

Review Essay

CONSTITUTIONAL LAW OF SPEECH AND PRESS: POLITICS, RHETORIC, AND DIALOGUE

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ELOQUENCE & REASON: CREATING A FIRST AMENDMENT CULTURE by Robert L. Tsai (Yale University Press 2008)

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INTRODUCTION

Eloquence and Reason: Creating a First Amendment Culture,¹ is a very fine and thought-provoking book about the role of the judge and the ordinary citizen in interpreting the Constitution. In it, Professor Robert Tsai shows how, over time, rhetorical dialogue among judges, political elites, and ordinary citizens creates, legitimizes, and transforms our understanding of the Constitution and the rights it embodies. Tsai uses the “First Amendment”—or more accurately the liberties of speech, press, petition, assembly, and association—as a case study. He also suggests how judges should perform constitutional analysis. In Part I, I set out a summary of Professor

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¹ ROBERT L. TSAI, *ELOQUENCE AND REASON: CREATING A FIRST AMENDMENT CULTURE* (2008).

Tsai's argument (with occasional evaluation). I turn to more extended evaluation in Part II. Part III concludes.

I. SUMMARY

"The principal aim of *Eloquence and Reason* is to present a general theory to explain how the words in the Constitution ratified by a distant generation become culturally salient ideas" for "ordinary Americans" and to show how interpretations of those words become ideas that shape, for a time, the actions and views of judges, elites, politicians and citizens.² Tsai seeks to identify "the social and institutional processes that produce and sustain constitutional meaning," as well as those processes that undermine one meaning and replace it with another.³

For Tsai, the constitutional understandings of ordinary citizens play an important role in this process. "Political faith" shared by ordinary citizens and elites is the "generative force of constitutionalism."⁴ Political faith is related to a "general will of the people . . . expressed over time" which can only "be understood to exist . . . in terms that average citizens can comprehend and call into existence."⁵ "General will" does not get much further definition or explication, but it could use both. In any case, Tsai says that popular sovereignty supports his theory of constitutional meaning.

Because of Tsai's emphasis on popular sovereignty, "social support" counts for a lot.⁶ Although "no one living today wrote" the words of the First or Fourteenth Amendments related to freedom of speech and press, readings of the constitutional text "by presently constituted people" are not inferior to the "original text" because "social support" for the two cannot "be meaningfully distinguished."⁷ Social support validates elaborations that go beyond the spare words of the text. So "extratextual grammar"—such as "freedom of thought" and "freedom of association"—is presently a part of the meaning of the Constitution. These extratextual ideas are reasonably stable over time.⁸

In Tsai's view, nothing in the Constitution is permanently stable—not even the words in the text. The words in the text do not always enjoy "unwavering obedience"⁹ and can be eclipsed by popularly accepted understandings. "Constitutional vernacular demonstrates its dominance over time; text becomes less dispositive as successive political struggles and so-

² *Id.* at ix.

³ *Id.* at xi.

⁴ *Id.* at 7.

⁵ *Id.*

⁶ *Id.* at x.

⁷ *Id.* at 6–7.

⁸ *Id.* at 7.

⁹ *Id.*

cial interactions fill a people's vocabulary."¹⁰ Tsai rejects original understanding as the one true test of constitutional meaning. By his theory, the meaning of the Constitution does and should change over time: "[I]t is futile to search for a single, accurate channeling of the Founding generation's preferences. One is instead choosing among plausible visions of law. . . . [D]emocratic constitutionalism involves justifying our actions to ourselves. Text is but one aspect of a people's vocabulary for this never ending task."¹¹

By Tsai's approach there are some limits to constitutional creativity, though I doubt they will reassure those who seek the stability and certainty promised (if not delivered) by "original meaning." These limits come from "[i]dentifying the precepts of eloquence as the primary source of constraint on rhetorical innovation."¹² There are "informal rules of intelligibility and legitimacy" which "constitutional actors . . . observe[] . . . out of respect and a desire to communicate effectively."¹³ There are also limits in the "customs identifying the grammar deemed acceptable for a particular inquiry; the conventions regulating the actual usage of such terminology;" and the customs regulating the "purposes of governing language to elucidate, illustrate and perpetuate. These precepts, in turn, are bounded by what is culturally feasible."¹⁴ These rather abstract general statements are not illuminated by examples or much in the way of further explanation.

