might need someone to build a ramp to access the doors with my wheelchair. That is, I suffer from a condition that hinders my access to speech choices. But significantly, this is a failure that is not clearly attributable to the will and actions of a doorkeeper.
2. I am in a circumstance by which I mistakenly perceive the doors to be at different distances, systematically leading me to opt for some doors rather than others; say, although I can reach all the doors, I might need to wear glasses to realize this, or some special sign to correct my distorted impression of reality. This is again a circumstance in which no doorkeeper is involved, though I systematically end up picking some speech choices because others seem to me (falsely) too far away or totally unreachable.
3. I am in a situation where the very same door takes me to a different room than other people; say, I can get into the elevator, but it will not get me to the floor I want to reach, although other people can get there with the same elevator. This is a speech choice that is open, accessible, and accurately presented to everybody, but that has nevertheless different outcomes for different speakers; a failure which, like the first two, is hardly attributable to the existence or power of a doorkeeper.

The purpose of these three scenarios is to isolate situations in which, despite the absence of controlling doorkeepers (i.e., despite fulfilling Pettit's ideal of protected speech), some agents still suffer from a lack of access to speech choices (see below, §5.2.1), a misrepresentation of the speech choices available to them (§5.2.2), or a communicative failure of performed speech choices (§5.2.3)—or any combination of these. Regardless of the unlimited possibilities of admittedly far-fetched thought experiments, these three

scenarios might help identify what is at stake, from a republican point of view, in certain historical and empirical circumstances concerning domination in the field of expressive liberties.

These scenarios are intended to show that there are conceivable circumstances that damage my chooser-based freedom, although this may not be the consequence of an uncontrolled doorkeeper interfering with my choice set. As Thomas Paine pointed out against unjust property distributions: “The fault, however, is not in the present possessor. No complaint is tended, or ought to be alleged against them, unless they adopt the crime by opposing justice. The fault is in the system.”¹⁶ Similarly, there are circumstances that undermine my expressive freedom by upsetting my status as a free speaker; circumstances which are not, however, easily imputable to the “fault” of a “doorkeeper,” a dominating agent. Can the neorepublican ideal of protected speech identify and tackle these freedom-undermining circumstances? In what follows, I briefly elaborate on the empirical cases that these three scenarios aim to capture.

5.2.1. Structural lack of access to speech choices

The first is the scenario that points to empirical cases more closely related with a major concern of this thesis, the political economy of communication. This scenario aims to grasp phenomena such as “news deserts.”¹⁷ These are areas within developed wealthy democracies that do not have local news outlets and journalism. The lack of local journalism damages the access citizens have to speech choices otherwise “protected” in the neorepublican sense (remember that I framed expressive liberties to include the informative resources necessary to make autonomous speech choices, §I).¹⁸ It is not that a public authority or a large corporation is preventing citizens in these areas from having local news outlets—there do not seem to be “doorkeepers” involved. However, if there are no “doorkeepers,” what produces news deserts?

Among the main causes of expanding news deserts are the structural changes in mass media markets during the last decades. Think of the changing habits of news consumption and the vast transformations in the advertising market resulting from the digitalization of the press, the emergence of search engines and social media, and the preeminence of targeted digital ads. Under these novel economic and technological conditions, many forms of news production simply become unsustainable.¹⁹ These are some of the structural

¹⁶ Thomas Paine, *Agrarian Justice*, in *The Complete Writings of Thomas Paine*, ed. Philip S. Foner (The Citadel Press, 1945), 613.

¹⁷ Penelope Muse Abernathy, *The Expanding News Desert* (The Center for Innovation and Sustainability in Local Media, University of North Carolina at Chapel Hill, 2018).

¹⁸ Braddon-Mitchell and West, “What is Free Speech?”; Rubén Marciel, “On Citizens’ Right to Information: Justification and Analysis of the Democratic Right to Be Well Informed,” *Journal of Political Philosophy* 31, no. 3 (2023): 358–84.

¹⁹ For an introduction to these changes, see Rasmus Klein Nielsen, “The Business of News,” in *The Sage Handbook of Digital Journalism*, ed. Tamara Witschge (Sage, 2016), 51–67.

processes behind one of the main explanatory factors of news deserts: the decline of the newspaper. It has been particularly harmful for small, local- and regional-level outlets that had to either close or become hollowed out newsrooms without their former capacity of coverage (downsizing to minimum levels, selling out to large media conglomerates, becoming zombie brands, and so on).²⁰ In sum, news deserts are areas with very deficient or null local news coverage and, therefore, short of all the speech choices generated by local news, and which are very significant from the point of view of republican liberty. In this sense, citizens living in news deserts have their status as free speakers undermined because they do not have access, for instance, to the kind of information required to hold local representatives or corporations accountable—that is, they are less able to make the suitable speech choices required to do this.²¹

Now, what is of interest to our discussion is to identify the sources of domination (if any) involved in news deserts. Is Pettit's neorepublican ideal of protected speech able to identify, redress and/or prevent the problem of news deserts?

First, it should be clear how people living in news deserts have their speech choice set impoverished, if not completely disabled, thus undermining their republican basic liberties and their status as free persons. Think of communities in which there is a vacuum of local journalism and news coverage, and a resultant barrier to the many significant speech choices that often grow from it and should be available for anyone: for example, to have and express an opinion on a corrupted town mayor, to know or complain about

²⁰ For the United States, see the contributions in Robert W. McChesney and Victor Pickard, eds., *Will the Last Reporter Please Turn out the Lights: The Collapse of Journalism and What Can Be Done to Fix It* (New Press, 2011); Pickard, *Democracy without Journalism?*, chap. 3. For European studies, see Gunnar Nygren, Sara Leckner, and Carina Tenor, "Hyperlocals and Legacy Media: Media Ecologies in Transition," *Nordicom Review* 39, no. 1 (2018): 33–49; Agnes Gulyas, "Local News Deserts," in *Reappraising Local and Community News in the UK: Media, Practice, and Policy*, ed. David Harte and Rachel Matthews (Routledge, 2021), 16–28; Stylianos Papathanassopoulos, "The Decline of Newspapers: The Case of the Greek Press," *Journalism Studies* 2, no. 1 (2001): 109–23.

²¹ Against my view of news deserts as caused by structural dynamics, it could be argued that there are in fact specific agents consciously pursuing these and similar results (e.g., nurturing certain kind technological changes with the aim of outcompeting traditional and smaller outlets, finally buying them out). Think of the claims that General Motors' consciously acted in concert with other parties with interests in the automobile industry in the 1930–40s to dismantle streetcar (i.e., tram) systems in the US. In this case, the claim is that the economic effect of technical innovations in the automobile industry were supported by the intentional strategies of powerful players. I do not exclude the possibility that similar cases to this one can be found in communication markets—I am willing to accept even that specific news deserts may be the result of this kind of intentional, agent-based processes. However, this does not detract from the fact that news deserts point to a pattern of global dimensions hardly imputable to conscious agents. In the same vein, no concrete case in which a dominating will could be identified undermines the general claim that the material and institutional environment that enables this power of domination is structural, in the sense of prior to, and independent of, the identified dominating will. I want to thank Julio Martínez-Cava and David Casassas for pressing me on this point.

the local polluting effects of some company, to track specific geographic interests in the context of national politics, etc.²² Moreover, news deserts have been found to affect vulnerable citizens more strongly. In the United States, for instance, news deserts correlate with impoverished, aged, and less educated rural and suburban areas.²³ It is clear why neorepublicans should be concerned about growth of news deserts all over the world.

But, secondly, recall that there is no clear dominating will behind the expansion of news deserts. To put it in terms that I will develop later, it is not easy to find among the causes of news deserts the kind of invasive, agent-based capacity of intentional interference that defines domination according to neorepublicans (§5.3). What makes news deserts elusive for the neorepublican ideal of protected speech is that they have not been created by a dominating will—it is hard to find “doorkeepers” responsible for news deserts. It is not that a public authority, an individual media mogul or corporation, or even a group of them, has decided arbitrarily that this or that region should not have news coverage. It is true that some of these actors may have an interest in extending news deserts, for they may take advantage of them to consolidate dominating positions, but the harm to expressive freedom and the status as free speakers I am trying to capture is prior to and causally independent from this. News deserts are usually the result of economic and technological changes in the media and advertising markets that make local journalism in low-populated areas unprofitable. We may tentatively say that news deserts—and the harms to the status of free speaker they cause—are structurally produced to some extent: for rather than being the product of an uncontrolled will, they are the outcome of a system of incentives shaped by certain institutional circumstances (e.g., the lawful commodification of news production and distribution, the dynamics of media and advertising markets, a certain technological and infrastructural environment, etc.).

At best, agent-based domination—the existence of “doorkeepers”—can be said to be a plausible but not necessary *effect* of news deserts. Since news deserts are often associated with audience and business concentration (i.e., accumulation of expressive and informative power), it would not be unreasonable to frame them as favorable settings for the emergence of “doorkeepers” of many sorts. These can be from despotic local officials who take advantage of lack of news coverage to outlets which, by enjoying a monopoly over news production in the area, shape local public opinion at will. It could be said, in any case, that news deserts resulting from changing market conditions do not constitute domination as such, although they would make it easier for some agents to dominate others. Put differently, news deserts would

²² On local news and political participation, see Danny Hayes and Jennifer L. Lawless, *News Hole: The Demise of Local Journalism and Political Engagement* (Cambridge University Press, 2021), chaps. 4 and 5. On the correlation of political corruption with low newspaper readership, Alicia Adserà, Carles Boix, and Mark Payne, “Are You Being Served? Political Accountability and Quality of Government,” *The Journal of Law, Economics, and Organization* 19, no. 2 (2003): 445–90.

²³ Abernathy, *The Expanding News Desert*, 15–20.

not count as violations of the Pettitian ideal of protected speech, albeit they may foster conditions that make the violation of this ideal easier, cheaper, or more probable. Imagine town majors who have the capacity to take advantage of poor media coverage so that their corruption goes unpunished; or a corporation making the most of the lack of independent journalism to manipulate local politics (recall that, on the dispositional account of power, none of these capacities need to be exercised to count as domination).

The same reasoning applies to other cases. Think of the “digital divide” in one of its most frequent forms: markets do not offer private internet service providers enough incentives to deploy costly wire infrastructure in rural areas—and whenever they do, it is because they allow for the generation of local monopolies in which a single internet provider offers subpar services taking advantage of its market power.²⁴ Consequently, these communities have low-speed internet unfit for many modern webpages, or no internet connection at all. Again, this situation is not attributable to “doorkeepers” intentionally preventing other agents from rolling out rural broadband cables. Rather, it is due to the distributive pattern by which telecommunications infrastructure is deployed in most Western countries, which is the same as news coverage: as a commodified private service whose supply relies on its economic profitability. In fact, both phenomena correlate, tending to affect the same communities: “digital divides” overlap with “journalism divides.”²⁵ Similar things could be said about the many media markets that instead of promoting a “free trade of ideas”—understood as a fair access to the most significant resources for expression—yield the opposite result: the concentration of speech opportunities in a few hands.²⁶

From the neorepublican point of view of protected speech, the question of whether news deserts and similar processes entail domination could only be answered by looking to their plausible, albeit always contingent, effects. That is, news deserts could be said to be detrimental to non-domination in that they *might* generate “doorkeepers” with uncontrolled power over their fellow citizens. But since this is neither a necessary nor an automatic effect, the neorepublican must remain agnostic about domination by the circumstances themselves. As I will argue later, this position may be problematic when it comes to justify policy solutions to domination in media markets (Chapter 6).

5.2.2. Structural misrepresentation of speech choices

The second scenario tries to bring to the fore situations in which, albeit I do not materially lack access to a certain speech choice, I am nevertheless

²⁴ E.g., Jonathan Hardy, *Critical Political Economy of the Media: An Introduction* (Routledge, 2014), 112–13; Pickard, *Democracy without Journalism?*, 121–22.

²⁵ Pickard, *Democracy without Journalism?*, 88.

²⁶ See generally, McChesney, *Rich Media, Poor Democracy*, chaps. 1–3; Sunstein, *Democracy and the Problem of Free Speech*, chap. 3 (on broadcasting); Sunstein, *#Republic*, chap. 1 (on new media).

conditioned by some external circumstance that leads me not to choose it. Imagine that I have an institutionally guaranteed right to speak in a particular communication setting, but I systematically think that “this is not for me,” which prevents me from using it. However, assume that I do not do this due to some psychological condition or cognitive disorder, not due to an agent manipulating the perception of my choice set.²⁷ On the contrary, assume that this subjective rejection of speech choices that are in fact within one’s reach specifically affects people with shared characteristics—e.g., with similar ethnic or racial traits, with similar gender attributes, with a similar social background, and so on. That is, I have a misrepresented view of the speech opportunities I actually have, a distorted picture of my set of socially protected and guaranteed speech choices, due to some social-structural phenomena not straightforwardly ascribable to the dominating will of an agent.

This second scenario intends to grasp, for instance, the well-studied sociological phenomenon of how gender negatively shapes the self-conception of students as intelligent, which in turn reduces their willingness to participate in classroom discussions.²⁸ The effects of gender on speech choices go far beyond educative and teaching environments, and occur also, for example, in scientific seminars and conferences, where women scientists participate less than men, and report feeling less comfortable doing so.²⁹ A similar effect has been found in legislative bodies: women take the floor less often than their male colleagues, even in political contexts where gender equality is promoted and quotas are in force.³⁰ In a more general sense, higher self-esteem has been found to correlate with the development of partisan attitudes and a higher disposition to open political participation.³¹ However, good perceptions of oneself are not distributed uniformly or randomly across

²⁷ Misrepresentation, deception and other manipulative strategies are considered by Pettit as encroachment of freedom of choice, but his analysis relies on identifiable agents using them against other agents. See Pettit, *On the People’s Terms*, 55–56.

²⁸ E.g., Sarah L. Eddy, Sara E. Brownell, and Mary Pat Wenderoth, “Gender Gaps in Achievement and Participation in Multiple Introductory Biology Classrooms,” ed. Deborah Allen, *CBE—Life Sciences Education* 13, no. 3 (2014): 478–92; Katelyn M. Cooper, Anna Krieg, and Sara E. Brownell, “Who Perceives They Are Smarter? Exploring the Influence of Student Characteristics on Student Academic Self-Concept in Physiology,” *Advances in Physiology Education* 42, no. 2 (2018): 200–208.

²⁹ Alecia J. Carter et al., “Women’s Visibility in Academic Seminars: Women Ask Fewer Questions than Men,” ed. Cassidy Rose Sugimoto, *PLOS ONE* 13, no. 9 (2018): e0202743.

³⁰ Hanna Bäck and Marc Debus, “When Do Women Speak? A Comparative Analysis of the Role of Gender in Legislative Debates,” *Political Studies* 67, no. 3 (2019): 576–96; Marc Sanjaume-Calvet, Joan-Josep Vallbé, and Marina Muñoz-Puig, “Can Women Take the Floor in Parliament? Evidence from the Spanish Lower Chamber,” *Women’s Studies International Forum* 97 (2023): 102694.

³¹ Jennifer Wolak and Carey E. Stapleton, “Self-Esteem and the Development of Partisan Identity,” *Political Research Quarterly* 73, no. 3 (2020): 609–22.

society. In addition to gender, for example, a lower socioeconomic background correlates with lower self-esteem in children and adults.³²

The point here is that there are many other imaginable and actual communicative environments, in which, as in the ones mentioned above, speech choices are arguably protected from “doorkeepers” in the demanding, neorepublican sense of “protection”—say, the well-functioning classroom and scientific seminar, established spaces for political deliberation such as parliaments, etc. Nevertheless, these arrangements do not prevent certain groups of agents from systematically not taking up the institutionally protected speech choices open to them, leading them not to speak up, to be more deferential with others, and so on.³³ I am pointing to cases where what is commonly referred to as “self-censorship” endures even after its original source (i.e., the arbitrary power of others) has been removed—even when speech is protected in the way neorepublicans would like. In other cases, this “no-doorkeeper” self-censorship is caused by the expectation (sometimes erroneous) of future dominating agents. Think of the studied predisposition among young social media users to self-censor or tailor their speech choices in their personal accounts to present themselves as “employable,” anticipating the monitoring of future employers or hiring committees.³⁴

Recognition of these issues predates modern social psychology and contemporary awareness of the socially constructed nature of the self. It is well known that historical republicans insisted on the subjective effects of domination for both the dominator and the dominated.³⁵ Especially, they underlined how the dominated party develops submissive dispositions in the face of arbitrary power, therefore distorting their capacities as autonomous beings in general, or free speakers in particular. Put differently, the Western canonical tradition of freedom, as Nancy Hirschmann has demonstrated, was much more attentive to the social formation of the self than it is often recognized.³⁶

A critic could add that many of these reflections are arguably captured by the neorepublican view of “protected speech”: I perform self-censorship and flattery, even when I have leeway to do otherwise, because I am aware of the arbitrary power of an identifiable “doorkeeper” (e.g., my slave-master, my

³² E.g., Jean M. Twenge and W. Keith Campbell, “Self-Esteem and Socioeconomic Status: A Meta-Analytic Review,” *Personality and Social Psychology Review* 6, no. 1 (2002): 59–71; Michael W. Kraus et al., “Social Class, Solipsism, and Contextualism: How the Rich Are Different from the Poor,” *Psychological Review* 119, no. 3 (2012): 546–72.

³³ For a similar process in the case of welfare benefits, see Bru L  n and Albert Juli  , “Why Do Poor People Not Take up Benefits? Evidence from the Barcelona’s B-MINCOME Experiment,” *Journal of Social Policy* First View (2022): 1–22.

³⁴ Brooke Erin Duffy and Ngai Keung Chan, “‘You Never Really Know Who’s Looking’: Imagined Surveillance across Social Media Platforms,” *New Media & Society* 21, no. 1 (2019): 119–38.

³⁵ Alan Coffee, “A Radical Revolution in Thought: Frederick Douglass on the Slave’s Perspective on Republican Freedom,” in *Radical Republicanism*, ed. Bruno Leipold, Karma Nabulsi, and Stuart White (Oxford University Press, 2020), 58–60.

³⁶ Nancy J. Hirschmann, *Gender, Class, and Freedom in Modern Political Theory* (Princeton: Princeton University Press, 2008). See especially the Introduction, 1–28.

absolute monarch, my feudal lord, my *pater familias*, my employer, and so on). However, note that historical republicans also problematized cases not unlike those above, in which my status as a free speaker has been undermined, leading to censorship and adulation, without there being an obvious “doorkeeper” anymore. Recall Stuart Mill’s justification of imperialism in India. He thought that the British colonial administration of India (or the French rule in Algeria) was positive, among other things, because Western imperial interference would put an end to prior sources of coercion—local despots, robbers, clerical elites, superstitious customs, etc.³⁷ The argument is unabashedly paternalistic and stained with eurocentrism, but the intertwining of sociological and normative intuitions it displays deserves to be noticed. For Mill, Western imperial administration was justified because it removed lower-level traditional “doorkeepers,” so to speak, allowing the development of tolerant and rights-protecting societies in the East. Significantly for my purposes, enlightened defenders of empire thought that the subjective effects of past sources of domination survived the abolition of their objective roots (e.g., superstition and a predisposition to servility continue after the removal of clerical despots). The consequences of past domination endured because some of it is internalized by the dominated, making them incapable of freedom without external aid—thus needing imperial, coercive tutelage to nurture the adequate dispositional attitudes.³⁸

This was the same sociological awareness cultivated by earlier republicans in their critique of what James Harrington termed “priestcraft”—in which “the people are led into superstition” by “the clergy.”³⁹ Liberating people from ideological and religious “doorkeepers” was not enough since adulatory dispositions endure in the minds of the formerly subjected peoples. Thus, the famous Harringtonian adagio often quoted by neorepublicans about the “liberty of a commonwealth” being the “empire of her laws” was the implication of the previous observation that “the liberty of a man consist[s] in the empire of his reason.”⁴⁰ For many historical republicans, a substitute ideological-institutional framework was needed to correct superstition and historical mind distortions. In this sense, many of them toyed with or straightly supported diverse ways of reviving the classical idea of a civil religion.⁴¹ In our terms, the problem was that although these individuals’ speech choices were now opened and protected (no more dominating priests around), they

³⁷ Tunick, “Tolerant Imperialism”; Chiu and Taylor, “The Self-Extinguishing Despot.” See this references also in the context of §3.3.3.

³⁸ Lovett considers these phenomena as “after-effects” of domination, but not domination (thus not unfreedom) as such. See his *A General Theory*, 48.

³⁹ Harrington, *The Prerogative of Popular Government*, in *The Political Works of James Harrington*, ed. J. G. A. Pocock (Cambridge University Press, 1977), 438.

⁴⁰ Harrington, *The Commonwealth of Oceana*, in PWJH, 170.

⁴¹ Champion, *The Pillars of Priestcraft Shaken*, chap. 6; Beiner, *Civil Religion*, chaps. 1–3, 7, 15, 20–21.

would probably decide not to take advantage of them, acting instead in a servile manner, prone to become subject to new dominators.⁴²

Note also how the well-known, classical republican view of property holding as a prerequisite of citizenship is built on the same sociological argument (§II.2). This shaped the anti-democratic argument (or radically democratic, if complemented with a scheme of property redistribution) that suggested that a lack of material independence makes people prone to servility because they need the property of others to make a living.⁴³ This was just the lesson of Mark Twain's childhood friend on "corn-pone opinions" I cited earlier: "that a man is not independent, and cannot afford views which might interfere with his bread and butter."⁴⁴ This argument conjectures that a lack of material independence can distort the cognitive capacities of individuals that they otherwise would have as rational human beings, making them unfit for deliberation. Their need to secure their most basic private needs undermines their competence to discuss the public good. In this view, the propertyless can have many protected speech choices they can pick—no one is necessarily censoring them—but their mere position in society would undermine their status as free speakers, for it threatens their capacity for autonomously picking among such protected speech choices. And this, significantly, need not be produced because they are actually dependent on (i.e., dominated by) a concrete individual to make a living. Their situation is such that, even if their concrete dominator disappears, they will still have to be dependent on someone else's wealth, prone to fall into networks of clientelism, or wage labor, modifying their speech choices to become attractive employees.⁴⁵ What solves their situation, in other words, is not to remove, or to protect them against, the will of "doorkeepers," but to ensure material independence—i.e., fundamentally changing the position they occupy in the socioeconomic structure.

These were, finally, the intuitions that also inspired Mary Wollstonecraft's reflections on "independence of mind"—on how objective conditions of

⁴² Tracking similar concerns, Michael Thompson has proposed to expand Pettit's view of non-domination to capture the realities of "routinization" and how power pervades dominated agents, making them prone to serve even when there is no actual power of coercion. See Michael J. Thompson, "Reconstructing Republican Freedom: A Critique of the Neo-Republican Concept of Freedom as Non-Domination," *Philosophy & Social Criticism* 39, no. 3 (2013): 277–98. It is worth noting that Thompson frames his concerns as explicitly modern, and imputes Pettit's blind spots to his reliance on seventeenth- and eighteenth-century republicans. However, my view above is that earlier republicans were much more aware of these issues than Thompson (or Pettit) are willing to recognize.

⁴³ David Casassas, Julio Martínez-Cava, and Daniel Raventós, "Socialismo y Renta Básica: Razones republicanas de la propuesta," *Revista Internacional de Pensamiento Político* 15 (2021): 37–56.

⁴⁴ Mark Twain, "Corn-pone opinions" in *The Complete Essays of Mark Twain*, 583–84.

⁴⁵ Socialist readings of republicanism have focused specifically on the problem of dependence on many potential masters. See e.g. Gourevitch, "Labor Republicanism and the Transformation of Work"; Alexander Bryan, "Structural Domination and Freedom in the Labor Market: From Voluntariness to Independence," *American Political Science Review* 117, no. 2 (2023): 692–704.

servility translated into subjective dispositions. Significantly, patriarchy was for her that “more specious slavery which chains the very soul of woman.”⁴⁶ According to Wollstonecraft, “servitude not only debases the individual, but its effects seem to be transmitted to posterity,” which explains why women “hug their chains,” clouding their moral reasoning regardless of the individual men that dominate them.⁴⁷

In all these arguments, the cognitive and speech capacities of individuals are taken to be affected by the social patterns through which power is distributed in the public sphere (e.g., with the presence of dominating and superstitious traditional customs, of powerful churches, of certain levels of economic inequality, patriarchal prejudices, etc.). In other words, the ideal of the rational citizen capable of assessing the public good was informed by important sociological or political-economic intuitions about how social structures condition individuals. One may not want to accept the whole social theory of the past—say, Mill’s claims on the inability of “uncivilized” peoples to live under free institutions, Wollstonecraft’s view of women’s acceptance of their own chains, or the classical republican observation that landless individuals are not prepared to be citizens. One may even reject the normative implications of such social theories. Yet regardless of whether one accepts the specific social-theoretical claims of past thinkers, what I want to emphasize is the embeddedness of their political theory in explanations of how power works in society, and the way in which they informed their politics (be they transformative or conservative) with information about their empirical experience—what I have been calling political-economic awareness.

Today, for instance, we may justly care about different facts; say, about how the algorithmic presentation of information and other built-in features of social media promote polarization, vitriolic speech, or fake news, and how their massive use compromises the political process: undermining deliberative spaces, weakening civility and trust, impoverishing information, threatening the economic sustainability of journalism, etc.⁴⁸ But my point is that beyond the specific sociological or political claims of the past, there is, so to speak, a methodological lesson to be drawn. The basic building blocks behind these contemporary concerns—minimal intuitions about political sociology,

⁴⁶ Wollstonecraft, “A Vindication of the Rights of Women,” *The Works of Mary Wollstonecraft*, ed. Janet Todd, Marilyn Butler, and Emma Reese-Mogg (Routledge, 1989), vol. V: 215.

⁴⁷ *Ibid.*, vol. V: 152. On this reading I am much indebted to A. Coffee, “Mary Wollstonecraft, freedom and the enduring power of social domination,” *European Journal of Political Theory*, 12/2 (2013), 116–35; A. Coffee, “Mary Wollstonecraft, Public Reason, and the Virtuous Republic,” in S. Berges, A. Coffee (eds.), *The social and political philosophy of Mary Wollstonecraft* (Oxford University Press, 2016), 183–200; C. Mackenzie, “Mary Wollstonecraft: An Early Relational Autonomy Theorist?,” in S. Berges, A. Coffee (eds.), *The social and political philosophy of Mary Wollstonecraft* (Oxford University Press, 2016), 67–91. For a recent critical view of these republican readings of Wollstonecraft, but nevertheless pointing to the same elements I am highlighting above, see Nancy J. Hirschmann and Emily F. Regier, “Mary Wollstonecraft, Social Constructivism, and the Idea of Freedom,” *Politics & Gender* 15, no. 4 (2019): 645–70.

⁴⁸ See generally, e.g., Sunstein, *#Republic*.

processes of exogenous preference formation, and how our cognitive capacities rely on our institutional environment—can be found in past republican thinkers. They also showed an awareness of how patterns of social behavior positively or negatively modify whether citizens are capable of freely deliberating about the public good. This awareness called for interfering with those patterns in order to guarantee an apt republican citizenry. The ideal of citizens governed by the empire of their reason was not so much a “modern” “rationalist” supposition, as it is often suggested by critics—achieving or preserving that ideal whenever it did not obtain or was at risk was a political project in itself. Many times, this view had deeply anti-democratic consequences (e.g., denying citizenship rights to those “incapable” of virtue due to their position in society, or coercive “tutelage” of peoples at home and abroad). However, this sociological and political-economic awareness is worth saving, for it also stimulated radically democratic proposals very useful for emancipation today.

5.2.3. Structural failure of performed speech choices

In the third scenario proposed above, the complaint was that, even if there are no “doorkeepers” and my access to speech choices is “protected” as Pettit would want it, nothing ensures that the speech I perform will produce the outcome I expect it to have. It is often assumed that free speech should only protect the dissemination of a message, not effective communication with others or anything close to a right to be listened to or understood. Why should the neorepublican ideal of “protected speech” consider the case of citizens whose speech choices systematically fail to be understood, whose performed speech choices regularly produce pragmatic breakdowns (i.e., not yielding the speakers’ expected consequences)?⁴⁹

For instance, Ronald Dworkin famously warned against the dangerous implications of taking these issues into consideration when legislating freedom of expression. He did this in his critical review of *Only Words*, Catherine Mackinnon’s influential selection of feminist essays against pornography. In these essays, she had brought up the “silencing” effect that mass pornography consumption could have on women, distorting how society tends to view them, plausibly lowering the status of women as speakers. Thus, Mackinnon’s argument for restricting pornography (i.e., pornographers’ and consumers’ free speech) was based on an egalitarian defense of the right of women to free speech. Dworkin contended that this was an “unacceptable proposition,” for it suggested that:

⁴⁹ The idea behind this third scenario—that Pettit’s “protected speech” is oblivious of how the status of free speaker can be threatened by social norms shaping the attitudes of the receivers—is deeply indebted with the work of Suzanne Whitten, “Critical Republicanism and the Discursive Demands of Free Speech,” *Philosophy and Social Criticism* 49, no. 7 (2022): 856–80; Whitten, *Critical Civility*, 100–120.

the right to free speech includes a right to circumstances that encourage one to speak, and a right that others grasp and respect what one means to say (...) a right to whatever respectful attention on the part of others is necessary to encourage him to speak his mind and to guarantee that he will be correctly understood; and that is absurd.⁵⁰

The feminist philosopher Caroline West, in turn, answered these concerns with a thought experiment on why liberal intuitions about free speech indeed include an awareness about "reception"—about messages being properly understood by audiences.⁵¹ West imagines a dictator who wishes to silence dissenters. This tyrant, however, does not use conventional methods of censorship. The silencing is done through a machine that West calls the "meaning-scrambler." It is a device that systematically changes the spoken and written messages of dissenters in the heads of their audiences (e.g., when a rebellious citizen utters "overthrow the dictator" the audience understands "support the dictator"). The machine modifies the meaning of the dissenters' speech, preventing them from effectively communicating their ideas but without properly interfering with their set of speech choices. No one will understand them, but they are free to speak after all. Yet despite such an absence of interference with the dissenters' capacity to produce and distribute their message, something suggests that the dictator is in fact encroaching their free speech. And the dictator is doing this, precisely, by preventing what Ronald Dworkin disregarded as an "absurd" claim: the machine prevents that others "grasp" and "correctly understand" what the dissenters mean to say.

West's argument aims to explain why silencing situations through systematic misunderstanding can constitute arbitrary interference with expressive freedom. But her ultimate focus is not on dictators intentionally distorting the messages of their critics. West is concerned with how social norms may do the work of meaning-scramblers, creating communicative circumstances in which the speech choices of certain speakers are systematically distorted. Concretely, she focuses on the kind of silencing produced when women rejecting a sexual proposition say "no" to men, but men repeatedly interpret women as meaning "yes" or "perhaps."

This is, in John Austin's conceptual framework, the idea that a woman's speech fails at the "illocutionary" level: even if she chose the right locution to refuse sex, her speech act goes wrong because her audience does not understand what she wants to do with her words.⁵² To have illocutionary force, a speech act requires a certain setting that ensures its success. It is well known that many cases of illocutionary success rely on specific institutional conditions (e.g., if I want my marriage vows to have illocutionary force and

⁵⁰ Dworkin, *Freedom's Law*, 235. He was reviewing Mackinnon, *Only Words*.

⁵¹ Caroline West, "The Free Speech Argument Against Pornography," *Canadian Journal of Philosophy* 33, no. 3 (2003): 391–422.

⁵² Jennifer Hornsby and Rae Langton, "Free Speech and Illocution," *Legal Theory* 4, no. 1 (1998): 21–37.

actually get me married, I have to utter them in front of someone with the relevant legal capacity). But outside these narrow institutional settings, general illocutionary success depends on some minimal conditions of recognition and reciprocity—that is, on some basic dispositions on the receiving side of speech.⁵³ These dispositions may, in turn, be undermined by social norms, stereotypes, and so on.

A similar problem to the neorepublican ideal of “protected speech” is presented by Miranda Fricker’s notion of “hermeneutical injustice,” when “some significant area of one’s social experience is obscured from collective understanding.”⁵⁴ This is the injustice suffered by certain people with a social disadvantage in terms of the epistemic resources they can access to communicate their experience. Fricker’s notion explains, for instance, the situation of victims of sexual harassment whose voiced experience of grievance is decoded by the community of listeners as something essentially different and less harmful than what the victim underwent (e.g., not having a concept of “sexual harassment,” the victim’s account is interpreted as referring to consensual flirting, acceptable attempts at seduction, etc.).⁵⁵ Tellingly, Fricker indicates that this wrong “involves no culprit. No agent *perpetrates* hermeneutical injustice—it is a purely structural notion. The background condition for hermeneutical injustice is the subject’s hermeneutical marginalization.”⁵⁶

As another example of this, take the case of the “right to consultation” that indigenous people enjoy in the Inter-American Court and Commission on Human Rights. These institutions are responsible for significant legal conquests in protecting common and customary forms of land use against encroachment by corporate or state interests. In this sense, indigenous peoples enjoy a notable “right to consultation” within these institutions—that is, a

⁵³ Ibid., 26–28.

⁵⁴ Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press, 2007), 158. Fricker’s hermeneutical injustice can be interpreted in two ways: as a cognitive harm or as a communicative harm. In the first interpretation, the subject of hermeneutical injustice lacks the epistemic resources to subjectively make sense of their experience; they lack the concepts to structure what they are feeling (note that this would make cases of hermeneutical injustice more apt for my second scenario: misrepresentation of speech choices). In the second interpretation, however, hermeneutical injustice is not a problem of subjective cognition, but of communication—the subject understands, and has the words and the concepts to structure their experience satisfactorily, but their community lacks the epistemic resources required for the subject to convey their experience publicly. In the arguments above, I am using the latter, communicative interpretation. On these two approaches to Fricker’s work, see Trystan S. Goetze, “Hermeneutical Dissent and the Species of Hermeneutical Injustice,” *Hypatia* 33, no. 1 (2018): 73–90.

⁵⁵ Fricker, *Epistemic Injustice*, 149–50.

⁵⁶ Ibid., 159. A subcase, or rather instance, of hermeneutical injustice is what Fricker calls “testimonial injustice,” in which the prejudices of the audience degrade the validity or rationality of the speaker due to some of his or her perceived traits. Although testimonial injustice also has a “structural” element that goes beyond the capacity of arbitrary interference of concrete “doorkeepers” or dominators, I have decided to focus only on hermeneutical injustice because the “structural” element is stressed by Fricker—therefore, it seems in principle harder to capture by the ideal of “protected speech.”

protected range of speech choices targeted at traditionally silenced groups. Nonetheless, critics have pointed out that there is an important epistemic gap between the indigenous interests in, and experience of, land tenure and the Western legal language of “property rights” in which the Court and the Commission evaluate cases and protect legal and moral interests. While the Court and Commission have actively expanded traditional ideas of Western property to protect indigenous ownership, these communities often find it difficult or impossible to make intelligible their experience of land tenure to the Court. For example, relevant legal conquests such as economic compensation in exchange for alienation or lease of land use do not make sense of indigenous interests in the cases in which land occupation is conceived by members of these communities as a family-like relationship or as a constitutive element of personal or communal identity.⁵⁷

Ultimately, one of the original questions that sparked this and other debates—the question of whether mass consumption of pornography creates dispositions that “silence” women by undermining their capacity for illocutionary speech—is an empirical issue that goes beyond the scope of this thesis.⁵⁸ However, in addition to what we may think about the specific case for regulating or censoring pornography (or certain kinds of pornography), the broader feminist point should not be missed. Unyielding followers of Ronald Dworkin on this dispute may benefit from zooming out.⁵⁹ What is at stake is

⁵⁷ Dina Lupin Townsend and Leo Townsend, “Epistemic Injustice and Indigenous Peoples in the Inter-American Human Rights System,” *Social Epistemology* 35, no. 2 (2021): 147–59.

⁵⁸ There is not concluding evidence of this, as Dworkin already pointed out against Mackinnon and other feminist scholars. Today, though, we have studies showing that pornography consumption affects other variables that could be associated with mutual recognition, as sexual and body expectations of consumers on themselves and their partners. While none of this need to be an argument for regulation, it indeed undermines the empirical case that many advocates of non-interference with pornographic speech have built. See e.g., Kaitlyn Goldsmith et al., “Pornography Consumption and Its Association with Sexual Concerns and Expectations among Young Men and Women,” *The Canadian Journal of Human Sexuality* 26, no. 2 (2017): 151–62; Georgios Paslakis, Carlos Chiclana Actis, and Gemma Mestre-Bach, “Associations between Pornography Exposure, Body Image and Sexual Body Image: A Systematic Review,” *Journal of Health Psychology* 27, no. 3 (2022): 743–60.

⁵⁹ In this context, it is worth mentioning that the free speech debate has focused very narrowly on pornography, with critics often taking Mackinnon’s, Andrea Dworkin’s and Gloria Steinem’s ideas and proposals of regulation in the 1980s as if they were representatives of all second-wave feminism. It is often forgotten by these critics that the feminist position on pornography was only a small part of a much broader assault on Western visual culture, especially advertising, filmmaking, and generalist TV shows, and on dominant medical and social discourses on women’s sexuality disseminated by the media. Moreover, this work of wide cultural criticism need not result in strategies of state censorship through civil or criminal legal reforms—in this sense, the media and scholarly attention received by Mackinnon, Dworkin, Steinem, or the New York group “Women against Pornography” did not even represent the majoritarian position of the US (not to say international) feminist movement on free speech. On the contrary, cultural criticism was a form of raising an anti-patriarchal consciousness in other women that did not require the coercive use of state power. This was the

not only the specific claims and measures against pornography, but a much more basic, age-old (and less contentious) intuition, to wit: pervasive social norms, received imageries, and patterns of behavior (i.e., “social structures”) may undermine the status of some groups of citizens as free speakers by distorting how most people receive their speech. In sum, it raises the possibility that the open and protected speech choices of some citizens will regularly fail due to dispositions of their audiences—a possibility of “discursive injustice,” as Suzanne Whitten has recently pointed out, that is independent from the agent- and action-centered perspective of Pettit’s “protected speech,” which only focuses on whether the audience holds arbitrary power over the speaker.⁶⁰

5.3. SOCIAL STRUCTURES AND DOMINATION

The three scenarios above intend to show that there are empirical circumstances that upset a person’s status as a free speaker, which are not, however, easily imputable to the will, direct actions, or capacity of a dominating agent (individual or collective). In other words, they are not easily attributable to a “doorkeeper” in Pettit’s sense. The question of whether the neorepublican ideal of “protected speech” can identify these situations as freedom-undermining and tackle them depends on how it deals with the concept of “structural” domination.

Recent critical literature within the republican field argues that mainstream models of neorepublican freedom are not able to capture these “structural” or “systemic” forms of arbitrary power. According to these critics, neorepublican accounts of domination are “agent-centered,” modeled on “dyadic” relationships between dominators and dominated, and rely too much on the “capacity of arbitrary interference” (which would be only one instance of

point, for example, of the most common feminist strategies aimed at denouncing speech considered harmful through non-state initiatives such as consumer boycotts, letter writing campaigns or discussion groups. From this point of view—once we zoom out from the specific issue of “censoring pornography”—the feminist argument on how women’s free speech may be undermined by patriarchal patterns of behavior, speech and attitudes is much stronger and insightful. My view of the history of second-wave feminism owes a lot to Carolyn Bronstein, *Battling Pornography: The American Feminist Anti-Pornography Movement, 1976–1986* (Cambridge University Press, 2011), esp. 314–335. I have developed most of my thoughts on these issues thanks to conversations with Andrea Pérez.

⁶⁰ Whitten, “Critical Republicanism and the Discursive Demands of Free Speech.” An additional point of incompatibility with neorepublicanism could be added. According to Pettit, basic liberties must fulfill the “individual exercisability constraint.” This “restricts” basic liberties “to choices in the exercise of which we do not depend on the voluntary cooperation of others” (*On the People’s Terms*, 95). This would complicate things for a neorepublican account of public reason, for example. How is one to ensure that every argument gets a fair say, if not with the voluntary cooperation of others?

domination among others).⁶¹ In this line, another very common, but in this case inaccurate, critique of Pettit’s neorepublicanism is that it requires “intentionality” as a condition of domination.⁶²

These features of the neorepublican view of domination would make it unable to capture instances of unfreedom that occur beyond the direct power or will of individual or collective dominating agents—as the three proposed scenarios illustrated. The neorepublican normative project presented itself as capable of dealing with a wider range of “grievances” than the liberal ideal of non-interference. However, are there additional “structural” grievances threatening freedom that remain unacknowledged? Despite differences and overlaps, it might be useful to distinguish at least two strategies intended to capture instances of unfreedom which remain undertheorized in the thinner neorepublican accounts of domination: a thicker view of non-domination (§5.3.1) and a structural account of the sources of domination (§5.3.2).

⁶¹ Marie Garrau and Cécile Laborde, “Relational Equality, Non-Domination, and Vulnerability,” in *Social Equality*, ed. Carina Fourie, Fabian Schuppert, and Ivo Wallimann-Helmer (Oxford University Press, 2015), 45–64. Rafeeq Hasan, “Republicanism and Structural Domination,” *Pacific Philosophical Quarterly* 102, no. 2 (2021): 292–319. Bryan, “Structural Domination and Freedom in the Labor Market.”

⁶² Nancy J. Hirschmann, *The Subject of Liberty: Toward a Feminist Theory of Freedom* (Princeton University Press, 2003), 16–17, 243 n80; Sharon R Krause, “Beyond Non-Domination: Agency, Inequality and the Meaning of Freedom,” *Philosophy & Social Criticism* 39, no. 2 (2013): 187–208; Roberts, *Marx’s Inferno*, 97–98; Gourevitch, “Labor Republicanism and the Transformation of Work”; Lillian Cicerchia, “Structural Domination in the Labor Market,” *European Journal of Political Theory* 21, no. 1 (2022): 4–24; Bryan, “Structural Domination and Freedom in the Labor Market”; Whitten, *Critical Civility*, 103. Among critical republicans, Dorothea Gädeke has reminded that it is only Pettit’s idea of “interference” that entails intentionality of this sort (i.e., only *actions* of obstruction or worsening of a choice set, exercises of power), not domination itself (i.e., the *capacity* to interfere, the power itself); see Dorothea Gädeke, “Does a Mugger Dominate? Episodic Power and the Structural Dimension of Domination,” *Journal of Political Philosophy* 28, no. 2 (2020): 215; Gädeke, “From Neo-Republicanism to Critical Republicanism,” 31 n30; Rutger Claassen and Lisa Herzog, “Why Economic Agency Matters: An Account of Structural Domination in the Economic Realm,” *European Journal of Political Theory* 20, no. 3 (2021): 468. This critique of the critics should be more acknowledged. The notion that domination does not require intentionality is especially cogent in the light of Pettit’s dispositional account of domination—there is dominating power whether intentional interference is carried out or not (see above, §4.1). This has been an important feature of the neorepublican view of domination since its early days, though it is much clearer in Pettit’s later formulations, as when he explicitly acknowledges the possibility of “unwilled domination” in Pettit, *On the People’s Terms*, 62–63. To overlook this point is to take away from neorepublicanism most of its edge as a tool of social criticism, which is precisely what these critics want to sharpen. However, all things considered, some instances of Pettit’s earliest accounts of domination could lead to the opposite idea: e.g., “Dominating power (...) is an intentional sort of power in the sense that the things which the bearer can do are things that the bearer can be blamed or praised for doing: they are not beyond the agent’s control,” Pettit, “Freedom as Antipower,” 603–4; Pettit, *Republicanism*, 79.

5.3.1. Looking for responses: neorepublican basic liberties

A first way of expanding the range of situations that can be considered as detrimental to freedom is to outline the positive requirements of what counts as autonomy. Such a strategy has been arguably adopted, at least partially, by Pettit himself—and can be thus extrapolated to his account of expressive freedom as “protected speech,” as I will do later.⁶³ Thickening non-domination can be understood as a way of dealing with the outcomes of domination, regardless of its sources. Connected to our discussion, this means that, in order to identify harms to freedom, it is not necessary to identify what is producing it, whether a socio-structural process of aggregated behavior or a dominating agent.

Note how this is different from the focus of thinner or “procedural” accounts of non-domination, in which the identification of politically relevant instances of unfreedom (i.e., domination) partially relies on examining the source of the grievance: only uncontrolled power of intentional interference by other agents produces domination. Without additional elements, one of the consequences of this view is the disconnect of freedom from distributive issues and other sources of unfairness.⁶⁴ Pettit’s earlier formulation of non-domination was arguably thin in this sense. This point explains, for example, his insistence on distinguishing “unfree” from “non-free,” which easily framed distribution as a less urgent, or at least a different, problem from liberty.⁶⁵

⁶³ In this sense, Pettit has explained why the ideal of non-domination includes concerns typical of the “capabilities” approach associated with Martha Nussbaum and Amartya Sen, see e.g. Pettit, *Republicanism*, 158–61; Philip Pettit, “The Domination Complaint,” *Nomos* 46 (2005): 112; Pettit, *On the People’s Terms*, 126–27. On the reading of Pettit’s later work as thickening non-domination, see Claassen and Herzog, “Why Economic Agency Matters,” 469. For other neorepublican attempt to strike a balance between the positive requirements of autonomy and non-domination, see Alan Coffee, “Two Spheres of Domination: Republican Theory, Social Norms and the Insufficiency of Negative Freedom,” *Contemporary Political Theory* 14, no. 1 (2015): 45–62.

⁶⁴ Lovett, *A General Theory*, 119. Which, as Lovett points out, does not imply that these other problems are not important at all or should not be dealt with. More simply, it is about conceptually distinguishing them from the problem of freedom. See the following note for a problematization of this.

⁶⁵ The most systematic defense of this position is Lovett, *A General Theory*, 111–20. On this distinction at work in Pettit’s earlier writings, see e.g., Philip Pettit, “A Definition of Negative Liberty,” *Ratio* 2, no. 2 (1989): 159–60; Pettit, *Republicanism*, 26, 76, 93. While “non-free” would measure problems regarding the “range” of free options I have, “unfree” would measure distinctive problems concerning my freedom to realize an option. By restricting the range of options that can be counted under the rubric of freedom or basic needs, this leads to a typically conservative conclusion. Namely, a society that boasts to guarantee equal freedom for all can also be, with no charge of hypocrisy, a society with many and very “non-free” members (i.e., highly unequal in terms of the range of free choices available to each, because the range of freedom is determined by, say, wealth or gender roles). Although Pettit’s later distinction of

However, Pettit’s later account of non-domination attempts to strike a balance between both worlds. On the one hand, it includes a thick, positive image of what counts as a free person; on the other, it wants to rely on a thin, negative definition of freedom as absence of uncontrolled interference. To do this, in his late development of a neorepublican “theory of justice,” Pettit draws on a conceptual triad: (1) the “image of the free person,” (2) the “eyeball test” and (3) a co-enjoyable set of “basic liberties” for each citizen that must be guaranteed. The “eyeball test” is the criterion that translates the ideal of the “free person” to a concrete set of “basic liberties.” In particular, the eyeball test assesses whether the “protected” choices enjoyed by republican citizens make them able to “look others in the eye without reason for the fear or deference that a power of interference might inspire; they can walk tall and assume the public status, objective and subjective, of being equal in this regard with the best.”⁶⁶

But, perhaps more relevant for our purposes, it is not enough that the basic liberties defining a free person be “protected”—they must be adequately “resourced” as well.⁶⁷ The eyeball test also defines the appropriate level of resourcing, allowing for a greater resourcing of basic liberties in the case of natural or socially produced special needs (e.g., disability, geographical disadvantages, scarcity of assets significant to exercise freedom).⁶⁸ The resourcing of the choices associated with basic liberty is sufficientarian in that it attempts to establish and entrench a minimum threshold of resources.⁶⁹ But that threshold is in turn outlined in relational egalitarian terms: citizens have “the same good in a dimension that impacts on how they can interact with one another and on what standing they can command in one another’s eyes.”⁷⁰

The notion of resourcing basic liberties—that is, to guarantee the means to freely perform choices considered essential to a free person—is capable of answering some of the critics who insist on the neorepublican neglect of “structural” domination. By identifying factors that “vitiate” choices considered significant for republican free persons, Pettit can spot situations that only “incidentally” undermine freedom without having to classify them as “invasions” of choices, the kind of agent-level, intentional interferences that, when arbitrary or uncontrolled, constitute domination.⁷¹

invasion/vitiation in *On the People’s Terms* tracks very similar concerns as unfree/non-free, his substantive understanding of basic liberties and their “resourcing” arguably avoids the conservative conclusion at least in two ways. First, as I explain below, by expanding the range of liberty proper through the eyeball test and the image of the free person (e.g., there are more basic free choices whose enjoyment you do not need to buy or perform a certain gender to obtain them). Or, second, by emphasizing how being “non-free” facilitates that you also become subject to the will of others in further interactions, that is, “unfree”—precisely, this is the problem of “structural domination” considered in the next subsection.

⁶⁶ Pettit, *On the People’s Terms*, 84.

⁶⁷ Ibid., 36–37.

⁶⁸ Ibid., 86–87, 96–97.

⁶⁹ Ibid., 88.

⁷⁰ Ibid., 91.

⁷¹ Ibid., 38–40.

Assume that having access to broadband internet is part of our image of the free person. That is, internet access is thought to be required to pass the eyeball test, for it is needed to access information and speech choices that allow me to hold the powerful accountable, to express my views about public issues, and so on. Suppose also that I cannot afford to pay for it in the perfectly competitive market in which internet service providers offer their networks. Also assume, lastly, the Pettitian view of competitive markets: they are properly regulated institutions consistent with non-domination, because they exclude uncontrolled wills imposing on each other (more on this later).⁷² The point is that, under these conditions, my not being able to pay for broadband connection is not due to the “invasive” sort of behavior that marks relationships of domination. But even if there is no domination, the argument goes, this should not put neorepublican anxieties to rest, because I still suffer from circumstances that “vitiate” a basic liberty. That is, I am deprived of resources vital to exercise speech choices which, according to the eyeball test, might be considered significant to live up to the republican image of the free person in a twenty-first-century western society. To turn to the open-doors thought experiment: even if there is no doorkeeper with the capacity to “invade” my door set on this matter, the current allocation of resources “vitiates” my choice set, preventing me from accessing some of the doors. In this argument, neorepublicanism demands the resourcing of my liberty (i.e., redressing “violation”) despite the fact that my lack of broadband access is not the result of the “invasive,” uncontrolled interference of others that exemplifies relationships of domination.

So far, I have shown that Pettit’s late theory of justice—relying on the conceptual triad of the free person, the eyeball test, and the basic liberties—can be thought of as a thickening of neorepublican freedom: a deepening into the more positive or substantive side of the institutional, material, and cognitive demands of non-domination. I believe that this move is able to deal with some of the questions raised by critics who insist on the neorepublican incapacity to capture—and in consequence, some suggest, to tackle—certain threats to freedom that escape the excessively agential and interactional accounts of domination. Provisionally, we can already see why Pettit’s theory of justice seems well-fitted to prove that neorepublicanism can deal at least with some “structural” threats. Take, for instance, Alex Gourevitch’s influential comment on why Pettit’s narrow understanding of domination is blind to the fact of lack of property as a source of unfreedom:

Since [in the light of Pettit’s neorepublicanism] the overall distribution of property is *unintentional*, whatever obstacles it places in the way of one’s life plans—such as forcing him to sell his labor rather than find some other means of living—do not compromise that person’s freedom.⁷³

⁷² Pettit, “Freedom in the Market.”

⁷³ Gourevitch, “Labor Republicanism and the Transformation of Work,” 600. Italics in the original.

Pettit’s view of justice was published after Gourevitch’s critique, so the point here is not that the latter was wrong but rather that he was correctly finding a gap that only Pettit’s subsequent work attempted to explicitly solve. Now, however, with Pettit’s theory of justice at hand we could safely say that unequal distributions of property can indeed compromise freedom. A certain distribution of property rights, no matter how unintended, could “vitiate” the significant choices outlined by the basic liberties. The lack of property can be thought to frustrate the “resourcing” of the choices required to be a free person, consequently endangering the central equal status of republican citizenship—say, it plausibly makes the propertyless fail the eyeball test in many contexts, especially the labor market. A Pettitian neorepublican could then say that an unequal overall distribution of property, even when resulting from a perfectly competitive market, can indeed compromise freedom in the specific sense of “vitiation.” That is, not because the current allocation of property rights entails, right now or in the past, the “invasive,” uncontrolled, and intentional interferences that characterize domination, but because it facilitates agent-level domination in subsequent interactions.

5.3.2. *Looking for the causes: neorepublican structural domination*

Even if thickening non-domination might be a good strategy to redress grievances to freedom produced by the unintended effects of social structure, it will fall short for many critical readers of neorepublicanism. This is because thickening non-domination only circumvents the deeper concerns of these critics, for it does not contribute to sharpening the analysis of *how* social structures produce unfreedom. Thickening non-domination simply gives us more details about the positive requirements of republican freedom, or about how the republican state could act if these requirements fail for whatever reason. To turn to the earlier example, if enjoying non-dominated access to broadband internet is deemed essential for counting as a free person, then one can readily identify the circumstances of unfreedom suffered by anyone lacking free access to the network. In fact, one can normatively criticize and attempt to resolve such lack of access without further questions. This failure of basic-liberty resourcing (i.e., this “vitiation”) may have been caused by military sabotage, internet service providers not observing net neutrality, sharks biting submarine cables, and so on. However, should not an ideal of freedom be able to distinguish among these?

In this sense, critics of neorepublicanism may press the issue further: although information about the causes of vitiation is not required to detect and denounce circumstances of unfreedom, understanding causation is clearly useful for practical purposes. Understanding the sources of vitiation might be necessary to effectively remedy it, especially when resources are limited. Shall we protect fiber optic cables with sturdier submarine cables against shark bites? Or shall we focus our efforts on enforcing net-neutrality rules against

rogue internet service providers? And what is more important, the correct understanding of what is causing any of these failures is necessary if neorepublicans want to prevent, and not merely redress, vitiation (i.e., taking political action *before* basic liberties are undermined).

Following the interests of these critics, my view is that the thickening of non-domination only dodges the deeper concerns, both epistemic and practical, about “structural” or “systemic” domination. This is because it does not question how and why there is vitiation in the first place. Conceptually, the thicker view of non-domination does not require that we care about the inner workings of the “social structures” or the “social system” and how they modify freedom, it merely takes their outcomes as facts to be solved. Let me develop two points to support this view.

Social structures as incidental facilitators of domination

The answer to my deeper concerns, then, lies in the argumentative steps that connect vitiation to domination itself. I will suggest that Pettit’s neorepublican concern about the vitiation of basic liberties is only triggered subsidiarily—background vitiating conditions never constitute domination as such, they merely foster the vulnerabilities and asymmetrical relationships of power that plausibly end up producing domination. A way of putting this is that neorepublicanism is “agnostic” about the relationship between social structure and domination. In order to activate full-blown normative concerns, neorepublicans must either wait for structurally produced positions of agent-level domination to be formed or, alternatively, base their normative stance towards structural domination on probabilistic predictions of causal relationships (which, as I will discuss below, entails other problems for neorepublicans).