In contrast, Tsai's ideas of the role of rhetoric in constitutional development are richly illustrated by examples from free speech law. Before getting to rhetoric, however, Tsai describes his understanding of the system of freedom of expression. The core of the system of freedom of expression is not a "group of rights."¹⁵ Instead, "[c]ore beliefs" give rise to doctrine and rights.¹⁶ Rights "are a creation of society to identify, particularize, and perpetuate interests deemed valuable to political self-understanding."¹⁷ "Freedom of expression . . . is a social commitment built upon several precepts:" that it "is preservative of other rights"; that "[m]aximizing the quantity of speech perfects deliberative democracy"; that "[a] free society is measured by its tolerance of dissent"; that "[f]reedom of speech aids the pursuit of knowledge and truth"; that "[g]overnment should be agnostic toward one's perspective"; that "[f]reedom of expression is worth the social costs"; and

¹⁰ *Id.* at 8.

¹¹ *Id.* at 11.

¹² *Id.* at 14.

¹³ *Id.* at 12.

¹⁴ *Id.* at 13.

¹⁵ *Id.* at 15 (quoting THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 3 (1970)) (internal quotation marks omitted).

¹⁶ *Id.*

¹⁷ *Id.*

that “[c]ourts are suited to the articulation and defense of expressive liberty.”¹⁸

These free speech “beliefs operate in no way like rules, though their presence makes rules possible.”¹⁹ Tsai thinks the beliefs are fluid: free speech ideas have not “existed since the earliest days of the Republic,” nor should they be “frozen for all time.”²⁰ Instead, ongoing discourse among political actors and citizens develops and shapes these ideas: “law arises from politics” and “the language of rights is a species of political discourse.”²¹

Of course, judges are important participants in this evolving discourse. Judicial interpretations of free speech ideas are not static. Instead, judges are “reshaping available rhetorical forms to create new meaning, rather than ‘enforcing’ self-evident understandings of text.”²² Tsai’s first example of this process comes from the “public forum,” a judicial concept that developed over time. In *Davis v. Massachusetts*,²³ Justice Holmes (then on the Massachusetts Supreme Judicial Court) refused to recognize a free speech right to use a public park for speech. Holmes deployed an ownership metaphor: The ban on the use of the park for speech was “no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.”²⁴ Forty-four years later in *Hague v. Committee for Industrial Organization*, the Court departed from *Davis* and found a free speech right to use streets and parks for speech and assembly.²⁵ In doing so the Court changed the metaphor: “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.”²⁶ The new metaphor changed the state from an owner with an absolute right of exclusion to a trustee for the public. As trustee, the state was obligated to respect the public’s great democratic interest in places to engage in free speech—by allowing speech in public streets, sidewalks, and parks.

Judges, however, are not alone in using free speech rhetoric. For Tsai, free speech ideas are part of a continuing dialogue between judges (and other elites) and the larger American public. Rhetoric is a way of sustaining, shaping, expanding, or limiting free speech ideas and doctrines. Though

¹⁸ *Id.* at 15–16.

¹⁹ *Id.* at 19.

²⁰ *Id.* at 16.

²¹ *Id.*

²² *Id.* at 8.

²³ 162 Mass. 510 (1895).

²⁴ TSAI, *supra* note 1, at 8 (quoting *Davis*, 162 Mass. at 511) (internal quotation marks omitted).

²⁵ 307 U.S. 496, 515 (1939).

²⁶ TSAI, *supra* note 1, at 9–10 (quoting *Hague*, 307 U.S. at 515) (internal quotation marks omitted).

some voices are clearly more powerful than others, as Tsai sees it, the dialogue is one in which ordinary citizens can participate, and at times they have done so with great effect.²⁷ Tsai illustrates this fact with two case studies, one from the Civil Rights Movement and one from the religious “conservative” attack on and demolition of the metaphor of the “wall of separation” between church and state.

In some tension with his popular sovereignty and democratic dialogue analyses, Tsai also has a more critical assessment of what is going on. “Constitutionalism” is “a close cousin of religious observance.”²⁸ So constitutionalism has “pathological” as well as “salutary” aspects—including “the tendency of free speech ideology to exclude competing structures of thought and valuation, a practitioner’s willingness to cabin critical judgment within dominant categories” and the danger that “democratic ritual” will replace “public deliberation.”²⁹

Metaphors are a central rhetorical device in the free speech dialogue. “[M]etaphors abound in First Amendment thought.”³⁰ Some metaphors “engage the political imagination in a more extended fashion and with greater ideological potency.”³¹ Such metaphors have a “special capacity to cultivate belief in the rule of law. . . . [C]ertain ones acquire regime-building significance.”³² Such “figurative language” can promote the “bonds of fellowship” and so “constitutes a political community”; can “[c]onvert[] constitutional ideals into terms accessible to and usable by members of the community”; can “[l]egitimate[] institutional relationships and role themes”; and can “repair[] rifts in the political imagination posed by changed social norms.”³³

Tsai gives enlightening examples of metaphors at work. For example, Justice Jackson in his 1943 opinion in *West Virginia Board of Education v. Barnette*³⁴ used popular language and metaphors both to create a powerful vision of expressive freedom and to deal with prior negative precedent.³⁵ Just a few years before, in *Minersville School District v. Gobitis*,³⁶ the Court had held that public schools could expel Jehovah’s Witness children who refused to salute the flag.³⁷ Three years later, the Court reversed *Gobitis*.³⁸ Justice Jackson explained why school children could not be compelled to

²⁷ *Id.* at 34–35.

²⁸ *Id.* at 2.

²⁹ *Id.*

³⁰ *Id.* at 23.

³¹ *Id.* at 26.

³² *Id.*

³³ *Id.* at 28–29.

³⁴ 319 U.S. 624 (1943).

³⁵ TSAI, *supra* note 1, at 31–32.

³⁶ 310 U.S. 586 (1940).

³⁷ *See id.* at 591, 600; TSAI, *supra* note 1, at 114.

³⁸ TSAI, *supra* note 1, at 113–14 (citing *Barnette*, 319 U.S. at 642).

salute the flag: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”³⁹ Tsai explains that “[t]his quotable maxim—devoid of jargon, full of populist brio—would become an influential tool in the construction of a political community in which belief in expressive liberty is a defining feature.”⁴⁰ Democracy would thrive through “the word and the spirit, rather than the sword.”⁴¹

The constellation metaphor in *Barnette* “objectifie[d] . . . the source of law in a constitutional text”—invoking “the claim of an external authority.”⁴² Tsai’s fertile explanation led me to think more about this powerful metaphor: the “fixed star” evoked the duty to steer through the stormy debate over the flag, patriotism, and national unity by the Constitution and its guarantee of freedom of expression.

For Tsai, metaphors have a leveling or democratizing function in constitutional discourse. They are “culled from a reservoir of shared life experiences,” making legal principles more understandable to average citizens.⁴³ Tsai offers an example from the statute in *Butler v. Michigan*,⁴⁴ which outlawed reading material that “manifestly tend[ed] to the corruption of the morals of youth.”⁴⁵ The Court said the statute would reduce adults to reading only things fit for children; this was “burning down the house to roast the pig.”⁴⁶ By “mapping governing principles onto day-to-day events,” metaphor “instantiates technical and abstract ideas. Acquiring physical form through association with bodily ideas and common objects renders governing principles salient to a citizen’s daily life.”⁴⁷

A rule that reduces adults to reading only things suitable for children is far too broad. Though pursuing a worthy goal, it suppresses too much valuable speech. The burning-the-house-to-roast-the-pig metaphor makes the technical idea of overbroad suppression concrete. In the house–pig metaphor something common to our experience and of great value to us (the house) stands for the free speech system. Protecting youth is valuable but there are less destructive ways to do it, just as there are less destructive ways to roast a pig. The metaphor is “a utensil for the care of the political

³⁹ *Barnette*, 319 U.S. at 642; see also TSAI, *supra* note 1, at 32 (quoting *Barnette*, 319 U.S. at 642).