Recall the earlier example: on the neorepublican account, I am not dominated by the mere fact that I cannot afford a broadband internet connection in the context of a competitive market of internet service providers. I am not dominated, even when this lack of broadband internet prevents me from accessing significant speech choices associated with republican citizenship. Recall, too, that this failure of resourcing does not count as domination as such, nor is the result of domination; and that, for the sake of the argument, I am still assuming the neorepublican view of competitive markets, where there is no invasive interference of others.

However, this failure in resourcing puts me in circumstances that make it easier for others to dominate me. In a context where most citizens have broadband internet and where its use has become a generalized fact of society (i.e., it is part of the republican image of the free person), a deficient resourcing of the speech choices we commonly associate with internet access might make me fail the eyeball test. In this view, deficient resourcing of basic liberties might not be the result of domination, nor count as domination proper, although it might foster domination. Deficient resourcing and the resulting vitiated choice set undermine my equal status, my chances of acting as a free

person. This failure is concerning for republicans insofar as it makes me prone to fail the eyeball test in some situations, in that it impedes me to behave without fear of deference of others, and so on.

This is the role that social structure and “structural domination” play in Pettit’s later neorepublicanism: social structures might “facilitate” domination.⁷⁴ Circumstances of vitiation do not necessarily constitute domination, but plausibly generate positions of invasive power—that is, domination.⁷⁵ Put differently, within Pettit’s neorepublicanism there is no conceptual space, as I will show below, for theoretical certainty on the dominating features of structures, nor for agentless domination. But this does not mean that neorepublicanism is designed to disregard all socio-structural variables in its analysis of freedom, as some critics might think. Rather, neorepublicanism could be properly thought of as “agnostic” on this matter, waiting for the empirical link between social structure and domination to become apparent before developing a normative stance and guideline for political action.

An anti-collectivist and anti-atomistic view of social structures

It is not sufficiently stressed in the literature that this agnosticism about the effects of social structure in the freedom of individuals is rooted in Pettit’s qualified ontological individualism. For our purposes, Pettit’s methodological and ontological commitments can be explained as opposing two broad trends in social theory. Firstly, Pettit’s position is explicitly built against what he calls “collectivism”—the view, often associated with functionalist sociology and Foucauldian theories of power, that social structures override or outflank the intentional psychology of agents (individual or collective).⁷⁶ Extrapolated to our discussion, Pettit’s critique of “collectivism” discards the idea that structures can dominate by themselves, or that there can be domination without dominating agents involved: the mental states of some agents—at least a perpetrator and a victim—must come into play at some point to describe domination.

⁷⁴ Pettit, *On the People’s Terms*, 44, 63–64; Mark Haugaard and Philip Pettit, “A Conversation on Power and Republicanism: An Exchange between Mark Haugaard and Philip Pettit,” *Journal of Political Power* 10, no. 1 (January 2, 2017): 26–27. The rudiments of this position can be traced back to earlier texts in a less elaborated form, e.g., Pettit, “Freedom as Antipower”; Pettit, *Republicanism*, 122–26; Philip Pettit, “Discourse Theory and Republican Freedom,” in *Republicanism: History, Theory and Practice*, ed. Daniel Weinstock and Christian Nadeau (Frank Cass, 2004), 74–77. On this position, see also social structures as “enabling” domination, Lovett, *A General Theory*, 47–49; Frank Lovett and Philip Pettit, “Preserving Republican Freedom: A Reply to Simpson,” *Philosophy & Public Affairs* 46, no. 4 (2018): 364–65.

⁷⁵ Pettit, *Republicanism*, 52. Haugaard and Pettit, “A Conversation on Power and Republicanism,” 27; Pettit, *On the People’s Terms*, 63.

⁷⁶ Pettit, *The Common Mind*, 117–64. On Pettit’s political philosophy as a continuation of these reflections, see Pettit, *Republicanism*, vii. On Pettit’s notion of “agent” as including group agency, see Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford University Press, 2011), 31–41.

However, secondly, Pettit's individualism is not only anti-collectivist, but also determinedly anti-atomistic. This is no less important for our topic, for it means that his preference for agent-level accounts of domination does not entail a complete blindness to structure-level causation and its plausible effects on agents. In other words, Pettit's qualified individualism is non-reductionist. It attempts to strike a balance between upholding the explanatory salience of social structures—they probabilistically program our actions: conditioning, distorting, or influencing our intentional psychology—while denying that such higher-level causation in human relationships gives us enough reasons to completely ignore intentional profiles at the lower level of agents. To sum up, ontologically, Pettit posits a causal fundamentalism in which any social process is connected to intentional psychology, all the way down to micro-physical properties. Epistemically, however, he advocates for an explanatory ecumenism: each causal level enjoys its own causal relevance and explanatory interest.⁷⁷

Once we factor in these ontological and methodological views, the status of “structural domination” within Pettit's neorepublicanism should be clearer. They serve to shore up both a defense against his critics, but also a concession to them. On the one hand, in light of Pettit's socio-theoretical views, it seems unfounded to suggest that his normative theory is completely unaware or unprepared to grasp the pernicious and unwilling effects that aggregate social behavior can have on freedom. “No republican holds such a naive view,” as he and Lovett have recently put it.⁷⁸ Within the ontological, methodological, and normative assumptions of Pettit's neorepublicanism, one can accept that social structures perceptibly pattern human action in ways that may facilitate domination, pointing at least to the need to redress it.

⁷⁷ The general ontological picture behind these views is an extension of Pettit's physicalism to social theory, positing a relationship of supervenience between social structure and intentional psychology. Supervenience serves Pettit to make the anti-atomistic claim that we cannot fully make sense of higher-level social processes by reducing them to the mental states and actions of a collection of intentional psychologies (e.g., rational-choice-like economic explanations are not enough to explain many instances of aggregated behavior). Yet supervenience also serves Pettit to make the anti-collectivist claim: to deny the complete autonomy of social structure vis-à-vis lower-level causal processes (e.g., it cannot be said that social facts act behind the backs of agents, overdetermining their actions). The middle ground is precisely to posit that social structure supervenes on intentional psychology, meaning that any change on the higher level cannot be imagined without some changes on the lower. At the same time, this does not discount the fact that higher-level patterns act as “programming factors” that facilitate or enable certain mental states over others. This keeps an ontological hierarchy for social theory with intentionality at its base, without rejecting, in turn, the specific salience of higher-level structural causation: a certain socio-structural process can occur with a different setting of lower-level behavior under certain conditions. As an example, think of the protracted conflicts between the landed gentry and monarchy that led up to the English Civil Wars. The point here is that they might have still occurred, even if Oliver Cromwell had been a different person, with different desires and preferences; but this need not mean that conflicts between the gentry and the monarchy should not ultimately be explained in terms of the intentional psychology of (other) individuals participating under certain structural constraints and incentives. See Pettit, *The Common Mind*, 228–83.

⁷⁸ Lovett and Pettit, “Preserving Republican Freedom,” 364 n2.

On the other hand—and this time more unfavorably—it should also be clearer why such a neorepublican awareness about “structural domination” is purely subsidiary, ultimately contingent on agent-level instances domination. No matter how structure-level causation might “facilitate” or “enable” relationships of domination, domination as such is to be measured at the lower level of agent interaction because, ontologically, it is a phenomenon concerning the mental states of the dominator and the dominated. Note, further, that this connection between agent-level mental states and domination is even stronger from a normative point of view. If, as Pettit does, we view domination as the kind of relationship for which we want someone to be held responsible, “blamed or praised,”⁷⁹ “the sort of action in the doing of which we can sensibly allege negligence,”⁸⁰ then domination will require certain things regarding the mental states of dominating agents (e.g., that they know the normative significance of their position, that they are able to judge about the choices they have and other accessible options, that they are in control of this power when choosing, etc.).⁸¹

Consequently, while Pettit’s late efforts are an important step towards the critics concerned about “structural domination,” it is indeed simply giving a different meaning to it. This is because Pettit’s notion of structural domination is only instantiated through agent-level relationships of domination. Structural processes are thought to play a causal role in producing such agent-level relationships.⁸² But all the normative weight of the argument remains attached to agent-level interaction: Must socio-structural settings crystallize into actual positions of domination in order to become a target of neorepublican policymaking? In the next section I argue that if my reading is correct, “structural domination” in Pettit’s account would lose most of its conceptual specificity or normative appeal, depending on how we interpret it.

⁷⁹ Pettit, *Republicanism*, 79.

⁸⁰ *Ibid.*, 52.

⁸¹ List and Pettit, *Group Agency*, 153–57. Then, if Pettit’s domination has an “intentionality” requirement, as some critics point out, it is only in the weaker sense presented above: that of requiring information on the level of “intentional psychology,” about the mental states of agents. This is, however, distinct from saying that domination requires “intentionality” in the sense that for an agent to count as a dominator they must wield their power “intentionally” in the conventional sense of “purposely” or “deliberately.”

⁸² Assuming causality behind structural risk domination is super clear, one may question whether its endurance under a democratic government can be the ground for a further attribution of responsibility: to those public authorities that, having the mandate to the maximize freedom of their constituents, are failing to act, and thus may be held into account for such structural domination. This would solve the issue of responsibility in cases of “structural” domination in which there are no clear agents, or there is not clear intentionality in their actions. One could argue, then, that many forms of structural domination are still in place due to the intentionality of public authorities not willing to act on their mandate; they are contributing to domination by not acting accordingly if they have the capacity. I cannot develop here the conceptual discussions I think are needed to integrate in mainstream neorepublicanism the claim that failing to act may count as intentional domination—but I find it promising. I owe this point originally to David Casassas’ comments (see his *Unconditional Freedom*) and Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990), 148–55.

5.4. INTERPRETING NEOREPUBLICAN STRUCTURAL DOMINATION

5.4.1. Structurally produced agent-level domination

Following my arguments from the previous section, “structural domination” could be taken to mean something like “structurally produced agent-level domination”—as distinct from cases of agent-level domination unrelated to social structure. However, this first reading loses a great deal of the conceptual specificity of “structural domination.” If neorepublicans are interested in a workable political ideal of freedom, they must be able to distinguish between domination and sporadic cases in which I happen to be at the mercy of others. That is, as Dorothea Gädeke has pointed out, neorepublicans must make a distinction between domination proper and “episodic” uses of power. Neorepublicans must be able to explain why the slave master, the monarch, the capitalist employee, the husband in a sexist society, or the feudal lord hold a politically distinct power, different from that of the armed street mugger who threatens me by chance.⁸³ The distinctive feature is, precisely, that domination proper is always “structurally produced” to some extent, because it relies on formal and informal structures and institutions that enable such uses of power across different situations. In other words, it is social structures that make a power over someone modally robust and not purely accidental and episodic.

Nonetheless, from this perspective, to say that social structures “facilitate” domination—as if pointing to a distinctive subset of political harms—becomes an uninformative truism. All relationships of domination that historical republicans or neorepublicans should care about are facilitated or enabled by structures. Take the struggle against absolutist monarchs: historical republicans should not be interpreted as fighting only specific individuals—say, Charles I of England, Fernando VII of Spain, and so on—but absolutist regimes regardless of who holds the throne. Historical republicans, in this view, were fighting agent-level domination, of course, but *also* the institutions, laws, social norms, and so on, that made possible the status of domination itself: structures, in turn, which should be dealt with irrespective of its specific wielders, and which are not reducible to them. But if all domination is structurally produced and the structures themselves should also be (and indeed were) a target of political action, the category of “structural domination” as such would not add much new or specific to the analysis of unfreedom.⁸⁴

⁸³ Gädeke, “Does a Mugger Dominate? Episodic Power and the Structural Dimension of Domination.”

⁸⁴ It is perhaps worth noticing that, if taken seriously, this critique against neorepublicanism is in fact a point against many of the theorists who underline the “structural” qualities of

5.4.2. Structural risk of agent-level domination

Pettit’s “structural domination” could also be interpreted as a shorthand for “structural risk of agent-level domination”—that is, “structural domination” would merely inform of social circumstances that are incidentally, potentially or eventually dominating at the level of agents, not a special class of dominating relationships. With Gädeke, neorepublicans could in fact accept that all domination proper is structurally produced (i.e., that the robust capacity of arbitrary interference with others requires social structures to arise, to function, and to persist). Nonetheless, against her critique, neorepublicans could add that such structurally produced agent-level domination is merely a possibility, a risk, not ready-made domination. Say, a non-discriminatory public law that sanctions slavery can be very dominating, but only potentially: it is not until the first human being is enslaved that structural patterns of behavior are crystallized into agent-level relationships of domination. Or think of a property regime with no thresholds of minimum and maximum wealth. Neorepublicans could say that it might be dominating, although it is not until wealth inequality undermines someone’s ability to pass the eyeball test that there is domination proper, that is, when structural patterns of behavior mature into relationships of domination at the level of agents.⁸⁵

If this were the case, the crux of the matter for neorepublicans when it comes to face structural domination would be about assessing the prospects of agent-level domination produced by specific structures. Here, it is useful to distinguish between clear and contested instances of socio-structural risks. Perhaps neorepublicanism can integrate almost all the structuralist concerns of its critics, but only with clear cases: when a particular social structure is seen as very likely to generate domination and as not yielding additional goods. For instance, I believe that most neorepublicans would agree that to combat the domination caused by slavery, patriarchy, or monarchical absolutism, one’s political efforts must be directed at something else beyond actual agent-level domination. Even when the moral and political wrong called “domination” is still ontologically located in the interactions between intentional agents, the risk (i.e., the expected probability of the wrong) involved in some socio-structural patterns of behavior may be very high. It

domination. “Structural domination” is often presented by these critics as a late modern or even contemporary concern, as if the neorepublican unawareness about “structure” would be rooted in its overreliance on a premodern and early modern classical republican canon illiterate on matters of social structure, or as if structural domination as such would be a phenomenon of late modernity alien to those sources. See especially Michael J Thompson, “The Two Faces of Domination in Republican Political Theory,” *European Journal of Political Theory* 17, no. 1 (2018): 57, 59–60. But also Thompson, “Reconstructing Republican Freedom,” 3, 6; Gourevitch, “Labor Republicanism and the Transformation of Work,” 601–2; Gädeke, “Does a Mugger Dominate? Episodic Power and the Structural Dimension of Domination,” 212. I owe this observation to Edgar Manjarín.

⁸⁵ This is what Lovett’s reasoning suggests to me in *A General Theory*, 48–49.

may at least be high enough as to act against the social structure itself before it matures into actual agent-level relationships—e.g., abolishing slavery laws though no human being has been enslaved yet, interfering against sexist stereotypes even before they translate into concrete forms of sexual domination, and so on.

Getting closer to the structuralist concerns of some critics, however, might be harder for neorepublicans in what we could call contested cases of structural domination: social structures whose risk of domination is disputed, or social structures which, albeit plausibly producing domination, are also thought to yield additional benefits to the project of non-domination. Put differently: What will neorepublicans do about socio-structural risks of agent-level domination that they think as less intense, difficult to foresee, worth taking, or avoidable without eliminating the structure at stake? For example, the risk of private-property-generated domination may be worth taking if that property regime is also thought to improve overall wealth and thereby reduce non-domination in certain areas. Or take a particular market that conceivably generates dominating oligopolies and politically dangerous accumulations of wealth. Neorepublicans could say that this is a possibility that does not concern “the market” as such, but only other elements accompanying this social structure that can be tinkered with (i.e., what generates the risk of agent-level domination is not markets, but markets functioning under certain background economic and technological conditions, with ill-disposed economic agents, lacking adequate regulations, and so on). If a structure has components that neorepublicans consider worth saving—and this is the case with capitalist markets and private property, as I will discuss in the next chapter—they can always make the argument that the domination they may create is either unlikely, not predictable enough, avoidable, or remediable without rejecting the social structure as such. In these cases, the identification of “structural domination” will never focus on the structure itself, but merely on its incidental effects at the level of agents, often framed as remediable by fixing the structure at issue.

5.4.3. Structural domination and neorepublican state overreach

The second interpretation of “structural domination”—as a risk of agent-level domination—is not less indeterminate than the first from a theoretical point of view. Many, if not all, socio-structural processes can be regarded as risks of domination. And even those patterns of behavior planned to promote freedom can go wrong, precisely because both human agency and the unintended consequences of aggregated interaction always remain relevant variables. Faced with such a theoretical indeterminacy about the effects of social structure on freedom, neorepublicans must rely on empirical guesses about specific risks associated with specific social structures. While this is a very reasonable position, it may involve problems for neorepublicans in terms of political action.

Recall from §4.2 that, in the neorepublican view, the use of state power, even when the aim is to fight domination or extend non-domination, *also* always entails a risk of domination: the problem of *imperium*, with state interference itself creating a risk of domination whenever it is not properly controlled. Yet this is not too big of a problem when it comes to fighting actual agent-level domination, when the danger is so clear that we can assume that the risks of state interference are worth taking. But what about the merely potential agent-level domination produced by some social structures? Is the risk of *imperium* worth taking when confronting seemingly unclear or low risk of domination generated by social structures?

My view is that due to their empirically oriented notion of “structural domination” neorepublicans must remain undisturbed until the socio-structural patterns of *potential* agent-level domination become *actual*, or at least very probable. And given that neorepublicans presumably want to prevent (and not merely remedy) domination, having to wait for socio-structural risks to crystallize into tangible agent-level domination might be problematic.⁸⁶ A most reasonable solution here would be for neorepublicans to tailor their normative position on concrete cases of structural domination according to empirical estimates on agent-level consequences. Thus, neorepublican political action against structural domination would have to be contingent on empirical assessments, comparing the risk of state domination implicit in any political action vis-à-vis the manifold and constant socio-structural risks of agent-level domination. The risk of state overreach would only be worth taking if the risk of structurally produced domination is urgent or high enough.

This means that, at least when it comes to tackle structural domination, neorepublicans are forced into probabilistic justifications for state interference: state action is warranted only when the socio-structural probability of agent-level domination outweighs the state-generated risk of domination. This connection of normative theory and empirical science is, a very reasonable position to guide policy making; I agree, for instance, with Lovett’s commitment to a “theoretically thin and empirically thick” republicanism that “quickly hands things over from the political philosopher to the social scientist.”⁸⁷ Thus, this consequentialist calculus need not be a problem, except that this is precisely the kind of probabilistic defense of state action that neorepublicans hold against liberals. This is what, for example, Pettit condemned as the “presumption against state interference”—“a presumption that the state should not intervene in any area until the case for intervening is more or less overwhelming.”⁸⁸ Put differently, this is the neorepublican criticism that the liberal ideal “is not constitutionally rich

⁸⁶ I presume that preventing, and not merely remedying, unfreedom is part of the neorepublican agenda of minimizing domination. See, e.g., Pettit on infrastructural and insurance programs, and criminalization as part of a republican theory of justice in Pettit, *On the People’s Terms*, 110–22.

⁸⁷ Lovett, *A General Theory*, 164.

⁸⁸ Pettit, *The Common Mind*, 320.

enough to allow us to discern the possibility of a freedom-friendly-state.”⁸⁹ In the context of expressive freedom, Pettit deemed the liberal common sense as “politically dubious” exactly for these reasons:

the onus is on regulators to argue that although their initiatives certainly reduce some free speech, those measures promise to do better by free speech in the longer term. The default option is no regulation, then. Regulation will be triggered only in response to positive evidence that it may be necessary for achieving the maximum level of free speech.⁹⁰

If my reading holds, neorepublicans would commit the same error of which they accuse liberals. At least when confronting “structural domination,” neorepublicans would have to employ a kind of reasoning which, in their own view, is self-defeating and that too often defers to the status quo. If “structural domination” is interpreted as a merely potential threat of proper domination, the neorepublican policymaking against social structures incidentally enabling agent-level domination will be contingent on proof of high or imminent risk. This may be understood as a step back to the liberal-libertarian commonsense neorepublicans wanted to overcome, in which the burden of justification is on the very idea of regulation, not in the kind of regulation needed.

Hence, the legitimacy of neorepublican state interferences decreases as their target moves away from agent-level domination. This is apparent, for instance, in Pettit’s disapproval of what he calls the ideal of freedom as “non-limitation”—a variety of positive freedom that considers “personal” and “impersonal” obstacles to freedom as equally serious:

the ideal [of freedom as non-limitation] would permit the state to coerce or manipulate or force people (...) just so long as this was beneficial in the overall struggle against limitation: just so long as those interpersonal assaults on freedom promised to emancipate people from somewhat larger impersonal obstacles. Because it demonizes impersonal and interpersonal obstacles equally, the ideal would be likely to justify a state in treating people as less than properly discursive subjects.⁹¹

In either of the interpretations suggested earlier (§5.4.1 and §5.4.2), if “structural domination” has any normative import at all, it is only insofar as it leads, or could lead, to agent-level instances of domination (i.e., only because the “structural” may mature, more or less probably, into inter-agential positions of power held by some agents against others, individually or collectively). This is the sense in which I suggest that the neorepublican concern for structural domination indeed exists, but just agnostically and

⁸⁹ Pettit, *A Theory of Freedom*, 134.

⁹⁰ Pettit, “Two Concepts of Free Speech,” 67.

⁹¹ Pettit, *A Theory of Freedom*, 131. On his notion of being a “discursive subject,” see *Ibid.*, 141–142.

subsidiarily. Ultimately, this means that neorepublican policymaking against the freedom-undermining effects of social structure, if it wants to go beyond ex post compensation, punishment, or remedy, will depend on empirical conjectures about merely potential domination.

As I pointed out, I do not think that probabilistic justifications for state interference are conceptually or normatively problematic as such. Political practice, in this sense, should be informed by empirical predictions—of what will happen if we do not act, of how our actions will transform the world, being open to criticism in the light of new evidence, and so on. The problem with probabilistic defenses of state interference has rather to do with their pragmatic and rhetorical effect in contemporary public discourse. By this, I mean the effect that these justifications have in a political environment which is already strongly biased against state interference (as Part I of this thesis has shown, free speech is a case in point on this regard). In the case of communication policy, this fact is distinctly pressing as well because it is the media themselves—with a strong private interest against reform—that shape the news coverage and the widely accessible information regarding media reform.⁹²

One of the merits of the republican revival in political theory and constitutional law was precisely to overcome this bias with an alternative framing of state power. Neorepublicanism in political theory and civic republicanism in American constitutional law brought back the constitutive and necessary role that state interference must have in any well-functioning polity. And this re-framing was politically meritorious because it was developed in a post-Cold War world impregnated by a libertarian triumphalism that had turned intuitions about the unavoidably inefficient and dominating consequences of too much public power almost into an epochal commonsense.⁹³ The neorepublican argument against freedom as non-interference was instrumental in challenging this point, for it recovered an older constitutivist view of state interference as an essential feature of liberty.⁹⁴ For this reason, neorepublicanism was able to present itself as a transformative left-of-center public philosophy.⁹⁵ It made very clear that using the power of public institutions to promote liberty was not more risky, despotic, non-neutral, or partisan than preaching the opposite. Neorepublicanism brought back the old anti-laissez-faire intuition according

⁹² McChesney, *Rich Media, Poor Democracy*, 63–76.

⁹³ Remind here the diverse episodes this thesis has examined, e.g., §1.3.3, §2.1.2, §2.3, §3.1.3, §3.4.3.

⁹⁴ Pettit, *Republicanism*, 106–9; Pettit, *On the People's Terms*, 124.

⁹⁵ E.g., Pettit, *Republicanism*, 12; José Luis Martí and Philip Pettit, *A Political Philosophy in Public Life: Civic Republicanism in Zapatero's Spain* (Princeton: Princeton University Press, 2010); Martin McIvor, “Republicanism, Socialism and the Renewal of the Left,” in *In Search of Social Democracy: Responses to Crisis and Modernisation*, ed. John Callaghan et al. (Manchester: Manchester university press, 2009), 252–66. And even more to the left, Philip Pettit, “Republican Reflections on the 15-M Movement,” *Books and Ideas* (blog), September 20, 2011. I owe the last reference to Julio Martínez-Cava.

to which refraining from using public power often means actively allowing its use in the protection and legitimation of the status quo.

My argument here is that neorepublicanism should follow its original intent. If it is not able to do this, then, when it comes to the problem of “structural domination,” neorepublicanism will ultimately give way to the very liberal-libertarian commonsense against which it was originally developed.⁹⁶ State interference “will be triggered”—to paraphrase Pettit’s reproach against liberals above—“only in response to positive evidence that it may be necessary.”⁹⁷ As earlier chapters of this thesis have made clear, free speech and media reform are fields distinctly prone to be framed in this manner.⁹⁸

5.5. CONCLUSION: STRUCTURAL DOMINATION, A SUBSIDIARY NEOREPUBLICAN CONCERN

Now we are prepared to revisit Pettit’s rendition of Berlin’s thought experiment, in which choosing what to say is represented as picking open doors. Pettit argues for modeling expressive freedom as “protected speech” (§5.1). According to this conception, I can indeed be considered a free speaker only when I enjoy absence of interference in the door I choose, regardless of which option I actually choose, but with an additional republican caveat: that this capacity that I enjoy is not at the mercy of the uncontrolled power of a “doorkeeper.”

⁹⁶ For a parallel point, see Cillian McBride, “Freedom as Non-Domination: Radicalisation or Retreat?,” *Critical Review of International Social and Political Philosophy* 18, no. 4 (2015): 349–74.

⁹⁷ Pettit, “Two Concepts of Free Speech,” 67.

⁹⁸ One may argue that positive evidence of risk of domination (e.g., enabled by patriarchal norms or capitalist markets) is abundant—more than enough to warrant political action against structures, even on the narrow neorepublican understanding of structural domination I am criticizing above. In short, that we do not need to go beyond the view of structures as contingent enablers of domination because our empirical knowledge is good enough as to detect high risks deserving political intervention. I agree with this optimistic stance about our current knowledge about how structures foster domination. However, this contrasts with the fact that, in many cases, there is no agreement on what the right political interventions are, or in which cases intervention against structures is warranted, even among those who follow neorepublicanism (as I will discuss in the next chapter). Yet I believe it would be unfair to moderate neorepublicans to suggest that their policy views are dishonest respect to their normative theory in the face of current empirical evidence. Say, I do not think that Pettit is disregarding empirical evidence or failing to pursue his own political theory when he praises markets more than other republicans. But I do think that his view subsidiary conception of structural domination makes him more fearful of the risks of acting politically against structures that may or may not crystallize into domination. And that, conceptually, this distrust of political action parallels the liberal-libertarian state skepticism he has contributed to denounce. I think it is Pettit theoretical attitude toward structural domination, not his disregard of particular empirical evidence or his declared normative commitments, that tilts the scale one way or another. I want to thank David Casassas and Lisa Herzog for raising this point.

Recall also the three alternative scenarios that I proposed to complicate this thought experiment. They were scenarios that fulfilled the conditions of Pettit’s protected speech and its neorepublican, non-dominating focus on ruling out doorkeepers and their power through properly institutionalized rules, public policies, and so on. Yet, I suggest that in these three alternative scenarios freedom is still endangered. The scenarios represented situations in which despite enjoying absence of interference regardless of the options chosen, and despite not being dominated by a doorkeeper, some agents still suffer from a lack of access to speech choices (§5.2.1), a misrepresentation of the speech choices available to them (§5.2.2), or a communicative failure of performed speech choices (§5.2.3)—or any combination of these. The question they were intended to ask was this: Can the neorepublican ideal of protected speech identify and deal with sources that endanger expressive freedom but are not attributable to the will and actions of an identifiable “doorkeeper,” a dominating agent?