⁴⁰ TSAI, *supra* note 1, at 32.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 35.

⁴⁴ 352 U.S. 380 (1957).

⁴⁵ TSAI, *supra* note 1, at 35 (quoting *Butler*, 352 U.S. at 381) (alteration in original) (internal quotation marks omitted).

⁴⁶ *Id.* at 35 (referring to *Butler*, 352 U.S. at 383) (internal quotation marks omitted). The Court’s turn of phrase was: “Surely, this is to burn the house to roast the pig.” *Butler*, 352 U.S. at 383.

⁴⁷ *Id.* at 36.

imagination.”⁴⁸ It invites citizen reflection and participation. “[B]y reworking the idioms of self-rule, members of the polity bring themselves into close contact as they labor to perfect their democratic society.”⁴⁹

Tsai believes that popular rhetorical reworking legitimizes the Constitution by increasing public understanding and acceptance. Flexibility is also an important factor in preserving legitimacy. The Constitution “achieves its legitimacy in part by ensuring a measure of revisability,” “derived from the generality of original text, . . . historical practice,” linguistic transformation, and other factors.⁵⁰ Popular “linguistic creativity” applied to the general words of the text furthers this objective: “the structure of constitutional language itself signals the Constitution’s unsettled nature, while familiarity with its basic forms encourages dissent through recomposition.”⁵¹

There is no “single formula for elaborating a nation’s values over time.”⁵² Still, “[c]ultivating popular language generally and encouraging the use of metaphor specifically” are two crucial means.⁵³ “For such a trope not only facilitates the diffusion of political knowledge among different sectors of society,” but it also enriches “the methods for construing text.”⁵⁴ It “fus[es] . . . doctrine and vernacular.”⁵⁵

Tsai knows that this fusion is not always pluralistic and appropriately protective of liberty. The metaphor of fire, for example, was used to restrict political speech. Justice Holmes used the metaphor of a person falsely shouting fire in a crowded theater to justify punishment of a man who, during World War I, sought to repeal the draft by democratic action.⁵⁶ The Court also (this time with Holmes dissenting) used the fire metaphor to justify punishing a man for distributing revolutionary pamphlets.⁵⁷ Suppressing such speech because of its “bad tendency” to create a revolutionary disaster was reasonable, the Court announced.⁵⁸ This was so because “it cannot be said that the State is acting arbitrarily or unreasonably when in

⁴⁸ *Id.* at 37.

⁴⁹ *Id.*

⁵⁰ *Id.* at 37–38.

⁵¹ *Id.* at 38.

⁵² *Id.*

⁵³ *Id.* at 39.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See *Schenck v. United States*, 249 U.S. 47, 52 (1919). Most of the text of the leaflet for which Schenck was jailed is set out in 2 MICHAEL KENT CURTIS, J. WILSON PARKER, DAVISON DOUGLAS, & PAUL FINKELMAN, *CONSTITUTIONAL LAW IN CONTEXT* 1055 (2006). Schenck’s leaflet urged people to write their congressmen and to exercise their rights to “free speech, peaceful assemblage, and petitioning the government for a redress of grievances.” *Id.*

⁵⁷ *Gitlow v. New York*, 268 U.S. 652, 669 (1925).