In light of Pettit’s republican theory of justice sketched above and the thickening of non-domination (§5.3.1), it seems an unfortunate wording that he decided to convey his unmistakably neorepublican account of expressive freedom simply as “protected speech”—still worse, since there is no single mention of the crucial concepts of basic liberty, resourcing, or vitiation.⁹⁹ However, as I showed in earlier sections, according to the wider exposition in *On the People’s Terms*, republican basic liberties should not only be “protected,” but “protected” and “resourced.” I believe, then, that any charitable reading of Pettit’s ideal of protected speech should take these two procedures—protecting and resourcing—as two stages of a single effort to guarantee basic liberties.¹⁰⁰ In this sense, and against what critics often suggest, neorepublicanism seems able to deal with the freedom-undermining consequences of the unintended consequences of aggregated social interaction—it is theoretically open to solutions to the problems posed by “structural domination.” Consequently, the above question should be answered positively: once “protected speech” is friendly amended within Pettit’s republican theory of justice, there seem to be enough theoretical tools for solving problems of access to speech choices, misrepresentation of speech choices, or communicative failure of performed speech choices.

However, I have suggested that pointing to solutions is not the same as comprehending the problem (§5.3.2). The ideas of “free person,” “eyeball test,” and “basic liberties” do not contribute to explaining the specificity of “structural domination” that critics of neorepublicanism underline. For

⁹⁹ He explicitly relates the ideal of protected speech with the “long republican tradition” and their “way of thinking about freedom,” *ibid.*

¹⁰⁰ Issues of resourcing of speech choices—“how far people should enjoy access to opportunities of speech”—are set aside by Pettit for reasons of space, see *Ibid.*, 62. It would be unfair, however, to read this as a complete overlooking of the problem, especially in the light of the rest of his work, where expressive freedom is unambiguously considered a “basic liberty,” implying the need of adequate resourcing and awareness against vitiation (e.g., Pettit, *On the People’s Terms*, 103.)

neorepublicans such as Philip Pettit or Frank Lovett, social structures incidentally “facilitate” or “enable” agent-level domination. Thus, the socio-structural generation of domination should be seen as a matter of probability or empirical contingency. In the neorepublican account, social structures must crystallize into agent-level positions of power to count as domination proper.

I have discussed two readings of what “structural domination” might mean for neorepublicans. The first takes it as a special case of agent-level domination that has been generated or is upheld by socio-structural processes (§5.4.1). However, this reading turns structural domination into an uninformative truism. In light of Dorothea Gädeke’s critique, all domination republicans and neorepublicans should care about is to a certain degree structurally produced. My second reading understands “structural domination” as a risk, as a potential case of agent-level domination (§5.4.2). In this second interpretation, not all social structures are the same, and because human agency always remains a relevant variable, the effects of socio-structural factors in the development of relationships of domination should be measured empirically and as a matter of probability, not deterministically or defined *a priori*.

Yet this reliance on empirical estimates of potential agent-level domination when dealing with “structural domination” creates another problem for neorepublicanism, or so I have argued (§5.4.3). Particularly, it makes the neorepublican justification of state interference fall into the kind of conservative snare that neorepublicans hold against liberals. Namely, the notion that state interference requires positive evidence of a bigger, urgent danger, in order to be justified. The argument that liberals and libertarians always put the burden of the proof on the very idea of regulation, and how this involves being submissive to the status quo, served neorepublicans to make their case as an attractive left-of-center public philosophy in the 1990s. If state interference is understood as constitutive of freedom, as an essential prerequisite of it, then the public debate will revolve around the kind of interferences and regulations needed to promote freedom, not around the liberal-libertarian background assumption that questions whether the very idea of state interference is justified in the first place. However, regarding the problem of “structural domination” that original normative thrust fades away. For neorepublicanism, state interference with social structures that condition or vitiate freedom seems to be defensible only when there is positive evidence of actual, imminent, or very probable agent-level domination. Thus, the neorepublican reliance on empirical estimations of potential agent-level domination seems to bring back the liberal-libertarian presumption against political action that neorepublicans significantly contributed to reject.

CHAPTER 6

Beyond “a tolerated play area”

Freedom in contemporary media markets and the limits of exit options

But, ineluctably, the official culture of power goes on its way: and perhaps it has its way even more easily when some part of the opposition confronts it with only a disgusted back. Opting for an alternative can, in certain circumstances, also be opting out, by leaving a vacuum into which power can move. We are not allowed an indefinite period in which to construct an alternative culture, which will then re-emerge into national life, after three or four decades, in the form of a “revolution.” For during that time the official culture of power is not politely waiting for the Left to return, so that the game can start fair again. It is busy all the while. (...)

The “alternative culture” *must* find ways of influencing again, in active ways, the national political life.

E. P. Thompson¹

Chapter 4 examined several reasons why neorepublicanism offers a promising alternative to the free speech libertarian framework. This favorable analysis, I suggested, need not be on normative grounds, as if the neorepublican conceptual toolkit deserves attention only if one has specific political commitments in mind. On the contrary, I contended that neorepublicanism may act as a better descriptive common ground—more parsimonious, less biased, more attentive to the institutional and empirical dimensions of freedom—even for the traditional free speech libertarian concerns. In Chapter 5, though, neorepublicanism did not fare so well. Notwithstanding its many conceptual advantages (on which this project builds extensively), Pettit’s neorepublican conception of freedom of expression—his ideal of “protected speech”—could be blamed for some of the same issues he holds against the liberal-libertarian common sense on expressive freedoms. I argued that there

¹ E. P. Thompson, *Writing by Candlelight* (Merlin Press, 1980), xii. Italics in the original. I owe this quote, pertaining to a rather unknown text, to Julio Martínez-Cava’s sharp expertise on Thompson and his intellectual context. See Martínez-Cava, *Gorros Frigios*; Julio Martínez-Cava, “La tradición democrática en el comunismo británico. E. P. Thompson a la luz de los archivos del MI4,” *Historia Social* 104 (2022): 93–111.

is a neorepublican ambivalence or indeterminacy when it comes to tackle structural domination. Insofar as the relationship between social structures and the positions of domination they generate are conceived as contingent, neorepublican policy interventions against social structures are only justified when these structures have indeed created agent-level domination, or when empirical evidence is strong enough to predict that such agent-level domination will occur.

However, it is often the case that empirical evidence will not convince those who are currently benefitting from structural domination. Efforts for media reform today are a good example of this. To make political action against plausibly harming structures conditional on proving that those who take advantage from them may dominate others in the future is a self-defeating strategy. This is especially true of communication markets, for the social structures in question shape the background conditions that enable free and rational discourse. That is, one needs to prove the case for reform, not only to those who benefit from current communication structures, but also to those who are themselves in control of the means and infrastructures that are needed to have the required public discussion in a fair and equitable manner. This is the background problem that frames this chapter.

In the first section, I emphasize that neorepublicans should evaluate specific markets instead of “the market.” I argue that cultivating the political-economic awareness of historical republicans, we must put our efforts on studying more specific markets. In this sense, I give an overview of communication markets today and some of the ways in which they contribute to the three cases of structural threats to free speech examined in the last chapter (§6.1).

I discuss two neorepublican responses to these issues (§6.2). One makes use of the conventional neorepublican criticism of agent-level domination: tougher policy interventions in media markets are warranted whenever dominating positions are fully formed and threatening liberty. A second, not merely remedial approach can also be justified on neorepublican grounds: predicting and preventing the emergence of dominating agents by understanding structural market patterns and how they may contribute to the emergence of freedom-undermining positions of power.

Then I suggest that not only market failure may be at odds with republican freedom; in some cases, market “success” harms neorepublican goals as well (§6.3). I explore this point by focusing on advertising markets. These markets, pivotal in contemporary communication, commodify audience attention and user data, altering the ends and shapes of communicative interaction. The dependency of producers and outlets on advertising revenue poses a significant structural constraint, distorting the speech choice set available to citizens in ways incompatible with republican democratic self-government and freedom.

This leads me to my final suggestion that advertising markets as we know them undermine expressive liberty, challenging neorepublican ideals even in utopian scenarios in which economic regulations and other media policies

counteract the effects of agent-level advertising dependence, guaranteeing the possibility of “exiting” these markets (§6.4). By considering the public sphere as a limited, shared space, I argue that when it comes to guaranteeing expressive liberties there is nowhere else to exit to. “More” protected and resourced speech choices will only grant the possibility of alternative media and counterpublics. This would be a significant improvement compared to how things currently are in most places. Yet if we conceptualize attention as a common, rival resource essential to effectively carry out the communicative practices that characterize democratic self-government, robust neorepublican exit options are not enough. By reclaiming collective ownership and control of attention in the public sphere, I argue that such a vital resource cannot be left in the arbitrary hands of private attention-hoarders, nor in the hands of arbitrary public power. All elements of the political economy of communication, including the attention-span of societies, must be subject to democratic decision-making and protected from private appropriation if republican expressive freedoms are to count as universalizable citizen rights—that is, as something else than local benefits (no matter how protected and resourced).

6.1. FREE SPEECH AND THE POLITICAL ECONOMY OF COMMUNICATION

6.1.1. Republicanism, markets, and socio-historical change

When it comes to thinking about expressive freedoms nowadays and the circumstances that will make the ideal of citizenship feasible or undermine it, media markets occupy a prominent place. For our purposes, we might understand today’s media and communication markets as the institutions that distribute more and more significant opportunities for public expression and information. Media markets are among the major background structures that regulate the flows of information in the public sphere. And insofar as media markets do not allocate speech opportunities following the egalitarian or sufficientarian distributive patterns that the status of citizenship demands (§II.1), the role they play in the provision and guarantee of expressive freedoms deserves to be considered: Are market distributions of speech opportunities detrimental to the values of equal freedom and self-government that a civic community seeks to promote?

Admittedly, the attention devoted by historical republicans to media markets and their distributive results is scarce. This, however, should not lead us to conclude that these institutions are irrelevant for the republican analysis of expressive freedoms. The reason for the lack of attention to media markets in republican sources is very simple: in earlier periods of history, the role that media markets play nowadays in the distribution of speech and information opportunities relied on other institutions, such as religious pulpits, universities, access to common land and other spaces of socialization, or public offices—and these were much studied, criticized, and reformed by

republicans. It was not until the late nineteenth century that media markets begun to acquire the prominence with which we are familiar; and this was a time when republicanism was becoming eclipsed by other political traditions (§III.1).

Although the historical republican reflection on media markets is scant, this is not the case with other markets. Republicans reflected a lot on markets and their effects, and specifically on those they considered most relevant for the guarantee of liberty in their own contexts, such as markets for land, labor markets, financial markets, or markets for luxury products. The traditional republican approach—which was broadly shared by the bulk of premodern political theory—looked at these economic institutions rather distrustfully. Movable property, the commodification of land, the private accumulation of wealth, moneylending, the pursue of private gain at the expense of others, the poverty and dependence that upheld labor markets, or the moral dispositions allegedly fostered by manufacture and commerce were considered by republicans of different political tendencies as inconsistent with virtue and civic liberty. Phenomena such as these were to be avoided or, at the very least—whenever considered crucial for the material reproduction of society—to be carefully controlled and insulated so as not to distort political life.²

This was the case at least until the late seventeenth and eighteenth centuries, when some thinkers integrated the modernizing insights of what came to be known as classical political economy into long-held republican assumptions.³ According to these new understandings, markets could be something else than buying cheap, selling dear, and taking advantage of others. They could be places for realizing the kind of material independence and civic freedom that captivated classical social theorists.⁴ Markets could, in fact, be allied institutions in the emancipatory struggle against old-regime dependencies.⁵ This relatively modern transformation of the republican attitude toward markets—from skepticism to qualified optimism—is behind many contemporary neorepublican justifications of the compatibility, and even the synergy, between allocative market mechanisms and non-domination.⁶

² E.g., Pocock, *Virtue, Commerce and History*, 48–49, 103–23; Britton-Purdy, *The Meaning of Property*, 34–37; MacGilvray, *The Invention of Market Freedom*, chap. 3.

³ István Hont, *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective* (The Belknap Press, 2010), 8–11. See also John Robertson, “The Scottish Enlightenment at the Limits of the Civic Tradition,” in *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment*, ed. István Hont and Michael Ignatieff (Cambridge University Press, 1983), 137–78. On the ambivalence towards republican conventions on property and liberty within the seventeenth-century English discourse of agrarian improvement and commodification of land, see the historical remarks in David Casassas and David Guerrero, “De ingresos y pedazos de tierra: renta básica, predistribución y desmercantilización en el marco de economías políticas populares,” *Política y Sociedad* 59, no. 2 (2022): 1–16.

⁴ For two works on Adam Smith examining this view, see Casassas, *La ciudad en llamas*; Herzog, *Inventing the market*.

⁵ Britton-Purdy, *The Meaning of Property*, 59–63, esp. n110.

⁶ E.g., Pettit, “Freedom in the Market,” 142; Taylor, *Exit Left*, 46–47.

Before continuing, I want to make a last observation on method. I believe historical republican attitudes toward markets should not be taken in the abstract, but as empirically oriented reflections: as reflections rooted, for instance, in the specific eighteenth-century markets experienced by some of these historical republicans. They were not, put differently, reflections on *any* markets, neither on *the* market, but on *specific* markets that emerged and functioned under *specific* socioeconomic circumstances. It could not be otherwise given the social and political awareness of many of these past thinkers. Adam Smith's political-economic views, to name the most influential case, should be considered bearing in mind that the eighteenth-century markets he wrote about have almost nothing to do with today's industrial capitalist markets.⁷

This observation against normative analyses of *the* market, and in favor of political-economically aware reflections on *specific* markets is relevant for our study of expressive freedoms. As I have suggested in earlier chapters, one of the reasons behind the pervasiveness of the "free speech libertarian framework" is a sort of *décalage* or delay of regulative ideals in economics and politics in the US at the turn of the twentieth century. Chapter 2 suggested how the intellectual and political originators of the demise of laissez faire in economics (roughly, an amalgam of progressives, realist jurists, socialist and later new dealers) contributed with their ideas to the preservation of laissez faire as the most suitable regulative ideal for expressive liberties. They underwrote, in theory and practice, the republican point that state interference is constitutive of, and not just detrimental to, freedom—especially economic freedom. Yet their interwar advocacy for free speech led to the opposite view when it came to think about intellectual and expressive freedoms (§1.3; §2.1).

Thus, the mild anti-trust attempts of media reform or the even softer recommendations of media "self-regulation" that took place during the post-WWII years were built upon shaky ground, normatively speaking (§2.3). This was so for at least two reasons. First, they were conceptually severed from the issue of expanding freedom of expression. At best, media reforms were understood as necessary free speech trade-offs for the sake of healthier democracies or competitive media markets; interference with media markets could be hardly construed as constitutive components of free speech. And second, they were also short-lived: as the postwar consensus around the economic and political need of restraining the democracy- and competition-undermining tendencies of industrial capitalism faded away in the 1970s, belief in the necessity of media reform followed suit. By the 1990s, the communication and information industry was one of the main agents of capitalist globalization, growth, and technological change, and the source of the major accumulations of private economic and political power that were to follow in the next decades.

The lesson is that social and political theorists—and not only historians—must consider the enormous gap between what Justice Holmes's could have

⁷ Casassas, *La ciudad en llamas*, 374–81.

imagined by a “free trade in ideas” in 1919 and the media markets a century later. And that the study of media markets and their relationship with expressive liberty must be open to empirical, specific markets, and have at least a minimal sense of historical and social change. Just as Adam Smith realized that Glasgow’s markets were different from those in Aristotle’s Athens, and just as US progressive thinkers grasped the distance between American industrial capitalism and Adam Smith’s Glasgow, we should do the same when studying earlier or contemporary public spheres, marketized or not.

6.1.2. Media market failure and structural domination

What, then, are today’s public sphere and media markets like? During the last fifty years, communication markets have been characterized by corporate growth and increasing concentration across all media sectors, trends that have been accelerated by digitalization and other technological changes.⁸ From a worldwide perspective, the average C4 ratio in national media markets—which calculates the share of the top four companies in a market—ranges from 87.7% (in platform media markets that mostly distribute content) to 65% (in content and news media markets).⁹ Media concentration has been found to be the highest risk for today’s media pluralism in Europe.¹⁰ And contrary to conventional perceptions, concentration in US media markets of content production and news are not even considered to be oligopolistic on a national level by US Government anti-trust standards—they are relatively low compared to most European democracies. However, well-established oligopolies can be found in local and regional news markets, national telecommunications, and online platform markets.¹¹

In more recent years, these trends have worsened. The internet’s digital promises for free speech have consistently failed. Instead of decentralization, horizontal communication, low barriers of entry, variety of information, enhanced deliberation and universal access to speech opportunities (recall the cyberlibertarian utopia from §IV.3) there is more concentration in online media industries than ever existed in traditional media markets.¹² In fact, online media platforms (search engines, social media, news aggregators...) have grown exponentially thanks to a business model—digital targeted

⁸ Hardy, *Critical Political Economy of the Media*, 81–107.

⁹ Eli M. Noam, ed., *Who Owns the World’s Media? Media Concentration and Ownership around the World* (Oxford University Press, 2016), 1306 (Table 38-1).

¹⁰ CMPF, *Monitoring Media Pluralism in the Digital Era: Application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia and Turkey in the Year 2021*, 49–54.

¹¹ Noam, *Who Owns the World’s Media?*, 552–54.

¹² Tristan Mattelart, Stylianos Papathanassopoulos, and Josef Trappel, “Information and News Inequalities,” in *Digital Media Inequalities: Policies against Divides, Distrust and Discrimination*, ed. Josef Trappel (Nordicom, 2019), 215–28. For a review of early enthusiasm about the internet, see McChesney, *Digital Disconnect*, 1–22.

advertising—that has undermined the economic sustainability of traditional newsrooms and journalism. In the US, Google and Facebook accumulate up to 70% of digital advertising revenue.¹³ It has been estimated that Google’s 2017 advertising income could have provided jobs for 300,000 journalists.¹⁴ These problems are partly due to a failure of public authorities to keep pace with technological innovation (e.g., specific media regulation, such as caps on advertising revenues, audience or market share thresholds often apply only to traditional media).¹⁵ Perhaps the most illustrative expression of the accumulation of power without precedents that some actors wield in today’s media markets is Google’s search engine, with a worldwide market share of more than 80%.¹⁶

In sum, we have easier and cheaper access to information than ever in history, yet control of that access is as concentrated as ever. From a republican point of view, both trends are meaningful for the guarantee of free speech. While the first involves the material potential for a deepening of democratic institutions—better informed citizenry, more chances to communicate with larger audiences, cheaper means of political participation—, the latter trend makes this prospective dependent on the whim of a few powerful private actors—thus making much of that potential irreconcilable with republican freedom.

In this vein, note how the economic trends mentioned just above are among the causes of many examples of what I earlier called “structural lack of access to speech choices” (§5.2.1). Recall news deserts: areas which, comparatively with other parts of a country, do not have good or enough local news coverage. The lack of local journalism damages the access that citizens have to speech choices that might be otherwise “protected” in the neorepublican sense. The same reasoning applies to other cases in which markets fail their liberty-enhancing distributive promise, such as the “digital divide” or concentration of media audiences in a few hands. Of course, “lack of access” is the case most obviously connected with the political economy of communication. But this should not lead the reader to conclude that the two other cases of structural domination I examined earlier are disconnected from political economy—as if they were only concerns, say, related to “symbolic” dynamics of identity and recognition.

Consider the possibility that a market distribution of speech opportunities may end up in most or most significant media controlled by a relatively homogeneous group (culturally, politically, socially...). And consider, too,

¹³ Victor Pickard, “Restructuring Democratic Infrastructures: A Policy Approach to the Journalism Crisis,” *Digital Journalism* 8, no. 6 (2020): 711.

¹⁴ Herzog, *Citizen Knowledge*, IX.3.2, quoting Zephyr Teachout, *Break ‘em Up* (St. Martin’s Publishing, 2020), 74.

¹⁵ Theresa Josephine Seipp et al., “Dealing with Opinion Power in the Platform World: Why We Really Have to Rethink Media Concentration Law,” *Digital Journalism*, 2023, 16–19.

¹⁶ StatCounter, “Market share of leading desktop search engines worldwide from January 2015 to March 2023,” *Statista*. As of the final months of this research, Google has two ongoing antitrust trials in the United States concerning the two examples above (search engine and digital advertising markets).

how this may lead to what I called misrepresentation of speech choices—that is, situations in which speakers suffer from a bias in how they perceive their own expressive capacities, including the range of information available to them (§5.2.2). The phenomenon known as “agenda-setting” captures an instance of how such situation could evolve. (Agenda-setting is the process by which the selection of newsworthy issues in the media influences what the general audience considers relevant or what politicians consider relevant, consequently defining the main topics of political campaigns.)¹⁷

To illustrate, take the case of Spain and the news coverage of *ocupación* (squatting) in the last years. In 2022 there were 17,000 complaints about squatting, which means this criminal offence affected only 0.06% of Spain’s housing stock. And only 5% of these cases were occupations of inhabited houses or second homes—the other 95% involved empty properties.¹⁸ Surveys of public opinion prove the low significance of these facts, since only 1% of Spaniards consider squatting among the main problems of the country.¹⁹ All this, however, contrasts with the ample coverage that the issue receives in major media. As one of the most watched news anchors in Spain put it while reporting in the summer of 2020: “Almost every day we tell you stories of homeowners who have their homes squatted.”²⁰ An initial empirical study of breakfast television finds that, between July and August 2020, 43 out of 66 episodes (65%) of one of the leading programs featured stories focused on squatting.²¹ Hence, the news coverage of squatting has magnified a statistically irrelevant crime (and suffered mainly by a wealthy minority of the population), turning it into one of the main disputes in recent election campaigns—the need to protect citizens from the (alleged) high risk of having their homes squatted becoming a central electoral demand.²²

Suppose that Spain is a Pettitian neorepublican regime. What the notion of “misrepresentation of speech choices” points out here is that, among the set of protected and resourced speech choices an average Spanish citizen would be able to perform on the issue of squatting (e.g., expressing fear, a critical opinion, qualified support, an enthusiastic endorsement...), the information offered by the most significant media outlets clearly favors certain choices instead of others. Even though a citizen right to express fear about squatting

¹⁷ For an introduction, see e.g., Renita Coleman et al., “Agenda Setting,” in *The Handbook of Journalism Studies*, ed. Karin Wahl-Jorgensen and Thomas Hanitzsch (Routledge, 2009), 147–60.

¹⁸ José Manuel Romero, “¿Está descontrolada la ocupación? Ni un fenómeno frecuente ni en aumento,” *El País*, July 9, 2023.

¹⁹ CIS, Barómetro de octubre 2022 (estudio nº 3380), Question 8.

²⁰ Matías Prats quoted in Dani Domínguez, “Ración diaria de okupas en televisión: cómo convertir un problema en el problema,” *La Marea*, August 19, 2020.

²¹ Lourdes García Molina, “La cobertura mediática de la ocupación de viviendas y el pánico moral. Análisis de los magazines matinales de TVE y Telecinco,” *Dígitos. Revista de Comunicación Digital* 8 (2022): 251–72.

²² Martín Cúneo, “El fantasma de la okupación, agítase antes de usar,” *El Salto*, August 28, 2020; Martín Cúneo, “El ‘fake’ de la okupación sigue ganando elecciones,” *El Salto*, June 3, 2023.

could be as resourced and protected as their right to express enthusiastic endorsement, the news and media environment misrepresents the plausibility, reasonableness, or saliency of one of those choices, encouraging one choice over another (fear of squatting, in this case).²³

Now, to reintroduce the problem of “failure of performed speech choices” (§5.2.3), think of the same topic, but this time from the point of view of squatters as speakers. Note, first, that occupation exceeds the narrower phenomenon sometimes called “deprivation squatting.” That is, the self-organized guarantee of spatial social needs often involves—if not always, according to some views—“political squatting.”²⁴ Occupying real estate property, in this sense, is itself a form of protest about housing and urban policies, or the lack of common spaces of leisure. Or, since decent housing is a recognized human right by the UN declaration and a constitutional right in Spain, squatting could be construed as denouncing the incapacity or unwillingness of governments to abide by “the principles of justice which regulate the constitution and the social institutions generally”—to put it in the Rawlsian terms of civil disobedience.²⁵

Secondly, consider how media coverage does much more than magnifying the issue of squatting in relation to its actual statistical or social significance. The way mass media “frame” squatting stories also contributes to a particular picture of the topic.²⁶ On the one hand, it is well-known thanks to official data that most squatting affects the inhabited real estate stocks of banks, hedge funds or big landholders. A recent study in Valencia, for example, estimates that at most 1% of squatting in the city affects small proprietors.²⁷ In the same line, official estimates show that only around a third of squatting cases can be considered as “conflictive.”²⁸ Yet, on the other hand, the conventional framing of the issue in the media fosters a widely different picture, contributing to generate a “moral panic.”²⁹ Anecdotal and dramatic cases shape common news stories, for example: elderly people that lost their home to squatters while doing the groceries, violent squatters that generate problems in the neighborhood, mafias that make a living out of renting squatted houses,

²³ Additionally, fear is a profitable emotion. It keeps audiences engaged and, as I will discuss below, it is a very fertile ground for advertising and selling private security services. I owe this observation to Lisa Herzog.

²⁴ E.g., Rowan Tallis Milligan, “The Politics of the Crowbar: Squatting in London, 1968–1977,” *Anarchist Studies* 24, no. 2 (2016): 8–32.

²⁵ Rawls, *A Theory of Justice*, §55.

²⁶ For an introduction to framing, see e.g., Robert Entman, Jörg Matthes, and Lynn Pellicano, “Nature, Sources, and Effects of News Framing,” in *The Handbook of Journalism Studies*, ed. Karin Wahl-Jorgensen and Thomas Hanitzsch (Routledge, 2009), 175–90. On economic competition leading to lower journalistic standards and sensationalist framing, see Lisa Herzog, “Shared Standards versus Competitive Pressures in Journalism,” *Journal of Applied Philosophy* 39, no. 3 (2022): 393–406.

²⁷ El Rogle Cooperativa, “Informe Oficina pel Dret a la Vivienda” (Ajuntament de València, 2022).

²⁸ Institut Cerdà, “La ocupación ilegal: realidad social, urbana y económica... un problema que necesita solución,” 2017, 18.

²⁹ García Molina, “La cobertura mediática de la ocupación.”

homeowners that lost their property during holidays or to their tenants, young people that occupy without urgent housing needs, and so on.

Here, one can find several reasons that point to a failure of performed speech choices insofar as squatters have to accept the very negative terms—the “frame”—in which their demands are transmitted to the general public. Even supposing that the squatters’ speech is protected and resourced (say, there is a neorepublican “fairness doctrine” requiring representatives of the squatters to be featured each news piece about illegal housing occupation), media framing of the topic could still determine *how* their speech reaches the public.³⁰ The point of the reasoning above is that squatter’s ideas, interests, the things they say and do, could still get distorted in many important ways, even if their access to media is guaranteed—the receiving-side of communication, the average member of the public, would be conditioned by an information environment heavily biased against the squatters’ claims.

6.2. NEOREPUBLICAN MEDIA REGULATION OF MARKET FAILURE

There are two ways neorepublicanism could conceptualize the “structural” threats to free speech examined in the last section. One is by construing them as non-structural, but as conventional cases of inter-agential domination. The other—in line with the arguments I examined in §5.3.1—is by construing these threats as “vitiating” conditions that, albeit not necessarily dominating, plausibly contribute to create future dominating agents.

6.2.1. *Media moguls as the problem: waiting for dominators to appear*

Regarding the first option, for instance, neorepublicans could bring up the recent report that Ana Rosa Quintana, the creator and anchorwoman of one of the morning shows responsible for magnifying squatting in Spain, owns 44 touristic rental apartments.³¹ Thus, it may be argued that she was pursuing her own agenda amplifying the risks of squatting. Or, better, that many powerful shareholders in Mediaset (the media conglomerate) who also have proven interests in the Spanish markets of private security and real estate have put their media power to the service of their economic gain—plausibly acting as “doorkeepers,” domineering news framing and reporting to amplify the risks of squatting. Neorepublicans could also mention other powerful individuals or corporations controlling relevant shares of the media market, such as Silvio

³⁰ The Fairness Doctrine was an FCC regulatory approach that, from 1949 to 1987, required broadcasting licensees to present contrasting views on controversial public interest issues. For an overview focused on competing ideals of freedom, see Victor Pickard, “The Strange Life and Death of the Fairness Doctrine: Tracing the Decline of Positive Freedoms in American Policy Discourse,” *International Journal of Communication* 12 (2018): 3434–53.

³¹ Dani Domínguez, “El negocio turístico de Ana Rosa: gestiona 44 apartamentos entre Madrid y Sevilla,” *La Marea*, May 24, 2023.

Berlusconi in Italy, Rupert Murdoch in Australia, or Carlos Slim in Mexico, or any internet service provider with a regional monopoly power. It should be clear by now how the conventional neorepublican analysis gives a successful account of what is wrong about the power wielded by these agents, and how depending on their networks for information undermines our status as free persons.

Whenever markets have created powerful players that threaten economic competition or civil liberty, neorepublicans have straight reasons for advocating market regulation.³² In this view, the critique to contemporary media markets and the excessive power of some of its players to convey their ideas and interests to the public opinion would not be much different than, say, the traditional republican critique of clericalism in the seventeenth century: monopolies over knowledge and significant means of communication produce self-serving information structures that undermine the deliberative capacities of free citizens, fostering superstition, distorted images of reality, and factionalism instead of unbiased discussions about the public good. In this sense, recall, the return of “feudal” and other premodern metaphors of domination to critically describe markedly non-competitive periods of capitalism, including today’s digital economies, answers to same intuitions as this neorepublican view of markets yielding dominating positions (§4.2.1).

This view, however, involves a limited framing of the problem. The analogy between contemporary media moguls and early modern despotic bishops not willing to open the pulpits to all—or absolutist monarchs granting printing licenses only to their flatterers, or feudal barons using their sway against public authorities—only goes so far. To reduce the negative effects that media markets may have on freedom to specific cases of agent-level domination, albeit it proposes an attractive republican analysis of relationships of dependence, errs on the side of social and economic theory—which are, for our purposes, the supplementary tools to detect structural patterns that may lead to agent-level domination. Let me give three reasons behind this argument.

First, it is easy to imagine theoretical media markets of perfect competition (i.e., with no media moguls, no regulation...) that nevertheless create local gaps of resources fundamental to basic liberties whenever technological and sociopolitical conditions make it unprofitable. We are concerned here with things such as good journalism, news coverage, or broadband internet, but this is also a classic problem with most public utilities.³³

Second, the presence of oligopolist media moguls should not be seen as an exception or deviation from the “normal” (according to some theoretical

³² Richard Dagger, “Neo-Republicanism and the Civic Economy,” *Politics, Philosophy & Economics* 5, no. 2 (2006): 151–73.

³³ Julian Reiss, “Public Goods,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2021. For an overview of this argument in the Western canon of political philosophy, and how it became an (insufficient) rationale to justify state power, see Jonathan Anomaly, “Public Goods and Government Action,” *Politics, Philosophy & Economics* 14, no. 2 (2015): 109–28. On this argument applied to media, see Baker, *Media, Markets, and Democracy*, chap. 2.

model) functioning of media markets. On the contrary, media moguls should be seen as the expected, modellable outcomes of market performance under the empirical conditions of many media markets today, such as high returns to scale, strong network effects, high barriers of entry, innovations locked out by intellectual property, or the fact that some basic infrastructural and natural resources used by mass media often are natural monopolies (e.g., fiber optic cables, airwaves, and so on).³⁴

Third, the “uncontrolled power” of most contemporary media moguls does not only answer to their own will, but to profit-maximization dynamics imposed by market pressure and, notably, their legal duty to shareholders. Therefore, if the economic power of a media corporation such as Google happens to create news deserts by capturing advertising revenue traditionally channeled to journalists and publishers, this should not be ascribed to the hostility of Google’s CEO or managers to this or that region, but to corporate subordination to legal obligations to its shareholders in the context of economic competition and accumulation.³⁵ The point here is that this power would not qualify as the “invasive” targeted capacity of interference that constitutes domination in the Pettitian neorepublican sense.³⁶

Moreover, reducing the problems of media markets to agent-level domination is only normatively fruitful *ex post*, so to speak. It only serves to

³⁴ Kaleb Byars, “An ‘Essential’ Solution: Reworking the Essential Facilities Doctrine to Address Big Tech’s Harm to the Marketplace of Ideas,” *Mississippi Law Journal* 91, no. 3 (2023): 271–73, 298–299 (explaining network effects with the case of Google); Herzog, *Citizen Knowledge*, §VII.2.6 (on intellectual property entrenching first-mover advantages); John Bellamy Foster and Robert W. McChesney, “The Internet’s Unholy Marriage to Capitalism,” *Monthly Review* 62, no. 10 (2011): (on network effects and natural monopolies in communications). I owe this line of criticism to the broader view against the feasibility of liberal theories of property in industrial capitalist societies (i.e., with high returns to scale) put together by David Singh Grewal and Jedediah Britton-Purdy, “Liberalism, Property, and the Means of Production,” *LPE Project* (blog), January 25, 2021.

³⁵ For a critique of the view that managers should only maximize shareholder value, see Lisa Herzog, *Reclaiming the System: Moral Responsibility, Divided Labour, and the Role of Organizations in Society* (Oxford University Press, 2018), 14, 241–44.

³⁶ Regarding the last economic argument, it may be added that some other ways in which media power distorts the public sphere are partially out of reach of the specific agents who wield such power. Think of the systematic negative news framing suffered by religious and ethnic minorities in communities where they lack access to media ownership and control. The fact that, say, mainstream French media contributes to black and Muslim citizens getting a bad press is the product of pervasive racist stereotypes independent of agent-level domination in media markets. Substitute this or that CEO, this or that powerful journalist, or distribute their power among more agents from the average citizenry to counter dominating tendencies, yet you might get the same racist content—despite changing specific dominating agents, you get the same undermining of expressive liberties of audiences and black and Muslim speakers. This is even clearer when, for example, a certain way of distorting reality is, or is thought to be, more profitable because it engages audiences (e.g., sexist stereotyping, sensationalist coverage of crimes, etc.). Here, market incentives reinforce previously existing society-wide prejudices. Can these distortions of reality, and their consequent misrepresentation of speech choices available to audiences, be purely attributed to the will of dominating agents with media power? Or are they merely following a structure of incentives shaped by a racist culture, profit-maximization and advertising markets? On this point, see the next section.

guide normative reasoning and proposals of reform when market interaction has already crystallized into dominating accumulations of power. To the extent that this view only focuses on the wrongs of actual domination between agents, it does not tell us anything about how dominating power emerge in the first place—an imperative task if we want to prevent domination rather than merely redressing it (see §5.4.3).

This raises important questions. What if it is too late to act because the dominating position, once fully formed, is harder or impossible to reform through the conventional uses of public power? Domination is not only a problem because it endangers personal freedom, but because it gives the dominator leverage to resist public norms and power—recall, this was the early modern republican diagnosis of toleration and the Catholic Church (§IV). In this regard, it is worth having in mind Google’s recurrent threats to stop offering its search engine or news aggregation services whenever a democratic legislature starts considering forcing online platforms to share with news producers part of the advertising revenue they absorb from online media readers.³⁷ Or consider the recent history of media conglomerates in South America, fiercely opposing elected presidential candidates advocating for media reforms, taking advantage of their control of communication markets to distort the democratic process, to the point of legitimizing coups d’état.³⁸ Or bringing up Weimar Germany, the case that haunted the first sociologists of mass communication, think of Alfred Hugenberg—the most successful media mogul in the late 1920s and later Nazi Minister of Economy—and the vital role of his multiple newspapers, telegraph company, news agency and film studio in the destabilization of the Weimar Republic.³⁹

To turn again to the case of news deserts, what if the dominating power caused by lack of news (e.g., the local corrupt official) crystallizes silently, taking advantage, precisely, of the lack of informative coverage? As I mentioned elsewhere, the negative correlation between media freedom or plurality and corruption is a well-studied phenomenon.⁴⁰ One might wonder, then, about the counterfactual scenario of not enough media: that is, market-

³⁷ Morgan Meaker, “Australia’s Standoff Against Google and Facebook Worked—Sort Of,” *Wired*, February 25, 2022; Joshua Benton, “Google Is Threatening to Kill Google News in Europe If the EU Goes Ahead with Its ‘Snippet Tax,’” *Nieman Lab*, January 22, 2019.

³⁸ For English introductions to the cases of Argentina, Ecuador or Bolivia, see Cheryl Martens, Ernesto Vivares, and Robert W. McChesney, eds., *The International Political Economy of Communication: Media and Power in South America* (Palgrave Macmillan, 2014), chaps. 2, 4 and 5. These are processes in which the Western international press has often participated; for a recent long-term case study, see Alexander Zevin, *Liberalism at Large: The World According to the Economist* (Verso, 2019).

³⁹ Ross, *Media and the Making of Modern Germany*, 175–77, 180, 241. I want to thank Andrea Pérez for calling my attention to Hugenberg in the context of interwar German culture; see her account in *Arte y política en Hannah Höch: dadaísmo, socialismo y emancipación femenina durante la República de Weimar*, PhD Thesis, sup. À. Lorena Fuster and M. Josep Balsach (Universitat de Barcelona, 2023), chap. 3.

⁴⁰ Aymo Brunetti and Beatrice Weder, “A Free Press Is Bad News for Corruption,” *Journal of Public Economics* 87 (2003): 1801–24; Adserà, Boix, and Payne, “Are You Being Served? Political Accountability and Quality of Government.”

driven news deserts do not only produce specific risks of agent-level domination, but these market processes also undermine the very means required to detect domination. This is exactly what happens with internet access in the US, where the tasks of mapping and measurement of broadband connection are left to the private internet providers themselves (instead of to public or private independent agencies). For this reason, when public authorities in charge of improving internet access must detect market failures, they do not have truthful information. Since the companies responsible for mapping are also the ones responsible for industry failures, monopolies, and areas of subpar service, all these problems are systematically downplayed or hidden in the datasets that public agencies use to assess broadband deployment and telecom markets.⁴¹

6.2.2. Media markets as the problem: the regulator’s burden of proof

To provide a solution in the direction required above, neorepublicanism can opt for another framing of the issue. Instead of focusing on actual dominating relationships, neorepublicans may see specific distributive settings yielded by media markets as “vitiating” circumstances for basic expressive liberties. Circumstances in which, although there need not be dominators, the aggregated result of private interactions creates conditions that incidentally endanger the status of free persons, making them more vulnerable to domination. From the point of view of normative theory, this would only require minor amendments to Pettit’s notion of “protected speech.” Basically, it needs to be expanded in the light of his republican theory of justice (as I have done in §5.3.1 and §5.4.2). It means, first, to include a finer awareness of structural conditions that will probably crystallize into agent-level domination. And second, to develop the neorepublican institutional toolkit so that the choices included among the “basic liberties” are aptly “resourced,” and not merely “protected.”

This, in turn, would outline a more attractive neorepublican argument for regulating and supplementing media markets. Whenever they are not providing the required goods so that every citizen can pass the eyeball test in regard to their speech choices, creating pockets of vitiation and risk of agent-level domination, the republican state needs to come to fix it by providing distributive solutions other than the price mechanism (e.g., antitrust law, offering non-commodified services, shaping market interaction with predistributive measures, and so on). This is perhaps clearest in cases of “lack of access” such as news deserts, digital divides, or media markets in which significant opportunities of expression are very expensive. To the extent that internet connection and news coverage share a lot, economically speaking,

⁴¹ Christopher Ali, *Farm Fresh Broadband: The Politics of Rural Connectivity* (The MIT Press, 2021), 87–91. For a similar example of a market that worsens the epistemic infrastructures that are required for detecting domination in that market, think of financial rating agencies prior to 2008 as elaborated in Herzog, *Citizen Knowledge*, VII.2.3.

with “public goods” (i.e., low rivalry and difficult excludability), neorepublicans may use conventional economic arguments to support state-funded services in those places where the market is predictably not up to the task: think of public funds for local newspapers, a basic income for rural journalists, public internet infrastructures, a share of TV and radio frequencies (or programming time) dedicated to content produced by minorities, and so on.

Then, the second, more attractive neorepublican argument for media reform has a preventive, and not merely remedial, focus, for it emphasizes the need to fix “vitiation” understood as settings that breed domination. Compared to how most communication markets look today, experimenting with the kind of policies to which the neorepublican reasoning leads draws a very promising horizon. I hope my arguments in Chapter 5 made clear that I would welcome any step, no matter how small, that brings our shared libertarian commonsense about expressive liberties closer to neorepublicanism. I wish, in other words, that media regulators would take neorepublican arguments more seriously. But it is worth sharpening this criticism a bit more.

Note that Pettit’s argument of republican basic liberties and their “vitiation” is targeting the plausible risk of agent-level domination, not “structural domination” as such (on this distinction, see §5.4). The focus of the neorepublican argument for media regulation, in other words, would be the prevention of future dominating agents that may take advantage of market distributions, not an argument against these markets as such. I want to note three things about this.

First, targeting agent-level domination, and not markets as such, bears on how media regulation is framed in the public discourse. The neorepublican argument places the burden of proof on media regulators and state interference, not on the advocates of non-interference and communication markets as they are—which was, precisely, part of the liberal-libertarian framework that neorepublicans want to overcome (§4.3, §5.4.3). Advocates of markets as they are, on the contrary, would not have to prove anything, because markets enjoy *prima facie* legitimacy for neorepublicans. The supposition is that, unless proven guilty, the market mechanism will be useful enough or that, at least, it will not make things worse.⁴²

Second, the former observation about public discourse points to the background assumptions of the neorepublican argument on commodification

⁴² On neorepublican *prima facie* reasons to look favorably at markets, see e.g. Frank Lovett, *The Well-Ordered Republic* (Oxford University Press, 2022), 106. Part of the problem is that neorepublican theorists often use relatively idealistic pictures of markets that make them compatible with non-domination by definition. This picture, as they acknowledge, requires much political intervention in markets (Lovett, *ibid.*, 105; Pettit, “Freedom in the Market,” 142, 147). They admittedly judge markets as they want them to be, not as we find them in empirical reality (i.e., they are critical of actual markets by first praising them to set a benchmark). Aside from the other benefits that this strategy may have, it consciously disregards the issue of commodification that I bring up below. In societies in which market imperatives increasingly set the tone in more spheres of life, the neorepublican view makes it difficult to consider the possibility that, in certain cases, not even properly ordered markets will meet the distributive demands of non-domination and citizenship.

(i.e., the process by which a good such as news production of broadband connection is distributed according to market prices and not otherwise). Pettit or Lovett’s agent-centered analysis of domination—which in the most charitable reading includes, recall, attention to how social structures generate the risk of future dominating agents—induces the neorepublican approach to media market regulation to take markets as given, and commodification as a *fait accompli*.⁴³ Say, commodification may be criticized by a Pettitian neorepublican whenever social and economic theory is able to show that it creates vitiation—in the hope of convincing policymakers and stakeholders with the force of facts. But commodification is here accepted as part of the given facts of the social world. On a descriptive level, this is of course acceptable: we have to work with the world as it is, whether we like it or not. Yet, on a normative level, taking markets as a *fait accompli* that must be accepted by further reform efforts is much more problematic: it is a naturalization of social structures.⁴⁴ Put differently, the neorepublican view tends to understand commodification as an independent or explanatory variable. That is, the effects of commodification are studied as plausible causes of domination, but the possibility that commodification itself might have been an effect of domination—thus dominating itself—is ruled out from the start.⁴⁵

⁴³ This point is deeply indebted to ideas originally developed by David Casassas against approaches to predistribution that do not question markets. See Casassas and Guerrero, “De ingresos y pedazos de tierra.” See also Casassas, *Unconditional Freedom*.

⁴⁴ Pettit’s neorepublican defense of markets shows this very clearly: markets can incidentally facilitate domination and must be regulated whenever necessary, but their origins or emergence is assumed to be non-dominating *ex hypothesi*; see his “Freedom in the Market,” esp. 139. In short, his account can explain *how* are the markets that neorepublicans should establish—a very important issue against conventional libertarian views of markets as spontaneous aggregators of preferences ruled by non-interference. But the question of *why* there should be risk-generating markets in the first place is disregarded. Markets are even compared to the facts of the natural environment! (i.e., something that must be regulated and modified if needed, but something whose previous existence is simply accepted; see *ibid.*, 139). For a similar criticism, see Steven Klein, “Fictitious Freedom: A Polanyian Critique of the Republican Revival,” *American Journal of Political Science* 61, no. 4 (2017): 852–63.

⁴⁵ This view of markets that disregards their origins is coherent with the claim that “consent” to institutions is not important for neorepublicanism—only “control” is relevant to achieve non-domination (Pettit, *Republicanism*, 61–63, 185; *On the People’s Terms*, 157–160). This makes neorepublicanism a bad theory to integrate historical arguments for justice or claims of reparation, but also blind to the coercive attributes of markets. Pettit focuses his argument on the correct intuition that consent is a bad proxy of freedom because it need not imply control (e.g., selling yourself as a slave). But he obviates the usual empirical correlation between lack of consent and lack of control—that is, lack of consent may be a good proxy to detect unfreedom. I am not claiming that markets should be only assessed through their history (i.e., whether agents consented to participate in them originally). The point is that, on a descriptive level, lack of past consent to an institution gives many clues to ascertain whether participants can control it today. My argument is less useful for political institutions formally subjected to democratic controls, such as the state (i.e., I did not consent to it, but I can control it). But it is

Third, note that, aside from a thicker view of non-domination, the normative weight of the argument lies on the supplementary predictive apparatus that neorepublicans use when studying empirical reality. That is, it relies on the economic and social theory able to identify “vitiating” circumstances as generating a high risk of domination (high enough as to warrant state interference in the name of non-domination even though there is no agent-level domination yet). However, as a systematic normative theory, neorepublicanism does not say much about what social and economic theory is best to understand the tendency of markets to create vitiation, or how surely or fast vitiating social norms will crystallize into actual agent-level domination. This has the advantage of making non-domination a more ecumenical ideal able to mobilize different views about media markets depending on the social theory used by the neorepublican theorist, it makes it an ideal compelling to different political sensibilities, and so on. It also makes it a flexible ideal, able to react to different social and economic circumstances.

Yet this ecumenism also runs the risk of leading neorepublicanism to political indeterminacy, always requiring further discussions about the merits and shortcomings of concrete proposals of reform according to criteria that are external to neorepublicanism itself.⁴⁶ This is particularly important in the context of most democratic regimes today, with highly unequal media power and domination in communication markets. In this situation—which is our situation—the neorepublican open-endedness about concrete policy issues will play against the chances of media reform. In already skewed public spheres, strong empirical evidence for the need of reform only goes so far. Recall the aggressive use of media power against democratically elected officials and media reforms in South America in the last two decades that I mentioned in the last section. As studies suggest, the social and economic theory or the arguments that back media reform will never get to be discussed rationally and fairly whenever those who are adversely affected by it are also

much more salient with markets, which are spaces usually shielded from political mechanisms of democratic control. If Pettit can be optimistic that today one can build political theory on the assumption that markets are controllable (and thus non-dominating) unless proven the contrary, this is because he is disregarding the essentially non-consensual origins of markets (see previous footnote). The assumption, in my view, should be the opposite. Historical experience shows that many markets are predicated on coercion and dependence; they should be regarded as dangerous for non-domination unless many institutional efforts are in place to prove the opposite (a possibility that I accept). Three classics on the coercive origins of markets are Marx, *Capital*, in *MECW*, vol. XXXV: 704–33, 751–61; Rosa Luxemburg, *The Accumulation of Capital*, in *CWRL*, vol. II: 265–278; Polanyi, *The Great Transformation*, 35–44, 71–80. For contemporary approaches to this idea, see e.g. Robert Brenner, “The Agrarian Roots of European Capitalism,” *Past & Present* 97 (1982): 16–113; Ellen Meiksins Wood, *Origin of Capitalism: A Longer View* (Verso, 2002), 6, 11–12, 97–98, 132–33; Harvey, “The ‘New’ Imperialism.” Note that the charge of market coercion by looking at the origins of commodification is different than the criticism considered and answered by Pettit—namely, the view that some rewards can be assimilated to coercive pressures and, therefore, to interferences; see Pettit, “Freedom in the Market,” 142–44.

⁴⁶ For a related point, see Christopher McMahon, “The Indeterminacy of Republican Policy,” *Philosophy & Public Affairs* 33, no. 1 (2005): 67–93.

those who enjoy the best opportunities for expression and control of flows of information.⁴⁷ In such a biased public sphere, framing the issue of restructuring communication markets as a contingent problem not necessarily connected with expressive freedom, as a question open to empirical discussion in which the burden of proof is always on the advocates of structural reform and never on the advocates of the structural status quo, is a sure recipe for things to stay as they are.

6.3. MEDIA MARKET SUCCESS AND STRUCTURAL DOMINATION

In all of the cases presented above, neorepublicans will tend to see media problems as the consequence of a malfunction or failure of market allocation, as the contingent breakdown of a mechanism that is otherwise worth preserving (although always, in the neorepublican view, with proper regulations and devices of compensation). As Steven Klein has recently put it with critical purposes, this is the view that neorepublican institutions should function “as social insurance in the context of market failures.”⁴⁸ I have argued that this need not mean a purely remedial approach to market regulation, as if neorepublicans could only intervene in communication markets when there are actual media moguls (§6.2.1). In the same manner as insurance companies use actuarial models to assess the risk of a client, neorepublicans might use predictive models from the social sciences to assess the risk of institutions and social structures—and when media markets yield vitiating circumstances that make citizens vulnerable to future dominators, neorepublicans might still have an argument to regulate such markets (§6.2.2).

But what if republican liberty is undermined by market success rather than its failure? That is, what if what threatens expressive basic liberties is not a market failing on its distributive promise, as in the earlier section, but the correct, expected, or normal functioning of a market?

⁴⁷ Martin Gilens and Craig Hertzman, “Corporate Ownership and News Bias: Newspaper Coverage of the 1996 Telecommunications Act,” *The Journal of Politics* 62, no. 2 (2000): 369–86; McChesney, *Rich Media, Poor Democracy*, 65ff; Miguel Álvarez Peralta and Joan Pedro Carañana, “Mediatización de las políticas mediáticas: cobertura de las propuestas de regulación de medios en la XI Legislatura española,” *Revista Internacional de Comunicación y Desarrollo (RICD)* 2, no. 8 (2018): 92–106; Binakuromo Ogbobor, *British Media Coverage of the Press Reform Debate: Journalists Reporting Journalism* (Springer, 2020), esp. 187–202; Christian Herzog and Alise Scerbinina, “‘Self-Centered, Self-Promoting, and Self-Legitimizing’: CNN’s Portrayal of Media Ownership Concentration in the US,” *Atlantic Journal of Communication* 29, no. 5 (2021): esp. 3 for a literature review.

⁴⁸ Steven Klein, *The Work of Politics: Making a Democratic Welfare State* (Cambridge University Press, 2020), 127; see also 34.

6.3.1. Advertising and the commodification of audiences

Commodification in the field of media is not merely a supply-side phenomenon. That is, media markets are not only about allocating communication resources according to the purchasing power of the emitter of messages (e.g., I expand my speech choices as long as I can pay for paper, ink and a printing press; for a TV license and broadcasting infrastructure; for a web domain and SEO services to promote my site, etc.). Neither are these markets only determined by the purchasing power of audiences (e.g., I expand my speech choices if I can pay for a newspaper; for a TV; for a computer and internet connection, etc.). One of the most striking features of media markets is the fact of a demand-side commodification, so to speak: the audience's data or attention is the main commodity which, gathered by media outlets, is then sold to advertisers.⁴⁹ (Note how traditional advertising-based media markets are an early instance of one of the most familiar dynamics in today's digital economies: the supply of low- or zero-cost services that farms audiences/users whose attention span or data are then sold to third parties. Profit is not made on selling the service itself, but on selling your clients' data and attention as potential consumers of other services.)

For this reason, the neorepublican analysis of communication markets must consider another locus of media power and domination: the fact that media revenue relies on advertising introduces another source of content control other than the power rooted in ownership or editorial rights.⁵⁰ This, it may be argued, represents no challenge to the conventional neorepublican view of domination as an agent-level phenomenon. To the extent that the economic viability of an outlet relies on a single or a few advertisers, it is clear how the published content might be seen as contingent on the goodwill of the advertiser. Thus, commercial relationships between powerful advertisers and media outlets can be construed as relationships of dependence that damage editorial autonomy.⁵¹

Recall the earlier example of news coverage of squatting in Spain (§6.1.2) and now consider the additional variable of Securitas Seguros: one of the biggest private security firms and the principal supplier of home alarms in Spain, fined for its aggressive, fear-based selling strategies. It is also the fourth largest advertiser in Spain, ranking many months the first, especially on radio

⁴⁹ For a descriptive model that sees the capacity to gather audiences as the main economic good that mass media produce and sell to advertisers, see the classic study of Dallas W. Smythe, "On the Audience Commodity and Its Work," in *Dependency Road: Communications, Capitalism, Consciousness, and Canada* (Ablex, 1981), 22–51. An updated version of this view can be found in Christian Fuchs, "Dallas Smythe Today – The Audience Commodity, the Digital Labour Debate, Marxist Political Economy and Critical Theory. Prolegomena to a Digital Labour Theory of Value," in *Marx and the Political Economy of the Media*, ed. Christian Fuchs and Vincent Mosco (Brill, 2016), 522–99.

⁵⁰ Baker, *Media, Markets, and Democracy*, 24–30.

⁵¹ For a collection of real examples from the US, see Sunstein, *Democracy and the Problem of Free Speech*, 63–66.

and television.⁵² There are reasons to question whether the media-generated moral panic around squatting can be explained in terms of media dependence on advertisers that sell home alarms explicitly capitalizing on the threat of squatting in their commercials. Put differently, it should be clear from a neorepublican point of view how media owners and editors, whenever economically dependent on others, may engage into subservient attitudes not unlike the early modern courtiers of absolutist princes criticized by historical republicans: as not having their own voice, molding their speech choices according to the interests of their patrons.⁵³

But what if we could have perfectly competitive advertising markets with no dominating players, with an efficient distribution of ad revenue? Or public laws establishing a wall of separation between the influence of powerful advertisers and editorial decision-making? Content distortion would still be threatening to expressive liberties. For what I want to emphasize is that the communicative distortions produced by the commodification of audiences go far beyond dependence on specific advertisers—the problem goes, to put it in the terms of the neorepublican debate of the last chapter, beyond actual or potential cases of agent-level domination. This is because whenever a media outlet must compete in the advertising market it can only do so by adjusting the content it broadcasts or publishes to make it more attention-grabbing.

However, this competition for the audience’s attention span does not lead to a virtuous circle in which the seeking of private profit yields common goods. Media outlets do not outcompete each other by better fulfilling their functions in democratic society (e.g., by offering more and better information, cultural and educative content, watchdog journalism, and so on).⁵⁴ On the contrary, competition to attract audiences leads in the opposite direction: the kind of content that fulfills the democratic functions of the media has repeatedly proven a bad deal when it comes to engaging audiences for commercial purposes.