⁵⁸ *Id.* at 667; TSAI, *supra* note 1, at 41. The “bad tendency” rule is the name Tsai assigns to the Court’s provision that “a State in the exercise of its police power may punish those who abuse this freedom by utterances . . . tending to corrupt public morals, incite to crime, or disturb the public peace.” *Id.* (quoting *Gitlow*, 268 U.S. at 667).

the exercise of its judgment as to the measures necessary to public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.”⁵⁹

Metaphors like this one, Tsai explains, “initiate[] a script, that is, a ‘structure that describes appropriate sequences of events in a particular context.’”⁶⁰ The script makes the Court’s ultimate decision seem necessary and inevitable. So, by the script, the “arsonist-speaker’s words threaten the legal order,” the state’s agents extinguish the spark, “[t]he Supreme Court endorses the political action,” and “[c]onstitutional equilibrium is restored.”⁶¹

As one might suspect, the fire metaphor has a long history in free speech controversies, one that reaches back to well before the period covered by Professor Tsai’s account. For example, the metaphor was a special favorite of those who advocated suppressing anti-slavery expression, both that of abolitionists and that of Lincoln’s Republican Party.⁶²

According to Tsai, another function of metaphor is “repairing rifts,” thus responding to “the impression that social forces have overtaken the law, rendering it anachronistic.”⁶³ Tsai’s example is the Court’s 1969 decision in *Stanley v. Georgia*,⁶⁴ which held that a person has a legal right to possess obscene, sexually oriented material at home.⁶⁵ As Tsai sees it, the Court’s task was to reconcile First Amendment law to Americans’ changed understanding of sexual materials:

Antitotalitarianism emerged as the language of choice as the political legacy of the last just war was distilled into an evocative metaphor: “If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”⁶⁶

⁵⁹ TSAI, *supra* note 1, at 41 (quoting *Gitlow*, 268 U.S. at 654–55) (internal quotation marks omitted).

⁶⁰ *Id.* (quoting ROGER C. SCHANK & ROBERT P. ABELSON, SCRIPTS, PLANS, GOALS, AND UNDERSTANDING 41 (1977)).

⁶¹ *Id.*

⁶² MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 134 (2000) [hereinafter CURTIS, FREE SPEECH] (noting proslavery concerns about the danger of abolitionist newspapers and pamphlets in states where slaves and whites dwelled “in the midst of such combustible materials,” and references to their publications as “of the most inflammatory character”) (citation and internal quotation marks omitted); *id.* at 275 (observing that proslavery parties asserted that Republicans distributed “incendiary books[,]” “applied ‘the spark, and then affect[ed] astonishment at the explosion’”—a reference to the John Brown raid) (citation and internal quotation marks omitted).

⁶³ TSAI, *supra* note 1, at 44.

⁶⁴ 394 U.S. 557 (1969).

⁶⁵ TSAI, *supra* note 1, at 45 (citing *Stanley*, 394 U.S. at 568).

⁶⁶ *Id.* at 46 (quoting *Stanley*, 394 U.S. at 565).

The implicit comparison to totalitarianism made Georgia's obscenity law suspect and grounded broader First Amendment freedoms in basic American values. Of course, Court doctrine changes over time, sometimes quite dramatically. Constitutional revolutions are accompanied by "[l]inguistic [t]ransformation[s]."⁶⁷ Linguistic transformations are changes in the dominant judicial rhetoric that, at least, signal changes in the law.

Tsai says that the First Amendment, like other "faith tradition[s],"⁶⁸ has a creation story, albeit one about which he is skeptical. According to Professor Tsai, the First Amendment faith tradition tells us that "the right to speak one's mind in America begins with the missed opportunities of the World War I decisions, and the 'end of the story' is the 1969 decision *Brandenburg v. Ohio*,⁶⁹ in which the promise of expressive liberty is ultimately realized."⁷⁰

According to Tsai, creation stories are "vehicles of constitutional transformation" that contain "not only the pooled learning of a people, but also loss and gain, convergence and dissensus, control and resistance."⁷¹