It could be argued that a stronger democratic or political control over content is able to counteract the race-to-the-bottom pressure that advertising markets put on content. Yet this process affects media regardless of public or private ownership. The case of Televisión Española (TVE), the Spanish public television, exemplifies well this point. After 1983, the Spanish government withdraw most of its economic support to TVE, which from then on would get its income from advertising markets (note, however, that control and ownership still relied on public authorities). Alteration in sources of revenue led to an alteration of content, particularly to the prioritization of entertainment, pushing cultural shows to programming slots of low audience share. In the 1990s, when the spectrum was liberalized and other private TV

⁵² Barlovento Comunicación, “Gross Rating Points de los anunciantes líderes de publicidad en televisión en España en agosto de 2022,” *Statista*. For a journalistic overview of squatting coverage and advertisers of private security products, see Diego Delgado, “Alarmas de ultraderecha y violencia rentable,” *CTXT*, February 14, 2022.

⁵³ See §4.1.2 and the sources cited there on republicanism and the critique of flattery.

⁵⁴ For an overview of these functions, see Herzog, *Citizen Knowledge*, §IX.3.2.

channels were established, TVE only got to keep its market leadership by competing in the new styles of advertiser-attractive commercial programming (e.g., infotainment, low-brow fiction, imported series and films, gossip shows, etc.). This lowering of content standards was an exceptional dynamic compared with most Western European public televisions, only comparable to other underfinanced systems of public broadcasting, such as the Italian RAI.⁵⁵ The lesson here should be that no matter how connected ownership and control rights are, what determines content in commodified media environments is advertising revenue. This gives us an important clue when thinking about media reform: the private vs. public ownership debate should be held with the variable of advertising in mind. Democratically controlled public media will only go so far if they have to compete in advertising markets. On the other hand, the prospects of freedom-promoting markets of privately owned media will grow if advertising markets are kept under check by other means.

Nowadays, “clickbait” is perhaps the most illustrative example of how the mere commodification of audiences (i.e., without the need of powerful advertisers using their market power to have a say on content) already distorts the speech choices made by the media and, consequently, the set of speech choices available to their audiences. In a setting where digital media advertising revenues depend on the user traffic that they are able to generate, clickbait refers to the use of misleading or sensationalist headlines and thumbnails aimed at attracting the attention of social media users and consumers of media outlets. Online users are “baited” into clicking links, thus increasing the advertising revenues of the digital media in question.⁵⁶ The success of “fake news” often relies on clickbait of this sort: on enticing but deceptive content that generates more clicks, user traffic, is shared more and more rapidly, and generally yields more interaction in social media.⁵⁷ Nonetheless, one of the problems of clickbait links is that the harm they produce is often independent of the quality or accuracy of the story behind the headline—established news outlets, for example, also practice clickbait strategies to fuel the user traffic that makes their websites more valuable to advertisers.⁵⁸ And since links on social media are often shared without being

⁵⁵ Enrique Bustamante, *Historia de la radio y televisión en España: una asignatura pendiente de la democracia* (Gedisa, 2013), chap. 3. For an overview of other privatization processes of broadcasting in Europe, see Enrique Armijo, “Media Ownership Regulation: A Comparative Perspective,” *Georgia Journal of International and Comparative Law* 37, no. 3 (2009): 430–44.

⁵⁶ Tim Wu, *The Attention Merchants: The Epic Scramble to Get Inside Our Heads* (Alfred A. Knopf, 2016), chap. 2; James Williams, *Stand Out of Our Light: Freedom and Resistance in the Attention Economy* (Cambridge University Press, 2018), chap. 5. For similar, much earlier processes of commercialization transforming the layouts of printed media, see Raymond Williams, *Communications*, 3rd ed. (Penguin Books, 1976), 99–103.

⁵⁷ On the “cascade” effects of fake news, see Sunstein, *#Republic*, chap. 4.

⁵⁸ Dolors Palau-Sampio, “Reference Press Metamorphosis in the Digital Context: Clickbait and Tabloid Strategies in Elpais.Com,” *Communication & Society* 29, no. 2 (2016): 63–79.

read, many users will only get the deceptive “information” of the clickbait headline.⁵⁹

Although growing rapidly in the last decades, clickbait is not a recent phenomenon. Rather, it should be understood as a late, internet-adapted descendant of much earlier trends in media markets such as tabloidization, infotainment, and sensationalist reporting. These are trends that historically correlate with periods of growing commodification of news production and consumption, both in the newspaper and the broadcasting industries. The process is well-known: as the economic sustainability of media outlets becomes contingent on advertising revenue, increasing media competition to attract larger or niche audiences—which is what makes outlets attractive to advertisers—turns out shaping the content and style of the information that gets published and broadcasted.⁶⁰ From an epistemic and democratic point of view, these changes have often been deemed negative.⁶¹ Think of the priority given to news stories of lurid crimes, sports and celebrities over the more expensive and less profitable (but democratically relevant) genres such as in-depth reporting, foreign correspondence, and watchdog journalism. Instead, one sees a polarizing and sensationalist coverage of democratic political processes; fast and superficial news cycles that generate as much novel and exciting content as possible; the blurring of the lines between sponsored content and actual information; or talk shows about issues of public interest in a histrionic style and populated by fast-thinkers, etc.

Certainly, high-quality content-creators are still alive. Independent, publicly funded journalism is still a reality in many places. And there are traditional private media, especially newspapers, that are turning to earlier methods of funding, such as reader subscriptions, to find alternative business models in a digital environment. In the light of concerns that I will develop below, however, it is worth stressing the very restricted nature of these outlets from a wider point of view (§6.4). In the case of public media, this restriction is quite literal and tragic when one notices how content created with taxpayers’ money ends up being absorbed by private digital platforms if it does not want to be relegated to indifference. This is barely impossible to avoid with search engines or news aggregators, but it should be emphasized, for instance, that most state-owned Western European broadcasting corporations systematically upload content to their YouTube, Twitter, Facebook, Instagram, or TikTok accounts. This is, of course, part of their public mission, a necessary step to

⁵⁹ Herzog, “Shared Standards versus Competitive Pressures,” 395.

⁶⁰ Aside from my remarks in §2.2.2 and §2.2.3, for a historical overview of this phenomenon as a specifically late nineteenth-century development in which political patronage of content producers gave way to dependence on advertising markets, see Habermas, *The Structural Transformation*, §VI.20; Williams, *Communications*, 14–27; Michael Harris, “The Structure, Ownership and Control of the Press, 1620–1780,” in *Newspaper History from the Seventeenth Century to the Present Day*, ed. George Boyce, James Curran, and Pauline Wingate (Constable, 1978), 82–97; Curran and Seaton, *Power without Responsibility*, 28–108; Pickard, *Democracy without Journalism?*, 17–39.

⁶¹ E.g., Habermas, *The Structural Transformation*, 181–95; Baker, *Media, Markets, and Democracy*, 7–19; Rawls, *Political Liberalism*, 364–68.

reach younger and international audiences, and so on. But it gives a measure of how far the private control of communication infrastructures goes that for the BBC, RTVE, Deutsche Welle, RAI or France Télévisions (to name the most powerful and well-established examples) to fulfill their public mission today, they have to agree on the terms and conditions of platforms while making these private companies richer. This is the meaning of “restricted” a few lines above: much of the great service that could be done by these broadcast corporations to the expressive freedoms of European citizens is delimited by the will and interests of private agents.

A similar thing could be said of newspapers that make efforts toward keeping journalistic standards protected from the transformations of advertising markets during the last decades. Editorial autonomy safeguarded by subscription fees is still circumscribed by reliance on private platforms for the sharing of such content—even among subscribed readers. Moreover, this restricted contribution to a free public sphere is not very promising from the point of view of access to speech opportunities: usually only established media with enough prestige achieve sustainable models in which subscription income eliminates advertising dependence. From the point of view of access to the speech of others, the model is not promising either when subscription is accompanied by paywalls that restrict readership or, as many media leaders recognize, by a tendency toward writing for niche, educated elites that are willing to pay.⁶²

6.3.2. Market opportunity and structural domination

What characterizes the media processes described above is that the deformation of content that shapes citizens’ speech choices is not easily explained by the power of specific dominating agents. It is the commodification of content production and communication that explains the democracy-undermining distortions of content. It is the mere existence of advertising markets—with advertisers willing and able to pay for the attention of audiences—that pushes content quality into a downwards spiral. There is no clear “doorkeeper” whose capacity of uncontrolled interference is determining that news reporting should be melodramatic or about shocking events. There need not be an agent whose invasive power favors alluring-but-misleading headlines over more informative ones. And importantly, advertising markets are not vitiating in the sense that they will plausibly contribute to the generation of future dominators: their effects are different in kind than, say, new desserts, digital divides, or other instances of lack of

⁶² Nic Newman, *Journalism, Media, and Technology Trends and Predictions 2022*, Reuters Institute for the Study of Journalism (Oxford University, 2022), 8–15.

access due to market failure that nurture positions of domination (recall §5.3.1 and §6.2).⁶³

Sure, from the point of view of the newsroom or the production company, there are dominating agents of this sort. There are boards of shareholders and managers who push towards profit-maximizing content, advertisers who put pressure on managers and owners, editors and producers who—receiving orders from above—force journalists and writers to cover some topics rather than others, senior staff who police the work of interns so that it adjusts to stylistic guidelines aimed at boosting interaction in social media, and freelancers whose next week’s pay hangs on obeying most of these demands to the letter. Along the process of content distortion that ends up producing a clickbait link, a sexist reality TV show, or an anecdotal news story of a crime there are indeed many instances of agent-level domination—recall, the relationships of power that neorepublicans criticize and against which the ideal of “protected speech” is aptly positioned (see Chapter 4 and §5.4). The detection of all these agent-level relationships is significant to develop preventive and remedial mechanisms within workplaces, public institutions, or any organization involved in the process of communication. However, to assume that clickbait, the scarcity of quality watchdog journalism, or the excess of reality TV (and the problems they may generate for the democratic process) can be merely explained in terms of these lower-level relationships of domination completely misses the point. As I said earlier, I do not think neorepublicanism necessarily involves such a naïve view of social structures (§5.3.1, §6.2). Yet it is less clear whether neorepublicanism induces us to believe that by fixing the lower-level relationships of domination the overall structural problem will be solved.⁶⁴

Suppose that a neorepublican democratic state boldly decides to put an end to the agent-level relationships just described. By transforming prevailing conceptions of property rights, it robustly separates power of ownership from advertisers, and these two from power over content; it gives journalists strong labor rights; thanks to a substantial unconditional and universal basic income the state also grants journalists an attractive exit-option from the power of

⁶³ A recent promising attempt in this direction is a study that finds a correlation between Italian municipalities with early access to Mediaset (Silvio Berlusconi’s media conglomerate, famous for its low-quality entertainment, sensationalist and sexist TV programming) and electoral support to personalistic leaderships (first Berlusconi himself in 1994, but also other “populist” parties from across the spectrum). See Ruben Durante, Paolo Pinotti, and Andrea Tesei, “The Political Legacy of Entertainment TV,” *American Economic Review* 109, no. 7 (2019): 2497–2530.

⁶⁴ It may be said that professional ethics could play a role in preventing these problems. My view, to put it in republican terms, is that virtue is nurtured under adequate institutions. I think that journalistic ethics could offer in the above cases a supplementary framework at most. Lacking enough motivational force on its own, it may play a role reinforcing patterns of professional performance that, whenever possible, must be either enforceable or incentivized by institutional strategies independent from ethical considerations. In situations not covered by conventional institutional design for practical or moral reasons (e.g., we cannot or do not want to build a panopticon in every newsroom) professional ethics may then play a legitimate and important role. I want to thank Lisa Herzog for raising this question.

editors, etc. Imagine, further, how drastically these measures would change the media landscape. Big and mid-size media corporations would no longer be an interesting option for investors, who cannot force outlets to become profitable audience-gatherers to be rented to advertisers. Supplementary measures toward general economic inequality would eliminate another common trend in advertising markets today: the creation of content for niche wealthy audiences. Against the backdrop of declining media corporations, a market of independent journalists would flourish, economically supported, in the last resort, by their guaranteed basic income. With the help of their own social media accounts, newsletters, and video blogs—suppose, for the sake of the argument, that these are hosted in non-dominating digital platforms—the basic-income-supported independent journalists and their small-scale cooperative ventures would deliver most of the communicative goods a modern democratic plural society is supposed to get from media markets, from watchdog journalism to celebrity gossip. In sum, suppose that society succeeds in putting an end to the agent-level relationships of domination mentioned above, that it succeeds in setting the conditions for a kind of republican property-owning democracy in media markets.

My point is that none of these worthy measures against agent-level domination would change the fact that a significant part of media income *could* still come from advertising revenue.⁶⁵ That is, in the neorepublican property-owning democracy we are envisioning, advertising markets are still legal because markets as such are thought of as non-dominating—hence, there are no freedom-related reasons to act against them. Media and journalists, then, albeit taking part in an economic environment in which there is no domination, they may still engage in familiar practices related to advertising markets, say, attracting wider or very niche and profitable audiences to get an extra revenue which, in turn, involves changes in content and style that distort information in democracy- and freedom-undermining ways. Importantly, I insist, thanks to the universal basic income the economic survival of outlets and journalists is not at stake anymore. This would mean a major improvement compared to the current situation. Under the imaginary conditions proposed above, it is not wage-dependency or market-dependency what moves journalists and outlets towards worse but more profitable content—it is not the fact that labor and advertising markets are structurally unavoidable unless you are very wealthy, as in today's capitalist societies. However, in so far as becoming an asset for advertisers is still a lucrative

⁶⁵ Put differently, the imagined example is intended to settle the background conditions so there is only market opportunity, and not market compulsion. On this distinction, see Wood, *Origin of Capitalism*, 6-8.

possibility, the incentive towards content distortion is still in place, albeit not coerced by necessity anymore.⁶⁶

It is plausible that, in the imagined scenario, clickbait-like distortions will not be as big and extensive as that they are in today’s media markets. Journalists and publishers can safely say “no” to specific advertisers but also to advertising markets in general. However—this is the important point—even if the imaginary conditions rule out market coercion, they do not rule out market opportunity. In the imagined basic-income-supported property-owning democracy, independent journalists and their small-scale outlets still have the possibility of increasing their income by turning their communication capacity into a profitable audience-gathering mechanism to be rented to advertisers. I believe many journalists and creators of content would reject this opportunity for the sake of their creative autonomy, or due to a public-spirited understanding of their job. And, importantly, thanks to the imagined political-economic reforms, they will have a protected and resourced capacity to exercise this choice. In sum, the practice of the civic virtues associated with the media would not be at odds anymore with economic survival.

I find the normative horizon outlined by the example very attractive, for it captures that classical republican ideal of economically independent citizens: insulated—if they so choose—on their small plot of land but with the capability and means to organize collectively with their fellow citizens and participate in public deliberation—if they so choose. It captures that ideal and translates it to the current media landscape. And, according to such a view, the possibility of creating and communicating speech without depending on anyone (not on media owners, neither state bureaucrats, nor advertisers), which is only accessible to the very wealthy few today, would have general reach. Every citizen, journalist or not, would ultimately have a protected and resourced form of freedom of expression. And, if this view is supplemented with the lessons of earlier chapters, no citizen will suffer lack of access, misrepresentation, or failure of speech choices—and if they do, it would be only because they decide so by not choosing to use the always available and economically sustainable media not distorted by advertising.

⁶⁶ Note that here I am dealing with the criticism that advertising distorts content in a general sense, not with the view (with which I also agree) that ad revenue distorts content more specifically: preventing diversity by forcing media to create content that do not track the interests of poor, unprofitable audiences (see e.g., Baker, *Media, Markets and Democracy*, 27–29; Herzog, *Citizen Knowledge*, §IX.3.2). Incidentally, this is a problem that goes beyond advertising. As I argued above, this is, for instance, one of the main problems of subscription models (one of the main alternatives to advertising revenue): outlets tailor their content to readers willing to pay. In fact, digital media have partially solved the diversity criticism thanks to the personalized curation of content accompanied by targeted advertising. Thus, today the exact media product can display different adverts depending on additional predictions about the user—say, the same cooking video on YouTube may have ads of expensive cutlery addressed to older, wealthy foodies, but also ads of a professional school addressed to younger and poorer users. Similarly, in digital outlets and social media the same set of adverts may be shown to users who are nevertheless consuming different content through personalized feeds.

My example would embody, in other words, what some authors have imagined as an exit-oriented institutional arrangement guided by neorepublican institutions: a system which, thanks to suitable measures of protection and resourcing, makes the allocative attributes of markets to enhance the capacity of all to escape from relationships of domination, while leaving their range of alternatives open-ended.⁶⁷ In terms of the political economy of the media, this would mean a fertile and economically sustainable ground for so-called countercultural or alternative media. Anyone could “exit” toxic or uninformative media environments that dominate or foster domination and take part in the always feasible, alternative, non-dominating communication ecosystems shielded from the effects of audience commodification.

Nonetheless, in a Marxist, pessimistic view of property-owning democracy, the economic trends that reproduce market opportunity in some areas (the joint effects of profit maximization, competition, and accumulation) will eventually expand to the rest of social spheres, turning what has been a market opportunity into market coercion.⁶⁸ In our example, this is the plausible scenario that ad-boosted media will end up commodifying the whole field of professional communication, offering much better conditions and success opportunities for creators of content. However, for the sake of pondering the strengths and weaknesses of the neorepublican position, let us assume that other promising alternatives, such as crowd-funded media and big cooperatives emerge. And, in any case, let us also assume that vigorous political institutions could contain these economic trends in the media, limiting the scope of advertising markets so that they keep being a purely voluntary option that does not end up effectively capturing all relevant media. In short, let us accept, for the sake of argument and against the Marxist complaint, that at the end of the day, citizen self-organization, the state and media policy shape markets and processes of commodification, and not the other way around.

None of this means, I insist, that advertising will cease to exist. And what is more important, my imagined scenario built around protecting and resourcing exit options does not give us clues about how prevailing ad-boosted media will be. That is, we know that low-quality ad-boosted media is a legitimate but not necessary option for communication professionals, and its correlate, auspicious possibility: that expensive, objective, independent media

⁶⁷ See Taylor, *Exit Left*. In a more radical vein, with a deeper awareness of what is specially dominating about labor markets, and with the need of enhancing “voice” too, this is also my reading of what Casassas advances with regards to markets in *Unconditional Freedom*, or Lovett in *The Well-Ordered Republic*, 104–19. Categorizing the different families of neorepublicanism along their emphasis on “exit,” see Adrián Herranz, “Boundaries and Varieties of Republicanism,” *Critical Review of International Social and Political Philosophy* Online First (2023): 1–22. Out of the neorepublican milieu, Britton-Purdy envisions a similar world based on the diffusion of productive assets thanks to digital technologies in *The Meaning of Property*, 145–56.

⁶⁸ Tony Smith, *Beyond Liberal Egalitarianism: Marx and Normative Social Theory in the Twenty-First Century* (Brill, 2017), chap. 8; see also 332–34 on property-owning democracy.

will remain a feasible choice, and so will educative content, in-depth watchdog journalism, and so on. But the institutional setting outlined above does not answer the question of what share of the public sphere is taken by each of these options. Will ad-boosted media be less frequent than the less profitable (yet always feasible) alternatives? Or is the envisaged property-owning regime yielding a media ecosystem in which ad-boosted media predominate, with ad-independent media only engaging niche audiences, attracting a comparatively smaller part of the public sphere?

My view is that, after some time, other things equal, ad-independent media will tend to play a residual role in the public sphere vis-à-vis ad-boosted media. In a possible interpretation of neorepublican media market reform, the kind of non-dominating media environment that fosters democracy and expressive liberty will only be an alternative among others—conceivably, a minority alternative (albeit properly resourced and protected).⁶⁹ This is because the neorepublican focus on preventing agent-level domination is already satisfied by having public or private institutions robustly delivering the goods that markets are not able to provide. This means that guaranteeing the existence of a protected and resourced exit from commodified media markets is enough to counter actual and potential agent-level domination in those markets. But to the extent that advertising markets are still an opportunity for media growth, with their incentives to content distortion for the sake of making a profit on accumulating audiences, exit options will be just that—*options* that may or may not be chosen by citizens. Media professionals with fewer misgivings about the civic dimensions of their job will embrace the possibility of becoming audience-gatherers for advertisers. Plausibly, many if not most consumers will end up choosing as their means of information, entertainment, and expression the ad-boosted media purposively designed to be more engaging. In this process, ad-boosted media will get access to considerably bigger sources of revenue compared to non-commodified private or public media (even assuming generous public funding); revenue that might be reinvested, further improving the capacities of ad-boosted media for producing and distributing information, scaling up these businesses.

This possibility is one that republicans (and neorepublicans) have good reasons to consider, for many of the problems I pointed out in earlier chapters would survive—only in a less widespread and “voluntary” form, given that

⁶⁹ This should not be read as fatalistic view of democracy or self-government (i.e., that only a minority of individuals would live up to their expressive and informative duties as citizens). On the contrary, it should be read as recovering a republican-democratic view on the preconditions of government. This view is that whether people have “civic” dispositions or not depends on a certain institutional environment. In light of a lack of such dispositions, one should not proceed by limiting the franchise to those that have them (as undemocratic republicans used to do), neither by ignoring the problem of civic virtue (as some modern liberalisms do). The democratic-republican lesson is to carry out the necessary reforms so that the adequate institutional environment is in place, nurturing the adequate dispositions that make civic life possible. The argument is that advertising markets work against getting the suitable institutional environment in the field of media. I want to thank Lisa Herzog for pressing on this point.

suitable alternatives would always remain in place. Yet this is a problem not contemplated by the mainstream neorepublican analysis on actual or predicted agent-level domination (§5.4, §6.2). It is a concern that affects advertising markets as such, regardless of the positions of power of economic players in them. This concern requires, then, a critique of audience commodification itself: the explicit possibility of questioning the structural patterns associated with advertising markets themselves, regardless of whether they involve or foster agent-level domination. This is the issue I take up in the next section.

6.4. WHEN THERE IS NOWHERE TO EXIT TO

It is worth noticing that most neorepublican defenses of property-owning democracy or universal basic income focus on labor markets. This is most reasonable since these are some of the clearest sites of economic domination in contemporary societies. Notwithstanding the varying degree of radicality and concrete policies in different authors, I find the general neorepublican analysis of capitalist labor markets very convincing. Much in line with the imagined property-owning democracy above, it compellingly mobilizes the language of “choice” and “opportunity” (an essential semantic field of free market apologetics) to ground a criticism of markets. All of it, moreover, clearly connects with the historical uses of republican freedom to condemn wage-slavery.⁷⁰ In a nutshell, the argument is that selling labor under capitalist conditions involves unfreedom because it is predicated on the lack of choices of most people who, instead of voluntarily taking advantage of a market opportunity, are forced into labor markets. Absent any viable alternatives, most people cannot “choose,” properly speaking, whether to sell their time and effort—they have to do it, or else starve. It is for this reason that the obvious republican solution to such dependence is ensuring a citizenship status that allows workers non-dominating choices. Even in the most radical approach, this need not lead to banning wage labor, but to make it unfeasible by turning it into an unattractive option when compared to others. Hence, in practice, the neorepublican view recommends the protection and resourcing of alternatives—from a land redistribution that creates independent farmers to a universal basic income that makes wage labor voluntary, including measures to foster cooperatives and self-employment, workplace democracy, publicly funded labor benefits and rights, and so on. Commodification of labor, in short, is counteracted by enabling more and better choices than existing labor markets offer.

My contention in this section is that this “more and better choice” reasoning, no matter how attractive for neorepublicans in other fields, presents particular problems for the case of expressive liberties. It is remarkable, in any

⁷⁰ E.g., Domènech and Raventós, “Property and Republican Freedom: An Institutional Approach to Basic Income”; Gourevitch, *From Slavery*; O’Shea, “Socialist Republicanism”; Pablo Scotto, *Los orígenes del derecho al trabajo en Francia (1789-1848)* (Centro de Estudios Políticos y Constitucionales, 2021), 161–269.

case, that this is a very common rationale in discussions about freedom of expression (neorepublican or not). As it is said in an oft-quoted concurring vote of Brandeis and Holmes on free speech: “the remedy to be applied is more speech, not enforced silence.”⁷¹ This view has shaped, and it still may shape, a powerful rhetoric against arbitrary censorship of all sorts. But this dichotomic opposition between “silence” and “more speech” also tricks us into thinking free speech as limitless—as a disembodied, self-contained ideal, disconnected from the restrictions imposed by its preconditions and political-economic circumstances.

6.4.1. Attention and free speech in a limited, common space

From a neorepublican point of view, then, exit-oriented arrangements are attractive to solve the problems of many markets. However, this reasoning should not be extended to every market.⁷² Aside from labor markets, as discussed above, in some markets for consumer goods, protected and resourced options may include public alternatives which, like in the fields of health or education in a welfare state, set a minimum standard of quality, non-commodified and free options, partly subsidized options, etc. This is the subsidiary or complementary role of media policy in most Western countries today: media funded and/or controlled by the public provide content and means of expression that communication markets do not deliver. Note how in the imagined property-owning democracy of the earlier section, the role of public institutions ensuring these alternatives still follows this logic of subsidiarity—albeit much more amply, involving, I insist, a significant improvement compared to today’s media regimes, at least from the point of view of this thesis.

But the exit mechanism has a limit whenever the harm or dominating effects done by markets go beyond the individuals participating in that market. Consider a common measure against global warming: favoring the consumption of goods with a low carbon footprint. Following the reasoning above, public authorities could grant a resourced exit option from mainstream markets that offer cheap but highly polluting products (e.g., the state may subsidize green clothing to make it at least as attractive to consumers as fast-fashion). But since the harms of consuming goods with a high carbon footprint (i.e., climate change) go far beyond the agents participating in that market, the exit option falls short because the harm upsets everyone regardless of the option they chose. In a neorepublican regime with a properly ordered labor market, if I decide to accept an alienating, bad paying job, it may be said that

⁷¹ Whitney, 377. Not by chance, the phrase is part of a strongly Chafeean passage that retrojects epistemic free speech to the American Founders—“courageous, self-reliant men, with confidence in the power of free and fearless reasoning.” For context, see §1.3.2.

⁷² On exit options being an insufficient response to commodification in *some* markets, see Lisa Herzog, “Markets,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2021, §3.2, §3.3.

the blame is on me, because I have the protected and resourced option to do otherwise (assume resourcing and protection also preclude ideological influences). And if I choose the bad job nevertheless, the assumption is that there is no domination here. The reasoning from the point of view of employers is the same. If they decide to offer legal but subpar jobs in a context where employees have other options, it is the employers' problem, not the republic's, if they find no employees. In the neorepublican regime, all is fine as long as I have other non-dominating options and my actual choice does not contribute to dominate others. Yet this is not the case with carbon-intensive products: my choice in this market, as a consumer or producer, adds to the domination of others (e.g., future generations, people living in flood risk areas, etc.). I do not think, for this reason, that a neorepublican polity should settle here on preventing domination by means of market regulation or by offering subsidized alternatives. In some cases, maximizing non-domination will require attempts to ban markets in carbon-intensive commodities altogether. Funding exit options is not enough.