Brandenburg involved a sparsely attended Klan rally in Ohio.⁷² The Klansmen burned a cross, and the speaker announced that "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."⁷³ The appellant said that "the nigger should be returned to Africa, the Jew returned to Israel."⁷⁴ *Brandenburg* was prosecuted under Ohio's syndicalism statute, which banned advocating "'the duty, necessity, or propriety' of violence 'as a means of accomplishing industrial or political reform.'"⁷⁵ The statute also made it a crime to assemble with any group to teach such doctrines.⁷⁶ Avoiding the "bad tendency" analysis and the "fire" and "spark" metaphors of an earlier time, the *Brandenburg* Court struck down the statute.⁷⁷ It did so in the face of a real fire—the burning cross—and of language the Court might have described as "inflammatory." Tsai explains that the speech was "disturbing—and even silencing."⁷⁸ Here is Professor Tsai's account:

⁶⁷ *Id.* at 49.

⁶⁸ *Id.*

⁶⁹ 395 U.S. 444 (1969).

⁷⁰ TSAI, *supra* note 1, at 49.

⁷¹ *Id.* at 49–50.

⁷² *Brandenburg*, 395 U.S. at 445–46.

⁷³ *Id.* at 446.

⁷⁴ *Id.* at 447.

⁷⁵ *Id.* at 448 (quoting Ohio's Criminal Syndicalism Act, Ohio Rev. Code Ann. § 2923.13).

⁷⁶ *Id.*

⁷⁷ *Id.* at 449.

⁷⁸ TSAI, *supra* note 1, at 50.

Eschewing what many elites now considered the primitive rhetoric of an earlier time, the *Brandenburg* Court employed an alternative set of conceptual tools and popular sayings surrounding the right to assembly, which had, by the mid-1960s, emerged as a preferred method of characterizing and extending the reach of the First Amendment. The State of Ohio's criminal syndicalism statute, the Justices stated, "forbid[s], on pain of criminal punishment, assembly with others merely to advocate the described type of action."

....

The choice to couch the facts of *Brandenburg* in republican idioms rather than fire-based vernacular had a dramatic effect. Deserved or not, *Brandenburg's* gathering was cast as a meeting of a civic organization by the soothing cadence of this ascendant discursive strategy. The Klan's illiberal and historically violent agenda benefited from its association with the glorious tradition of the American people meeting out-of-doors to resolve the nation's most pressing social ills. This legal fiction repels regulation.⁷⁹

Though rhetorically effective, Professor Tsai's account of *Brandenburg* is skewed. *Brandenburg* held that advocacy of illegal action and advocacy or association thought likely to produce crime could be suppressed only if the speech or association was directed to inciting or producing imminent lawless action and was clearly likely to produce such action.⁸⁰ The roots of the *Brandenburg* decision lie not in assembly cases from the 1960s, but in Justice Brandeis's dissent in *Whitney v. California*⁸¹ and speech-protective cases from the 1930s and 1940s, before the Red Scare.⁸² The *Brandenburg* Court adopted something very close to Justice Brandeis's concurrence in *Whitney*. Justice Brandeis's test limited constitutionally permissible punishment to those persons whose advocacy was directed toward causing imminent lawless action, and then only if the evil was serious and had a high likelihood of occurring.⁸³

⁷⁹ *Id.* at 51.

⁸⁰ *Brandenburg*, 395 U.S. at 447.

⁸¹ 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

⁸² *See, e.g.*, *Terminiello v. Chicago*, 337 U.S. 1, 3, 6 (1949) (holding free speech protected even when it creates a condition of unrest, creates dissatisfaction with conditions as they are, or stirs people to anger); *Bridges v. California*, 314 U.S. 252, 263 (1941) (finding that "substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished" and that the rule does not "mark the furthestmost constitutional boundaries of protected expression"); *Herndon v. Lowry*, 301 U.S. 242, 263-64 (1937) (striking down a Georgia anti-insurrection statute and rejecting bad tendency). The *Herndon* Court stated:

If, by the exercise of prophesy, he can forecast that, as a result of a chain of causation, following his proposed action a group may arise at some future date which will resort to force, he is bound to make the prophesy and abstain, under pain of punishment, possibly of execution. [Under the Georgia statute] [e]very person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that if a jury should be of opinion he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government he may be convicted of the offense of inciting insurrection.

Id. at 262.

⁸³ *Whitney*, 274 U.S. at 376 ("[E]ven advocacy of [law] violation . . . is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the ad-

Brandenburg was part of a larger Warren Court expansion of protections for speech and press. Of course, *Brandenburg* was immediately about prosecution of a particular Klansman who had suggested that violence might be appropriate in the future. But far from wrapping the Klan in democratic rhetoric, the decision set out the Klansmen's ugly message—and protected *Brandenburg* despite this message. *Brandenburg* squarely rejected an earlier bad tendency approach that had punished antiwar speech that advocated peaceful change by democratic means (*Schenck v. United States*⁸⁴ and *Debs v. United States*⁸⁵). It also strongly limited the Court's decision in *Dennis*, which had permitted punishment of teaching of the necessity of violent revolution at some uncertain time in the future (*Whitney v. California*⁸⁶ and *Dennis v. United States*⁸⁷). Under the earlier *Schenck-Debs* approach, a dissenter could be presumed to advocate illegal conduct if one might rationally expect that someone who heard his or her harsh criticism (of a war or of the draft, for example) could be moved to illegal conduct.⁸⁸ The earlier approach also punished Communists and others whose evaluation of the defects of democracy under capitalism was coupled with calls for violent revolution at some indefinite time in the future.⁸⁹

Brandenburg created a broad, general, speech-protective rule, overprotecting speech (in Harry Kalven's phrase)⁹⁰ to be sure it was not underprotected. Underlying the *Brandenburg* Court's approach was its view that suppression of speech to prevent possible lawless action too often carried

vocacy would be immediately acted on.”); *id.* at 377 (“[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion . . .”). The evil must also be “relatively serious.” *Id.* In the absence of these conditions, the remedy for the advocacy of unlawful behavior must be “education and punishment for [actual] violations of the law.” *Id.* at 378.

⁸⁴ 249 U.S. 47, 51–52 (1919) (upholding punishment of a Socialist for urging draftees and others to oppose the draft by peaceful democratic means, such as writing their members of Congress and petitioning).

⁸⁵ 249 U.S. 211, 216–17 (1919) (upholding the jailing of a Socialist and labor leader for a strongly antiwar speech).

⁸⁶ 274 U.S. 357, 366, 372 (1927) (affirming a conviction of a defendant who “became a member of and assisted in organizing the Communist Labor Party of California, and that this was organized to advocate, teach, aid or abet criminal syndicalism”).

⁸⁷ 341 U.S. 494, 516–17 (1951) (affirming the defendants' conviction because “[t]heir conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a ‘clear and present danger’”).

⁸⁸ *Schenck*, 249 U.S. at 52; *Debs*, 249 U.S. at 216–17.

⁸⁹ *Dennis*, 341 U.S. at 516–17.

⁹⁰ Harry Kalven Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 213 (“It must be recognized, of course, that a reason implicit in the breadth of the protection afforded speech is due to the judicial recognition of [the Court's] own incapacity to make nice discriminations. It reflects a strategy that requires that speech be overprotected in order to assure that it is not underprotected.”).

with its suppression of basic political criticism.⁹¹ The Justices in *Brandenburg* simply concluded that a narrower scope for suppression of speech and a broader speech-protective rule was more consistent with the democratic function of free speech. Protecting some evil speech (that of Communists and Klansmen, for example) was the price to be paid for ensuring that political criticism was not also suppressed. The Court might have tried to distinguish between the evil conclusions of various groups that advocated violence because some had more worthy political criticism mixed with their evil recommendations, but instead it chose a broad, general rule.

No solution to the problem is without cost. Still, *Brandenburg* has protected lots of unpopular speech with a real or supposed bad tendency.⁹² To take just one example, *Brandenburg* protected the right of gay students to associate on public university campuses. Schools claimed that if gays were allowed to associate they would engage in oral or anal sex—then unlawful sex acts. Banning the gay groups was justified as a method of crime prevention, but this remarkable rationale did not survive *Brandenburg* analysis.⁹³ The Court's approach in *Brandenburg*, like the suppression of actual or presumed advocacy of crime or violence, had costs as well as benefits. But the benefits to progressive free speech have been substantial.