I believe the communication markets that structure much of the contemporary public sphere should be seen in this manner: not like the properly ordered labor market in which (at least in theory) my choices only concern me, but rather like markets in which, no matter how well regulated, my choices concern my fellow citizens, and in which commodification itself may therefore undermine the guarantee of non-domination. Similar to the atmosphere or the biosphere, the public sphere is an environment unavoidably shared by all with delicate ecological balances in which aggregated individual decisions eventually affect all. Significantly, the public sphere understood in this manner is not only a limited space, but it is also *the* shared space—there is no real “exit” option because there is nowhere else to go, so to speak. The public sphere can be segmented in different ways (e.g., by communication technologies, by segregation of audiences according to different variables, etc.), but as the informational and communicative space in which democratic institutions seek legitimacy, as the realm of “public opinion,” the public sphere may be thought of as a single, finite space.⁷³

This bears on how we think of the guarantee of expressive liberties. In the conventional understanding of the public sphere as an almost infinite space in which there is always space for “more speech,” the focus of expressive rights naturally leads to the emission of messages. Thus, the fact that I am able to release a message is usually thought of as a sufficient index of my freedom of expression. Such a message may find a big group of active listeners or fall into the most absolute indifference, but this is considered irrelevant for free speech.

⁷³ For two views of free speech as an environmental good that run parallel to mine but that emphasize other attributes of shared spaces and public goods (respectively, the collective well-being involved in a background culture of debate that nourishes democratic character, and the polluting effects of hate speech and), see Vincent Blasi, “Free Speech and Good Character,” *UCLA Law Review* 46 (1999): 1567–82; Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012), chap. 4.

Hence the occasional uses of “more speech” as the panacea that will solve most of the problems.

In a thicker view of expressive liberties, such as neorepublican “protected speech,” this emission-centered approach is more complex, for it includes concerns about what are the significant means of communication in a given society. Pettit’s “eyeball test,” for instance, may partially fulfill the purpose of concretizing the kind of resources and institutions required by basic liberties (§5.3.1). Here free speech is not simply about emitting messages regardless of what happens next (which social media already allows, in a way). It is about being able to do it through the proper means—what is “proper” being determined by shared social standards and the capacity to partake in relevant channels of political decision-making, be they part of public institutions (e.g., elections and parliamentary debates) or not (e.g., the street, mass media). It is in this sense that I suggest that the reflection on the proper means of communication—on the kind of means every speaker considered “free” must be able to use—demands awareness about the reception-side of communication. For it is the description of reception, of how audiences take up messages in a given society, that determines what are the most significant means of expression. In turn, the identification of these means, insofar as they include limited physical resources, can serve as the basis of distributive claims connected with expressive freedom. In this view, the public sphere is indeed considered “limited,” but only for *technical* reasons. “More speech” solutions may encounter technological and physical boundaries. This view captures much of what I argued for in the Introduction (§I): what grounds the finitude of the public sphere (and thus any distributive claims associated with free speech) is the fact that communication is rooted in its own political economy—the fact that human access to the public sphere, to the minds of our fellow citizens, is mediated by unevenly distributed resources that are, in many cases, rival goods, such as time or infrastructures.

Such a reception-centered view of free speech is not as odd or alien to established intuitions as it may seem at first sight. One of the most powerful regulatory rationales of communication in the twentieth century proceeded on such assumptions. Much in line with the early modern examples I quoted in the Introduction (§IV.1), Brandeis’ endorsement of “more speech” was also preceded by a conditional: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education.”⁷⁴ But what if there is just not enough time, not sufficient “opportunity for full discussion”?⁷⁵ This is often the case in mass societies, where the most significant opportunities for discussion require the use of clearly finite, rival resources. Among these were the airwaves required for radio and TV broadcasting. The rivalry and low excludability of the radio spectrum made crystal-clear that significant exercises of free speech could not be unlimited. The regulatory rationale followed naturally: once broadcasting technologies

⁷⁴ Whitney, 377.

⁷⁵ Ibid., 377.

are widespread, an arbitrator ordering turn-taking or frequency allocation is needed if discussion through the airwaves is to be comprehensible at all. This meant that only a limited number of speakers were able to use the means to transmit messages to massive audiences. “More speech” in the airwaves eventually yields “more noise” when speakers interrupt each other in a room, and also when broadcasters overlap each other in the same frequencies.

This was the view, for instance, behind the US Supreme Court’s arguments that upheld the Fairness Doctrine in the late 1960s—an FCC regulation that required holders of radio and TV frequencies to present controversial topics impartially, thus inviting diverse speakers. The radio spectrum, the Court argued, is a resource “of considerable and growing importance whose scarcity impelled its regulation.”⁷⁶ This political-economic circumstance, in turn, contributed to determine the constitutional meaning of free speech:

There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.⁷⁷

The Court concluded on these grounds that “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”⁷⁸ The First Amendment not only contemplated the obvious claim of licensees to broadcast free from government censorship. It also included the claim of audiences to get a fair informative treatment of public issues, and the claims of other speakers to access the private facilities of those who owned licenses.⁷⁹ The basic political-philosophic insight behind this decisions was expressed in a traditional demand of the labor and free radio movements of the earlier decades—“the air belongs to the people.”⁸⁰

It is important for my purposes to emphasize this idea, for it provides the background for an anti-commodification, reception-centered regulatory rationale grounded on the essentially common nature of the infrastructures or resources that make communication possible. As the Court said, in case that such resources are to be managed by a private party, this party is but a “proxy or fiduciary” of the public—private managers of means of communication,

⁷⁶ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. (1969), 367.

⁷⁷ *Ibid.*, 367.

⁷⁸ *Ibid.*, 390.

⁷⁹ Compare this reasoning, for example, with the Court’s expressly anti-egalitarian retort that Rawls disparaged in the *Buckley* decision a decade later in: “The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment” (*Buckley*, 48–49; *Political Liberalism*, 360). See §3.1.3.

⁸⁰ Victor Pickard, “‘The Air Belongs to the People’: The Rise and Fall of a Postwar Radio Reform Movement,” *Critical Studies in Media Communication* 30, no. 4 (2013): 307–26. See also McChesney, *Telecommunications, Mass Media, and Democracy*, 96–99.

put differently, hold in trust, conditionally, something that is only derivatively “theirs.” Interestingly, fiduciary control of resources—“in trust”—structured the Court’s view as well in a landmark case of the so-called “public forum doctrine”:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.⁸¹

As I have mentioned earlier (§4.3.2) late-twentieth-century technological improvements made the scarcity rationale obsolete. To the extent that the awareness about the finitude of the public sphere and any further distributive claims were predicated on technical limitations (use of the radio spectrum or public parks, in the case above), as soon as these restrictions were overcome or rendered insignificant by new media, the reception-side of free speech became unimportant again. In a situation without scarcity in which speech is not thought to require rival resources, claims for universalizing the guarantee of freedom of expression can be practically disconnected from redistributive claims concerning the political economy of communication. One of the most famous anti-regulatory retorts in US media policy discussions—that “television is just another appliance. It’s a toaster with pictures”—was precisely targeted against the view that ownership of communication infrastructure should always be limited and conditional. The rest of the quote is clear on this point: “It was about time to move away from thinking about broadcasters as trustees.”⁸² The early age of the internet exacerbated these

⁸¹ *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), 515. Fiduciary conceptions of ownership (i.e., limited property rights held in trust) have a very long history in Western political thought and legal systems intimately related with conceptions of political power “held in trust” that I cannot discuss here (see my “Looking for Democracy in Fiduciary Government. Historical Notes on an Unsettled Relationship (ca. 1520-1650),” *Daimon*, no. 81 (2020): 19–34.). Let me say only that fiduciary property offers a powerful conceptualization for the management of goods that are so significant that we do not want them to be purely in the hands of private parties, neither on the whim of government power—the natural environment will come to mind but think also of mass media or communication infrastructures. It is worth adding that Pettit’s neorepublicanism, at least given his views in his latest book (*The State*), makes it difficult to fully integrate this conception (David Guerrero, “Property by the Law or before the Law? The Neorepublican State and David Hume” (Unpublished manuscript, 2024).). On fiduciary property, its relationship with republicanism and its potential to justify regulatory arguments for today, see Antoni Domènech and Maria Julia Bertomeu, “Property, Freedom and Money: Modern Capitalism Reassessed,” *European Journal of Social Theory* 19, no. 2 (2015): 251–54; Jordi Mundó, “De la concepción absolutista de la propiedad al sentido común de la propiedad limitada,” *Sin Permiso* 16 (2018): 35–63; Martínez-Cava, *Gorros Frigios*, 65–68, 73–74, 104–10; David Casassas and Jordi Mundó, “Property as a Fiduciary Relationship and the Extension of Economic Democracy: What Role for Unconditional Basic Income?,” *Theoria* 69, no. 171 (2022): 74–96; Bru Llaín and Edgar Manjarín, “Private, Public and Common: Republican and Socialist Blueprints,” *Theoria* 69, no. 171 (2022): 49–73.

⁸² Mark Fowler (FCC chairman) quoted by Sunstein, *Democracy and the Problem of Free Speech*, 49.

changes, as I have also mentioned (§IV.3).⁸³ If everyone can start their own blog and have their own social media account to reach massive audiences, the possibilities of the “more speech” rationale look as promising as ever. Give everyone an internet connection and a proper device and you will get free speakers (which is no small feat still today, after three decades of the release of the World Wide Web). As technology improves, this digital space can grow larger and larger, accommodating more and more free speech. No scarcity means no rivalry, and no rivalry means no need of redistributing speech opportunities.

However, three decades of experiencing internet communication should prevent us from accepting this early anti-economical free speech optimism. As I have argued above (§6.1.2), our access to information and speech opportunities is easier than ever, yet the control of the digital environment is as concentrated as ever in a few hands—moreover, in transnational private hands often out of reach of democratic majorities. Internet communication is not less reliant on limited physical or digital infrastructures whose control holds expressive freedom on the internet at the mercy of powerful arbitrary agents, both public and private. These features of the new communication conditions are starting to raise anti-trust concerns that put on the table again the constitutive relationship between public power and communication infrastructure that was part of the political commonsense a century ago: that socially significant means of communication must be subject to democratic legislation.

But the lessons of internet communication may lead somewhere else. The increasing presence of so-called “smart devices” in our life and the transformations associated with digital targeted advertising could serve to underline that the most important and scarce communicative resource was with us all the time: our attention span—our own, limited capacity to receive, process, and interact with the expression of others.⁸⁴ Regardless of the massive technological changes that communication has undergone in the last two centuries, the long-term process that accounts for modern systems of mass communications is the commodification of audiences examined above (§6.3.1). Recall, this is the fact that there is a market in the attention of individuals. This process has taken diverse shapes in different technological environments and communication formats, but the rudiments are the same: our capacity to pay attention is collected by communicators with the purposes of renting it to advertisers who, in turn, use it to sell other products.

In a communicative ecosystem in which most of our attention span is taken by speech at least partially devoted to generating advertising revenue, attention becomes an increasingly scarce and sought-after resource. Yet that attention is a rival good has been always the case, and most spaces devoted to

⁸³ See Tim Wu, “Is the First Amendment Obsolete?,” *Michigan Law Review* 117, no. 3 (2018): 547–81.

⁸⁴ On this idea and the argument of reclaiming ownership of our attention as a practical attribute of our freedom, I have benefited from Wu, *The Attention Merchants*; Williams, *Stand Out of Our Light*; Pedersen, Albris, and Seaver, “The Political Economy of Attention.”

political deliberation and collective decision-making reflect this intuition. In these contexts, turn-taking, civility in discussion or minimal politeness when listening to others are understood as constitutive elements of fruitful communication. Such rules can be challenged in the light of new concerns, and they can be enforced through different means, but I want to emphasize three things about them. First, it is clear that they must be agreed on for communication to fulfill its main purpose. In the absence of minimal “rules of order,” successful interaction under conditions of freedom is impossible.⁸⁵ Second, it is further clear that the content or enforcement of these rules cannot depend on an arbitrary will if communication in these contexts is to be deemed free. In many conversational contexts among equals, these rules may have attributes of spontaneity, but in larger settings a neutral authority is necessary—in a democracy, such an authority will be subject to the demands and control of those affected by it.⁸⁶ Third, note that the thinnest conceivable rules of order involve distributive claims, at least about the uses of time (which can be framed, for our purposes, as an imperfect proxy of audience attention).⁸⁷ If in smaller contexts such as a town meeting, a student assembly, or a national parliament we willingly accept the strongly public nature of these rules of order that enable communication, what is preventing us from extrapolating this intuition to the public sphere in general?

What ultimately justifies background rules in smaller spaces where we want freedom of communication—the limited attention-span of individuals participating in them—also confers to these and other background rules legitimacy in wider contexts, even when this involves enforcing distributive claims that affect the use of privately owned infrastructures or resources. In this vein, Cass Sunstein argues for an expansive “public forum doctrine” that stretches the reception-centered free speech arguments above far beyond state-owned facilities essential for communication; he wants the public-forum rationale to include, specifically, privately owned environments such as digital platforms.⁸⁸ This is as well, recall, much of the normative architecture behind John Rawls’ remark that the political process was a “limited space” and should be in consequence considered as a “public facility” (§3.4.3). For him, this meant limiting the convertibility of economic power into communicative advantages—in practice, this argument took him to advocate for campaign expenditure limits (a measure he thought insufficient, in any case) and to a criticism of the pervasiveness of commercial speech and advertising in the modern public sphere. As I put it earlier, Rawls’ “public facility” metaphor suggests the need to arrange the spaces of the democratic political process

⁸⁵ On rules of order as constitutive of communicative freedom in a town meeting, see the classic Meiklejohn, *Political Freedom*, 24–28.

⁸⁶ For a very instructive discussion around this point, see David van Mill, *Free Speech and the State: An Unprincipled Approach* (Palgrave Macmillan, 2017), chap. 3.

⁸⁷ On a distributive understanding of rules of order, see for instance Pettit’s use of them to make “co-exercisable” and “co-satisfying” the choices covered under the umbrella of basic liberties that rely on scarce resources; *On the People’s Terms*, 106.

⁸⁸ Sunstein, *#Republic*, chap. 2.

according to the intense, egalitarian distributive demands that characterize the ideal functioning of public infrastructures in a just Rawlsian society: fair and equal access to a limited space, safeguards against private appropriation, laws that ensure it fulfills its public purpose and shield it from dynamics of profit-maximization, etc. It was, as he put it, an argument to protect the relevant communicative environments that constitute public reason from “the curse of money” as much as possible.

6.4.2. Thick free speech: local privilege or citizen right?

One of the historical origins of free speech in early modern England was parliamentary privilege. The idea that a person could or should speak their mind was deemed as problematic and potentially destabilizing, so it was justified as a corporate benefit (and duty) of members of parliament in their role as representatives of Englishmen and advisors to the monarch.⁸⁹ In other contexts, freedoms of thought and expression were also framed as licenses only suitable for certain officeholders. Hence, speaking truth to power, accessing special collections in libraries, discussing heterodox religious doctrines or printing without censorship were clearly embedded in institutional frameworks that explained the purposes, rules and means that enabled and bounded such privileges (e.g., public offices, academic or religious positions, licensing systems, etc.). Citizenship itself was for a long time one these offices: a restricted status only for men, property owners, or individuals with certain origins. In all these cases, we may say that expressive liberties were a local privilege—a faculty by definition not for all.

Ancient and modern democratizing ideals of citizenship widened the boundaries of these local privileges. As it is well-known, diverse movements across history claimed, and successfully achieved, the universalization of statuses that were previously limited to a few (§II.2). Thus, libraries were progressively opened to everybody. Freedom of the press was detached from patent systems. Every citizen became free to discuss about any religious or political issue. In short—allow me this whiggish excess for conceptual purposes—, what started as local privileges were turned into citizenship rights of an eventually universal scope.

A conceivable answer to many of the concerns developed in this thesis—especially those about thickening free speech by becoming aware of its political economy—consists in envisioning robust expressive liberties again as a non-universalizable good: as a local privilege. This need not be, of course, a call for returning to medieval and early modern times, neither a call for segregated citizenship rights. I believe this rejoinder would accept the rudiments of my complaints about the free speech libertarian framework. Yet, acknowledging the good of thicker views of free speech (e.g., my

⁸⁹ Siebert, *Freedom of the Press in England*, chap. 5; Colclough, *Freedom of Speech in Early Stuart England*, chap. 3.

reinterpretation of Pettit’s “protected speech” so as to include more explicit concerns about structural domination), some readers may suggest that they are still too demanding for modern, complex societies. Echoing the quarrel against the ancients, these critics may nevertheless agree that thickening free speech is worthwhile, but that it is a very ethically or distributively exacting task. That thick free speech, in short, is unsustainable on a general basis in modern pluralist societies (or that doing so would require means of enforcement that would raise additional concerns about domination).

I believe one could construe such a response building on recent work by Teresa Bejan. She has argued that thicker forms of free speech, such as the classical Greek ideal of “equal speech” could be reasonably pursued as a result of freedom of association.⁹⁰ Hence, more burdensome conceptions of expressive liberties may structure student assemblies, private clubs, or academic seminars, while keeping a thinner, liberal conception as the benchmark on a societal level: “decentralization and associational diversity should be crucial for those concerned to put equal speech into practice today.”⁹¹ In doing this, Bejan contends that the classical ideal of *isegoria* or equal speech was a status-based practice. It was, she says, about what voices counted as “on a par” in deliberative assemblies; the demands of equal speech, put differently, were grounded on a previous requirement of membership of a restricted association of peers.⁹² This interpretation serves Bejan to sever *isegoria* from distributive justice.⁹³ In her view, equal speech should not be construed as allocating speech opportunities according to some egalitarian pattern—for that involves, in Athens or today, leveling-down the weight of the voice of each.⁹⁴ Equal speech must be an inward characteristic of restricted spaces in which a thicker equality of status is assumed.

Even accepting Bejan’s non-distributive reading of *isegoria*, one could still argue that status-based associations of peers are often built on previous distributive settings—which is true both of Ancient Athens and modern societies. This is why access to citizen status was often linked to property-holding as an index of material and intellectual independence. And, taking this classical insight to its radical consequences, this is why democratizing movements for the extension of citizenship rights were escorted by important redistributive measures such as agrarian or debt reforms—to be considered a peer among citizens, one should indeed be able to become one, being materially independent enough to have one’s own voice (recall again §II.2).

⁹⁰ Teresa M. Bejan, “Free Expression or Equal Speech?,” *Social Philosophy and Policy* 37, no. 2 (2020): 153–69.

⁹¹ *Ibid.*, 168.

⁹² *Ibid.*, 163–66.

⁹³ *Ibid.*, 161.

⁹⁴ *Ibid.*, 165–66.

Classical citizenship, as Twain would have it, was incompatible with being vulnerable to “corn-pone opinions.”⁹⁵

In my view, what Bejan takes to be “the prior question of *who* should count as an ‘equal speaker’ in the first place” was not, and is not, merely a question of recognition and status membership, but already a question related to distributive issues.⁹⁶ I am not necessarily arguing here for the opposite position—that the distributive question is *always* prior to the question of recognition and membership. While this is a useful conceptual distinction, I think it may confuse the actual processes in which citizenship has served as a mechanism of inclusion and exclusion in history. The question of status was and is often amalgamated with the political economy of citizenship. It is, thus, unavoidably imbricated with distributive claims—including here claims for preserving an existing distributive status quo through the recognition of formal rules associated to a civic and political status.⁹⁷

In this sense, leaving the admittedly enriching principle of equal speech to “decentralization and associational diversity” runs the risk of turning it, or any other thick conception of free speech, into a local privilege—never into a right of citizenship *stricto sensu*. Those who already have the time, education, social environment, and resources to take part in a richer associational life will be able to opt into the insular benefits of thick free speech. Yet those who have more urgent needs to attend to will probably not.⁹⁸ It would be like having

⁹⁵ In this vein, it has been suggested that the origins of *isegoria* should be traced to Greek colonial life, which was founded on an initial allocation of equal plots of land that would have created de facto dynamics of egalitarian deliberation in local assemblies. See Jeremy McNerney, “Nereids, Colonies and the Origins of *Isēgoria*,” in *Free Speech in Classical Antiquity*, ed. Ineke Sluiter and Ralph Rosen (Brill, 2017), 21–40.

⁹⁶ Bejan, “Free Expression or Equal Speech?” 155, 161. Italics in the original.

⁹⁷ Acknowledging this point could have radical consequences, even in Bejan’s restricted understanding of *isegoria*. Thus, one of the first striking differences in the comparison she makes between ancient Athenian deliberative institutions and digital platforms should be the huge gap, in a distributive, political-economic sense, between them and us. Consider the fact, unknown to many earlier societies but pervasive in ours, that the major forums of our public sphere are private areas meant for economic profit and whose functioning is practically shielded from political decision-making. The idea that the Pnyx, the hill in which the *ekklesia* gathered, could be a privately owned plot of land would have probably shocked even the most conservative among the Athenians. This is, I believe, a strictly distributive lesson of classical *isegoria* with interesting implications for free speech today—that basic communication infrastructure should under public control—, yet very different from the levelling-down effects that Bejan associates with contemporary redistributive demands of equal speech. (On the Pnyx see, e.g., David Lewis, who referred to “areas which had been in the public domain for so long that no question of private property could arise. The Agora, the Kerameikos, and the Pnyx are the obvious examples,” in his “Public Property in the City,” in *The Greek City: From Homer to Alexander*, ed. Oswyn Murray (Clarendon Press, 1990), 249.)

⁹⁸ I am here hinting at inequality along social class lines, but I would be willing to consider other predictors of richer associational life, such as living in walkable neighborhoods vis-à-vis suburban car-dependent areas, or generational differences. None of these, however, solves the justice complaint above. In any case, that wealthier people with more time would have more

isegoria in Athenian democracy but without the previous agrarian and debt reforms that improved the economic position of the poor, and without substantial wages for judicial and political participation.⁹⁹ Any approach along these lines would still be much better than entrenching free speech libertarianism as the only legitimate framework on expressive liberties. However, it betrays a two-tiered model of legitimate free speech claims: the thin, liberal conception can be coercively enforced on a societal level in the form of constitutional free speech rights; but thicker conceptions may be practiced only on a voluntary basis, its only guarantee being the rights of freedom of association.

Now, one way of solving the problems I find in Bejan’s proposal of thick-but-local free speech would be to assume an accompanying battery of economic measures which, independently from speech rights, equalize the capacity of each citizen to engage in a richer associational life. Thus, we may still have thicker free speech only in certain places, but no justice concerns could be raised insofar as every citizen would enjoy the same effective capacity to exercise freedom of association and, if they so wish, all that is necessary to put into practice a thicker conception of free speech. To achieve this would involve massive redistributions of wealth and power, but it would make a rich associational life a real possibility for everyone. In other words, amending Bejan’s view with neorepublican insights, we may say that the political economy of communication is not arranged so that society at large behaves like a seminar room ruled by *isegoria*, neither that it opens all seminar rooms to everybody. However, it effectively guarantees that each citizen is able to set up their own seminar room with other fellow citizens if they want to.

Many of the neorepublican exit-oriented responses to media markets I considered earlier (§6.4.1) could be assimilated to this amended version of Bejan’s thick-but-local free speech. Against communication markets that are thought to generate agent-level domination, suitable public subsidies and market regulations can facilitate feasible media alternatives—in the most extreme but illustrative case, to the point of enabling a property-owning democracy of citizen-journalists sustained on an unconditional basic income. As I have argued above, if my reading holds—if it is true that the conventional neorepublican analysis induces to see the wrongs of media markets as a problem of actual or future dominating agents—then exit-options may do well enough in preventing domination. A neorepublican regime can claim to have

civic engagement is arguably an optimistic outlook. For example, in his seminal study on the decline of American associational life Robert Putnam did not assign much causal weight to differences of class and availability of time. See Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community*, Revised ed. (Simon & Schuster, 2000), chaps. 11 and 15.

⁹⁹ Ste. Croix, *The Class Struggle in the Ancient Greek World*, 137, 190–91, 214–15, 281–82, 298 (on agrarian reform, cancellation of debt, and abolition of debt bondage as popular demands, in some cases achieved); Sinclair, *Democracy and Participation in Athens* 13–17, 116–19, 133–35 (on public wages for participation); Domènech, *El eclipse*, 45–59 (on Aristotle’s critical views on some of these issues).

achieved a non-dominated public sphere insofar as it is able to show that it has protected and resourced each citizen's capacity to escape media dominators by enabling them to choose or set up their own non-dominating media environment. This is much more thorough than simply having the right to create one's own online blog. This is the effective possibility of becoming a journalist, self-employed or cooperatively, of crowd-funding the journalism of others, of distributing power and wealth in such a manner that there is always a workable alternative to the commodified, plausibly dominating segments of the public sphere. The power of "doorkeepers," to take Pettit's metaphor from Chapter 5, may be counteracted by merely opening more and better doors—alternative speech choices protected and resourced from the will of others. As Robert Taylor has it, the strategy of exit could be the "weak default" of neorepublican policymaking.¹⁰⁰

It is worth stressing once more that the normative commitments shaping this thesis would welcome any measure that take us closer to this admittedly utopian horizon. However, in light of the arguments about the scarce and limited nature of the public sphere considered above, we can also see the shortcomings of this neorepublican vision. In my view, its ultimate rationale is not unlike Bejan's invitation to experiment with thicker free speech in voluntary contexts, safeguarded by the non-compulsory character that freedom of association grants to those settings. My reading of the conventional neorepublican analysis of media markets points in a similar direction: the ultimate guarantee of thick, neorepublican free speech relies on providing exit options—alternative, voluntary media practices. The differences between these two views, of course, should not be neglected. As I pointed out above, the neorepublican case involves an explicit commitment to make these alternatives effectively accessible for everybody, while Bejan's emphasis on freedom of association is precisely devised to avoid the kind of distributive concerns that neorepublicans and others incorporate.

Notwithstanding, if my reading of the dangers of advertising and market opportunity is convincing (§6.3.2), and if we accept the view that the attention of others is a limited, rival resource fundamental for communication in general, including the democratic political process (§6.4.1), then exit options, no matter how resourced and protected, will fall short to guarantee non-domination in communications. The argument is that supporting exit options will, at best, create a fertile ground for local or sectional choices; "alternative" journalism, "countercultural" media, or "counterpublics," and so on, will be always workable choices.¹⁰¹ These spaces, even if they are not actual "exit-options", may still be crucial to achieve enough democratic support for transforming society.¹⁰² But if the broader horizon of infrastructural reform of

¹⁰⁰ Taylor, *Exit Left*, 109.

¹⁰¹ For historical examples, think of German social democracy before the IWW (Domènech, *El eclipse*, 141–60). Or think of how the Knights of Labor saw their own media (Gourevitch, *From Slavery*, 156f).

¹⁰² Andrea Pérez-Fernández, "Rosa Luxemburg, Bertolt Brecht y el problema de la ilustración obrera," *Res Publica* 27, no. 2 (2024): 145–153.

communication is neglected, an excessive focus on cultural and expressive exit-options will remain just that: alternatives within a wider public sphere.¹⁰³ They will plausibly be, moreover, minority alternatives. Ad-boosted media—wealthier, more engaging by design, built on strategies that take advantage of cognitive biases, addictive, ever-present in our daily life, deliberately attention-grabbing...—will tend to permanently relegate these options to sectional audiences. As E. P. Thompson in the opening quote of this chapter, Raymond Williams made this point clearly: focusing on exiting conventional media environments runs the risk of turning alternatives into “a tolerated play area.”

The idea of an alternative culture is radical but limited. It can very easily become a marginal culture; even, at worst, a tolerated play area. It is certainly insufficient unless it is linked with effective opposition to the dominant system, under which the majority of people are living. (...) we must be careful not to confuse (...) the limited dissent of the marginal alternative culture with the sustained and extending radicalism which is really necessary.¹⁰⁴

The existence of a protected and resourced right to consume or exercise watchdog journalism is futile if only minorities see, listen, or watch that content. The same could be said of media content fostering social inclusion, egalitarian representations of femininity, public-interest information, civic values or political participation. Regardless of how protected and resourced these options are, none of them are actual exit options because there is really nowhere else to go in the public sphere: instead of “exit,” what they offer is little niches carved out within the same public sphere. Since the aggregated amount of attention in a public sphere is limited and shared by all its participants, all media—be they “alternative” or “mainstream”—compete for the same overall audience when it comes to create public opinion as a source of government legitimacy. In this respect, all media compete for the same pool of attention.

In the public sphere, put differently, the distributive demands of expressive liberties understood as citizenship rights must necessarily be *redistributive*, in the basic sense that improving the opportunities of all will require, in most cases, restricting the opportunities of those who currently enjoy more and better chances for communication.¹⁰⁵ Thus, the solutions available to republican advocates of free speech today cannot be analogous to the solutions Jeffersonian republicans devised in the late eighteenth-century. For them, property-owning democracy was a feasible project insofar as the westward

¹⁰³ Some of the arguments in this section can be found in David Guerrero, “Contracultura y economía política de la comunicación,” *Res Publica* 27, no. 2 (2024): 133–143.

¹⁰⁴ Williams, *Communications*, 186–87.

¹⁰⁵ Note that *redistribution* is not here opposed to *predistribution*. The focus here is not *ex-post* vs. *ex-ante* allocation of resources. In this sense, an agrarian reform that makes each citizen a property owner (a traditional example of *predistribution*) is *redistributive* in the sense used above.

expansion could ensure the necessary amount of what in their eyes was free, unappropriated land. Agrarian republicanism could simply ground the demands for the extension of liberty and material independence on the availability of “more land.” Move the frontier further and you can accommodate additional independent freeholders suitable to become citizens.

The free speech libertarian framework could invite us to think that the question of expressive freedoms, even if we recover the demanding political-economic approach developed in this thesis, may be solved along similar lines: “more (resourced and protected) speech” will be the solution to our problems as if the public sphere could be expanded as much as we need—as if the common pool of attention from which each speaker needs to draw would actually grow with each new newspaper, TV channel, or social media account. This was, recall, the political-economic assumption that sustained the cyberlibertarian utopias of the 1990s (§IV.3). Yet, on the contrary, if anything the effective functioning of the public sphere shrinks with each new unit of “more speech,” eventually rendering our communication valueless unless we have access to the technical means to amplify it or making it more attractive—which, since attention is a rival good, literally involves overriding the speech of others, just because we have the power to do so. If speech grows, the collective pool of attention decreases. This is the ultimate political-economic reality that communication and free speech theorists should be willing to confront.

If the collective attentional reserve of a democratic society is wasted or vulnerable to powerful attention-hoarders wanting to make a profit on it, the success of democratic institutions in charge of promoting freedom is at stake. In an important sense, our attention span is part of us and belongs individually to each of us. But it should be seen as one of those goods, like clean water, the right to vote, or body organs, that deserve protection from complete alienation. The claim for collective ownership of attention and for at least partial inalienability could be grounded elsewhere, but the case I have made is mainly instrumental and addressed to neorepublicans (or interlocutors with similar concerns).¹⁰⁶ Regaining collective ownership and control of what we do with our attention is necessary to the extent that we participate in the kind of cooperative endeavor implied by democratic self-government. This goal, or so I have argued, is incompatible with advertising markets and the effects they produce on media environments regardless of whether we achieve, through other means, the end of agent-level domination. It should be a matter of public concern, then, whether we pay attention to the things we actually want, and the things democratic self-government requires, or whether such a capacity is being held hostage by actors that make a profit on the fact that we pay attention to them. Like early radio activists claiming that “the air belongs to the people,”

¹⁰⁶ On republican freedom, self-ownership and the inalienability of liberty, see Jordi Mundó, “Autopropiedad, Derechos y Libertad,” in *Republicanism y Democracia*, ed. María Julia Bertomeu, Antoni Domènech, and Andrés de Francisco (Miño y Dávila, 2005), 202–6; María Julia Bertomeu, “Familia humana y fraternidad (política) en la Declaración Universal de Derechos de 1948,” *Daimon Extra* 7 (2018): 19–23.

we may argue that “the attention belongs to the people.” As streets and parks, we may also say, attention may only be “held in trust for the use of the public.” Until this is indeed the case, the possibilities of enjoying the goods of free speech and rational discussion on large-scale circumstances will be built on a partial and insecure foundation.

6.5. CONCLUSION: A FAIR SHARE OF THE PUBLIC SPHERE

This chapter has delved into the structural threats to free speech involved in contemporary media markets. First, I have clarified how markets should be evaluated by republicans today. I have argued that our analysis should cultivate the awareness about social change that characterized historical republicans (§6.1.1). It is not *the* market mechanism as such that should be the center of republican (or neorepublican) anxieties or admirations, but more specific markets and their particular traits: the goods traded in them, their history and plausible future, their technological constraints, the powers they generate...—all these bear on the question of whether markets are compatible with freedom.

After offering an overview of today communication markets and how they may be said to create structural threats to free speech, I have examined what neorepublican responses to these dominating tendencies could look like (§6.1.2). Expanding my arguments in the last chapter, I have discussed two possible approaches. One is remedial: neorepublican state intervention against media markets is warranted when these markets have created media moguls—agents that may use their power to dominate others (§6.2.1). Yet this approach is insufficient. What if it is too late? What if, by waiting for agent-level domination to crystallize before acting, the conventional capacities of democratic legislatures are not enough to counteract private power? I have argued that this has been (and still is) the case of media markets, which are remarkably threatening due to the easy convertibility of economic media power into political influence.

Neorepublicans, then, may opt for a second strategy: preventing the risk of agent-level domination by predicting how the structural patterns of media markets may create dominating agents (§6.2.2). This approach is much more promising, for it is not fated to purely remedial policymaking. However, in line with my arguments in earlier sections, I suggest that this strategy should be seen by neorepublicans as self-defeating. I apply to neorepublicanism the very criticism they advanced against freedom as non-interference: on the issue of structural domination, neorepublicans put the burden of proof of lawful state interference on the regulators, thus granting *prima facie* acceptability to the status quo—a conservative policy bias that the neorepublican conception of freedom always wanted to overcome.

Then I have considered a further possibility. Neorepublicans seem ready to act against markets failing their freedom-compatible distributive promises—and a bit less equipped, but ready still, if read charitably, to act

against markets that only may, plausibly and contingently, fail such a promise. But what if it is market success what contributes to challenging republican freedom? I explore this point with the case of advertising markets (§6.3.1). Advertising is, economically speaking, a main explanatory variable of contemporary communication markets. It is responsible of what I have called a demand-side commodification. In modern media markets the crucial commodity is not communication products (i.e., contents, services, access to infrastructures...) but audiences and users. The mechanism that explains success in these markets is the ability of an outlet or service to gather the users' attention and data to be sold to advertisers. Hoarding audiences is the goal—communication is only an instrument to that purpose. The good, economically successful communication product, in other words, is not only the one that best serves audiences and users, but the one that best gathers them. Such attribute adds to contemporary media markets a further structural constraint responsible for determining the final product that audiences and users get. The fact that the economic sustainability of most players in media markets hangs on advertising revenue creates a distorting incentive in communication. A distortion, I may add, that is not necessarily attributable to agent-level relationships of domination. Thus, dependence on advertising in general should be worrying on itself, not only dependence on a single powerful advertiser (the latter case being an apt target of conventional neorepublican concerns).

These arguments have led me to consider the possibility that advertising markets should be seen as undermining republican expressive liberty, even in the ideal neorepublican world in which these markets are made non-coercive and voluntary institutions through regulation and other economic and media policies (§6.3.2). The possibility that mere market opportunity could still incentivize content-distortion and alter the speech choice set of citizens suggests an argument for abolishing these markets regardless of agent-level domination—advertising markets are thus a limit case that could invite neorepublicans to rethink their view of structural domination.

In the final section I have given further reasons related to expressive liberties to rethink one of the preferred neorepublican solutions to agent-level domination: the resourcing and protection of “exit” options. I propose to understand the public sphere in the manner of the atmosphere or the biosphere: as limited, shared spaces with delicate ecological balances (§6.4.1). This view goes against the thought that most free speech problems may be solved with “more speech”—in the neorepublican worldview, with more protected and resourced options. If we want republican expressive freedoms to be something else than a local benefit only enjoyed by those who engage in “alternative” media, “counterpublics” or “countercultures,” then it is not enough to guarantee that every citizen is able to “exit” dominating media markets and escape to these complementary, non-dominating communicative settings. Completely decommodifying attention should be an open possibility (§6.4.2).

CONCLUSION

Reframing expressive freedom

The power of truth is endlessly boasted, and yet this much boasted power is sterile, if the interest of the prince does not fertilize it. How many truths still buried in the works of those like Gordon, Sydney, and Machiavelli, will only be collected by the effective will of an enlightened and virtuous sovereign! (...) let us regard these truths, if we wish, as steppingstones and prepared materials. (...).

Opinion, it is said, is the queen of the world. There are times when general opinion undoubtedly commands the sovereigns themselves. But what does this have in common with the power of truth? Does it prove that general opinion is its production? No: experience shows us, on the contrary, that almost all moral and political questions are decided by the strong and not by the reasonable; and that if opinion rules the world, it is the powerful who rules opinion in the long run.

Whoever distributes honors, riches and punishments, always attracts a large number of men. This distribution enslaves minds and gives him empire over souls. This is the means by which the Sultans legitimize their most absurd claims (...)

But is not the progress of truth faster than that of error? Yes: when one and the other are equally promulgated by power—truth by itself is clear, and takes hold of every good mind. Error, on the contrary, always obscure, always withdrawn into the haze of the incomprehensible, becomes the scorn of common sense. But what is common sense without force? It is violence, cunning and chance that have always presided over the formation of general opinions, rather than reason and truth.

Claude Adrien Helvétius¹

THE POLITICAL ECONOMY OF FREE SPEECH

This thesis contends that communication, like many other human interactions, does not occur in a vacuum or in the abstract (§I). It follows that *freedom of communication*, which is only a specific arrangement of such interaction, cannot take place in the abstract either. As is the case with many other freedoms, communicative liberty is mediated through physical and social environments comprised of material and symbolic resources, rules on the distribution and use of such resources, and institutions that shape and enforce such rules. I have called such environments and their organization the “political economy of communication.” To the extent that communication is founded on these political-economic elements, expressive liberties stem from

¹ Claude Adrien Helvétius, *De l’homme* (Fayard [1773], 1989), vol. II: 825-826.

arranging these elements so that individuals are able to speak their mind and reciprocally share their thoughts with others in ways that are often considered valuable and, in fact, necessary for democratic self-government. In this light, expressive liberties (freedoms of thought, of the press, of speech, toleration...) are the outcome of how we structure the political economy of communication.

I have shown that this perspective is not new. It is in fact an attempt to recover the political-economic awareness that molded ideas on freedom and citizenship within the republican tradition (§II). Classical republican views opposed extending citizenship to certain groups, fearing that granting them political rights would undermine the egalitarian essence of self-governing communities. The argument was that if “dependents” (i.e., individuals lacking the necessary resources to not be at the mercy of others) are given the status of citizenship, if they are given rights of expression and participation, then the civic community will become corrupted. If dependents are given expressive liberty, “people’s voices” would be “bought and sold,” as seventeenth-century officers of the English parliamentary army argued against demands to expand the franchise.

However, this political-economic view of civic freedom can support radically democratic causes. Accepting that republican citizenship is indeed founded on a particularly demanding political economy, the democratic republican view requires that the growth of the civic community must be supplemented by suitable social reforms. In other words, this is the view that if civic freedoms are to be stretched so as to incorporate previously excluded people (e.g., by expanding the franchise, by allowing free speech outside specific corporate offices, by granting religious toleration to each individual), then socioeconomic relationships within the newly enlarged citizen body must be altered in a way that keeps actual social interactions consistent with the equality of legal status. Such a democratic reading of republican citizenship has informed the normative thrust of this project.

THE SEPARATION OF FREE SPEECH FROM ITS POLITICAL ECONOMY

I have suggested, however, that none of the above is part of the starting assumptions of much contemporary research and advocacy on expressive liberties. This is in part due to what I have called the “free speech libertarian framework,” an interpretive conjuncture that has turned free speech libertarianism into a normative, conceptual or explanatory common ground in the historical and theoretical analysis of expressive liberties (§III.2; §IV.3; §1.3.3; §2.1). Part I of this thesis focused on historizing and discussing this framework. More than filling the gap, my goal there has been to explain it. To do this, from the point of view of the history of social and political thought, this project has been developed along three layers: (1) early modern struggles for expressive freedom, (2) the interwar development of free speech libertarian ideas in the United States, and (3) the reception of free speech libertarian arguments in the second half of the twentieth century.

The first, lower layer, comprises my reading of what some of the canonical thinkers of the Western tradition said about expressive liberties. I have not devoted much space to this issue, except for the Introduction (§IV) and sporadic commentaries during the rest of the chapters. In regard to this first layer, my goal has been simply to make the case that there are good reasons to challenge the main interpretive assumptions on the history of expressive liberties. The argument is that many past defenders of free speech and religious toleration practiced, much in line with the republican tradition, a rich political-economic awareness that embedded their normative reflection in their own empirical surroundings (§IV.1). In this sense, the way they thought and advocated for expressive liberties (and exclusions from that liberty) should not be understood as a purely theoretical reflection on abstract principles, but instead as a prudential reasoning informed by a background of institutional, historical, and social conditions that determined the final shape that the ideal in question should take.

The second layer of intellectual history in this thesis is a higher stratum that is built on a particular reading of the former. I spent most of Part I on this second layer. Its main protagonists have been those who settled the ground, during the interwar years, of what later came to be known as “free speech” or “civic libertarianism” (§1.1; §1.2). In an attempt to give historical pedigree and constitutional coverage to their libertarian demands against government repression, interwar thinkers and activists contributed to an impassioned construal of the past as if it had been structured by libertarian concerns as well (§1.3). Thus, we may say that our second-layer history was instrumental for the canonization, along libertarian lines, of our first layer. The *idée-force* was that the historical appeal of expressive liberties was attached to their epistemic function—their role in ascertaining truth and in enabling deliberation and well-informed government. Conceptually and juridically, toleration, free speech and the like were understood by these interwar actors as establishing negative claims against state overreach. This gave important reasons for later thinkers to consider that intellectual and expressive freedoms were intrinsically connected with a *laissez-faire* model of the public sphere (§2.1).

However, the reflections on free speech advanced by many interwar theorists were richer than a mere call for negative liberty. I have examined their takes on communication along with their more general views on liberty and, in particular, their criticism of industrial capitalism and economic *laissez faire* (§2.2). As much as the interwar free speech libertarians emphasized the purely negative and anti-state aspects of expressive freedoms, they also promoted, especially in economic debates, ideas that at first sight appear to be the exact opposite: positive views of freedom demanding state intervention. In this vein, the results of my research suggest a mismatch or delay of regulative ideals: while “*laissez faire*” was considered an outdated model to understand or organize the economy in advanced industrial societies, “*laissez faire*” or pure negative liberty still had something to say in the realm of expressive liberties (§2.3).

As I have shown, many of the interwar thinkers who experienced industrialized communication markets realized that their earlier pleas for old-fashioned, early modern defenses of toleration against state despotism had expired (§2.2.3; §2.3.1). Yet, in doing this, they strengthened their already distorted construal of history. Hence, my view is that the progressive- and New-Deal-era fathers of free speech libertarianism in the United States contributed to the consolidation of a past “libertarian tradition” in two contradictory but mutually reinforcing ways. First, by idealizing what they saw as a fundamentally libertarian past, instrumentalizing it to oppose arbitrary state interference by the Wilson administration (§1.3). Second, by criticizing the very libertarian canon of free speech they had contributed to fabricate and popularize, this time stressing the inadequacy of negative liberty in an industrial civilization with mass communications (§2.3). Notice how these two strategies—of vindication and condemnation of the Western canon of expressive liberties—ultimately led to the same result: the establishment of a “libertarian tradition” of expressive liberties that had allegedly structured the Western, early modern common sense on the matter. This is one of the origins of the free speech libertarian framework I identified in the Introduction (§III.2).

Here is where the third layer of intellectual history comes into play. It builds on the two lower layers. It refers to mid-to-late-twentieth-century readings of interwar free speech libertarians (i.e., the second layer), and the consolidation of the latter’s construal of an early modern canon of epistemic defenses of expressive liberty interpreted along libertarian lines (i.e., the first layer) (§1.3.3; §2.3.3; §3.1.3). Distinguishing between the third and second interpretive strata is useful for emphasizing the biased reception of interwar free speech libertarianism as it became integrated in American constitutional law and in other branches of the humanities and social sciences. History repeated itself, so to speak: as had happened to the early modern heroes of interwar free speech libertarians, the latter’s ideas were also distorted, read through a one-sided lens mostly focused on their denunciations of state overreach. First Amendment jurisprudence, to the extent that it compiled the “libertarian” worldview of the two lower lawyers, was instrumental in transmitting *laissez faire* as a feasible and respectable regulative ideal in the second half of the twentieth century (§2.3.3). Even though interwar thinkers had deeply rejected *laissez faire* (not to mention early moderns!), their ideas on free speech, condensed and judicialized in First Amendment interpretation, were prepared to be read in that direction. This was especially the case when anti-regulatory views enjoyed the tailwind of the Cold War distrust of the modern administrative state (§2.1.2). The rich constitutional and political legacy of interwar free speech libertarianism was put to the service of libertarianism *simpliciter*.

JOHN RAWLS AND THE VESTIGES OF FREE SPEECH LIBERTARIANISM

Rawls antagonized these later constitutional developments in the last part of *Political Liberalism*. I have proposed that some of his arguments should be contextualized as glosses of First Amendment law; of its early twentieth-century protective evolution and its later ultra-libertarian twist. Thus, it is clear how he valued the interwar protective jurisprudence (§3.1).

Yet what turns Rawls into an attractive case study for this project is his ambivalent integration of the free speech libertarian framework. On the one hand, his theory of justice as fairness buttressed his critique of the unleashed free speech libertarianism of the late 1970s. Justice as fairness offers, almost in all the stages of the theory, ways to conceptualize, identify and tackle private power or non-state threats to freedom (§3.2). In this sense, his work contains interesting avenues for reframing free speech, reconnecting it with its political economy. On the other hand, Rawls' historical account of toleration, and his resulting view of what liberal stability demands, connects pretty well with the inherited assumptions about the Western tradition considered in earlier chapters (§3.3; §3.4).

Interestingly, however, he did not fall reading our first-layer intellectual history as a "libertarian tradition." Much to the contrary, Rawls insisted on the distance between his liberalism and the ideas of past thinkers (§3.3.1). Thus, the "libertarian" narrative of toleration that I have found in his work does not have intellectual history as its object; it works at the level of the socio-institutional processes that, in the view of Rawls, originated toleration and the preconditions of liberalism in early modern Europe (§3.4.1). This narrative pursues themes representative of the libertarian framework of free speech, particularly the association of the advent of expressive freedoms with the decline of state power (§3.4.2). Themes, in turn, that this thesis has contributed to questioning, both from the point of view of intellectual history (§IV.1; §3.4.1) and socio-historical explanation (§3.3.3; §4.2.1): recall, public authority and qualified defenses of state power were part of the early modern reflection on expressive liberties and arguably part of their realization as well.

The issue of how to create and preserve the preconditions of liberalism became increasingly significant for the late Rawls because he experienced the partial collapse of such preconditions. The fact that not even the Supreme Court of the late 1970s—an institution he had called the "exemplar" of public reason—could understand the corrupting influence of money on politics was a signal among others that the chances of political liberalism and an overlapping consensus dwindled in the last years of the twentieth century (§3.4.3). Against these challenges, he looked for inspiration in the past, as many other protagonists of this thesis. But compared to them, he did not find a promising or obsolete libertarian tradition to either vindicate or condemn. Rawls found just the opposite: a civic republican tradition to bolster the needed public-spiritedness of a liberalism that was being turned into sheer libertarianism.

NEOREPUBLICANISM, STRUCTURAL DOMINATION, AND FREE SPEECH

Part II has been devoted to considering the promises and pitfalls of republicanism (mostly in the form taken in neorepublican political theory) as an alternative framework for expressive liberties. Concretely, as an alternative able to reconnect the study of free speech with the study of its political economy.

First, my intention has been to show that, far from a straw man, the free speech libertarian framework is much more nuanced than what the neorepublican critique could suggest. For example, the idea that expressive freedom is threatened by mere dependence (i.e., by unused arbitrary power) structures libertarian concerns with state power (§4.1.2). Similarly, much of the contemporary critique of “cancel culture” shows that the free speech libertarian framework can be mobilized to denounce non-state threats to liberty (§4.2.2). And, in the same vein, libertarian approaches to the rule of law and the importance of infrastructure regulations also give a portrait of free speech libertarianism as, in principle, not incompatible with the neorepublican view of freedom as constituted by the law (§4.3.2). Nevertheless, my goal has been to show that, in each of these three cases, the neorepublican frame offers a more complete, parsimonious, and accurate account of the normative claims at stake. That is, it offers a framework that not only captures the anxieties that structure free speech libertarianism but does it in a less biased way.

I have also discussed the limits of neorepublicanism in the analysis of expressive liberties. Taking Philip Pettit’s “protected speech,” I have argued that neorepublicans may have a hard time spotting or conceptualizing as threats to expressive freedom situations in which the speech choice set of an agent is systematically undermined by the way things are socially organized (§5.1)—when my set of speech choices is damaged by a situation that is not the clear result of the actions and will of a dominator. I have considered three blind spots of this kind: structural lack of access to speech choices (§5.2.1), structural misrepresentation of speech choices (§5.2.2), and structural failure of performed speech choices (§5.2.3).

With these cases, and particularly with the empirical examples that illustrated them, I wanted to emphasize two additional points. One is the wide understanding of “political economy of communication” used in this thesis. As I have said at different points, political economy does not merely refer here to the distribution of the sort of physical resources that may have traditionally been studied by media economists (e.g., broadcasting frequencies). I am also interested in how other levels of social interaction and “symbolic” phenomena act as means that enable or hinder freedom of communication. These perhaps more subtle, but nevertheless determining factors should also be pondered by students and advocates of expressive liberties.

The second thing I wanted to stress is that what are often considered “new” (and for some reason more contentious) concerns about free speech can be traced back to rather traditional arguments developed by earlier thinkers. For

example, the claim that social structures have pervasive effects on the endogenous construction of speech preferences was part of the republican “sociology of liberty” that Pocock contributed to discover; views that focus on how widely held social norms affect how we receive the speech of others were not alien to Enlightenment critics of superstition, the subjection of women and clericalism; similarly, the notion that, given unfavorable conditions, certain classes of speakers should be canceled or deplatformed for the benefit of the liberty of others were part of early modern defenses of religious toleration (§II.2; §IV.1).

In any case, the issue of structural domination has been the focus of important debates in the recent secondary literature on neorepublicanism. My view on these debates is twofold. On the one hand, I partially sided with Pettit, Lovett, and other mainstream neorepublicans against their critics (§5.3.1). I have argued that neorepublicanism is much more capable of identifying and dealing with structural domination than many critics are willing to acknowledge. According to the ontological, methodological, and normative assumptions of Pettit’s work, it can be said that social structures perceptibly pattern human action in ways that may facilitate domination, pointing at least to the need to redress it (§5.4.1). This coheres with the neorepublican take on “structural domination”: structures are not constitutive of domination as such but can causally contribute to domination between agents. Study social structures and you will never get to grasp domination proper, but only how domination is incentivized, facilitated, how some agents but not others are given positions of domination, and so on.

In my interpretation, then, the neorepublican understanding of structural domination puts most of the weight on empirical research and suitable social theory. In other words, these auxiliary tools, not normative theory as such, are in charge of justifying why coercive political action against social structures is warranted. Here, I stand more with the critics than with the neorepublicans (§5.3.2). In my reading, the views of Pettit and Lovett offer an unreliable approach to deal with actual structures that produce domination. My argument against them has been that neorepublicanism falls into a probabilistic justification of state interference when it comes to dealing with structures that may only contingently generate agent-level domination (§5.4.3). In regard to structural domination, the burden of proof is on those who want to prevent it, not on the advocates of the status quo. This need not be a problem, were it not for the fact that this was (and still is) one of the neorepublican spearheads against a conservative bias they blamed on liberalism and libertarianism and the notion of freedom as non-interference.

FREE SPEECH, EXIT, AND THE POLITICAL ECONOMY OF ATTENTION

I have studied how these problems translate into the neorepublican analysis of contemporary media markets—what sort of things this analysis would leave unattended, how it would justify its policy strategies against structural

domination, and so on (§6.1). There may be, as I suggested, two neorepublican responses. The first relies on the conventional neorepublican criticism of agent-level domination: policy interventions in media markets (i.e., against social structures) may be warranted only if dominating positions are already fully formed and undermining liberty (§6.2.1). This approach is inevitably remedial in nature—it must wait for dominating relationships to emerge to act against them. This could be a too risky strategy, since a dominating power—and this is especially clear in media markets—may be harder to deal with once it has taken control over the formation of public opinion. A more attractive neorepublican strategy consists of predicting and preventing the rise of dominating agents by comprehending structural market patterns and how they may contribute to the emergence of freedom-undermining positions of power (§6.2.2). This second response, while much more promising than the former, falls into the issues of probabilistic justification of state interference identified above (§5.4.3).

In any case, neither of the two strategies seems to consider a further possibility. The neorepublican analysis is prepared to say that market failure may be at odds with non-domination—and also prepared, in some cases more than others, to counteract such failure. However, what if it is market “success” that harms neorepublican goals? (§6.3). Advertising markets could be construed in this manner: it is how they commodify audience attention and user data, altering the ends and shapes of communicative interaction, that contributes to damage freedom regardless of agent-level domination due to bad distribution of market power (§6.3.1). That is, I have argued that the reliance of producers and outlets on advertising revenue poses a significant structural constraint, distorting the set of speech choices available to citizens in ways incompatible with republican democratic self-government and freedom; a constraint that is different from the dependency on particularly powerful advertisers (§6.3.2).

This led to my final suggestion that advertising markets as we know them undermine expressive liberty, challenging neorepublican ideals even in utopian scenarios in which economic regulations and other media policies counteract the effects of agent-level advertising dependence, for example by guaranteeing the possibility of “exiting” these markets (§6.4). However, I have conceptualized the public sphere as a limited, shared space in which the communicative practices of democratic self-government take place. Thus, given our finite amount of individual and collective attention, there is nowhere else to go—nowhere to “exit” to. I have proposed to see our collective capacity to pay attention as an unavoidably rival resource in need of democratic regulation (§6.4.1). Therefore, no matter how robust the neorepublican resourcing and protection of exit is, it will only grant, at best, lush and economically sustainable complementary communication environments (which is no small feat, and a great improvement if compared to today’s media markets). But “more” protected and resourced speech choices will only get, in the best case, feasible alternative media and counterpublics.

This is promising but limited. My take has been that republicans should not settle on what Raymond Williams called “a tolerated play area”—voluntary pockets of media freedom within a public sphere pervaded by unfreedom, advertising markets, and audience commodification (§6.4.2). The kind of non-dominated collective capacity for self-government that historical republicans and neorepublicans desire requires something else. The focus of our proposals for media reform should therefore not be limited to empowering alternative counterpublics (i.e., resourced exit options from conventional mass communication settings). The focus must be on restructuring the mainstream, shielding against domination the conventional spaces of communication that are unavoidably shared in a political society.

This requires, or so I have suggested, reclaiming collective ownership of our attention in the public sphere. It requires thinking of expressive liberties in a way that tracks both the fact that communication has a political economy (including here our capacity for paying attention), and that in democratic societies that political economy of communications cannot be left in the hands of private or public arbitrary wills: it must be subject itself to democratic decision making. The main goal of this thesis—reframing free speech by challenging the pervasive libertarian imaginaries that structure its study and advocacy—should be understood as a first step in that direction.

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