Professor Tsai's larger point, however, is simply that the period during and shortly after World War I,⁹⁴ the transitional period in the 1950s after World War II, and the period from the late 1950s to the present had their own "linguistic regimes"⁹⁵ characterized by uses of the fire metaphor. In the speech protective era from the 1930s through the 1940s, the majority

⁹¹ See *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) ("[W]e are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action."); *id.* at 454 (Douglas, J., concurring) ("[T]he [clear and present danger] test was so twisted and perverted in *Dennis* as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.").

⁹² See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933–34 (1982) (striking down a large Mississippi damages judgment against the NAACP and one of its local leaders that was based in part on advocacy of violence).

⁹³ See, e.g., *Gay Student Servs. v. Tex. A&M Univ.*, 737 F.2d 1317, 1330–32 (5th Cir. 1984) (finding insufficient justification to deny group recognition after creating a limited public forum); *Gay Lib v. Univ. of Mo.*, 558 F.2d 848, 854–55 (8th Cir. 1977) (finding gay group did not advocate an immediate lawless act); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167 (4th Cir. 1976) (holding that a college violated a gay student group's expressive rights by refusing to register the group and provide the group with the privileges attendant to registration); *Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652, 661–63 (1st Cir. 1974) (attempt to prevent gay association in social events abridged freedom of association when activity was speech related and the conduct barred was not an overt sexual act); *Student Coal. for Gay Rights v. Austin Peay State Univ.*, 477 F. Supp. 1267, 1272–74 (M.D. Tenn. 1979) (university's failure to recognize group for fear of propagation of homosexuality was an abridgement of the right to associate for no compelling state reason).

⁹⁴ My period, not quite his. I say shortly after World War I because of speech protective decisions in the 1930s and 1940s.

⁹⁵ TSAI, *supra* note 1, at xi and 140.

did not typically invoke the fire metaphor. The first era, during and shortly after World War I, was characterized by references to fire that justified the denial of protection for defendant's speech. Circulating a leaflet criticizing the draft was implicitly treated as "falsely shouting fire in a crowded theater."⁹⁶ A claim that the "American army had been raised illegally" and that economic motives prompted World War I was spoken in quarters (the German-American population) "where a little breath would be enough to kindle a flame."⁹⁷ *Gitlow*, a case involving an advocate of violent revolution, warned of a spark that could lead to "a sweeping and destructive conflagration."⁹⁸ In the early 1950s, *Dennis*, a case involving a prosecution for organizing the Communist Party with the purpose of teaching the necessity of violent overthrow at the first convenient time, referred to "the 'inflammable nature of world conditions.'"⁹⁹ So "legal language licensed governing institutions to repel intruding ideologies."¹⁰⁰

But it was far worse than that: the Court's fire metaphor during World War I also repelled calls for democratic action, including a leaflet that called for writing one's congressman to ask for a repeal of the draft, for peaceful petitioning for redress of grievances, and for peaceful marches.¹⁰¹ Though the call came from a Socialist, the leaflet's advocacy of political action was as American as American democracy.

Professor Tsai describes the rise, fall, and return (in a speech protective guise) of the fire metaphor in its larger social and historical context. "When a sense of crisis appeared the most acute, institutions tended to favor highly context-based readings of text that facilitated the power of the state to discipline the would-be speaker. As the sense of urgency receded, jurists exhibited an increased willingness to elaborate more general principles enabling cultural dissent."¹⁰²

In the third and most recent phase (from the late 1950s on), the fire metaphor was transformed and pressed into service to oppose regulations the Court found threatening to free speech. In *R.A.V. v. St. Paul*, the Court struck down a city ordinance that prohibited the display of a symbol, including a burning cross or swastika, "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis

⁹⁶ *Id.* at 53 (referring to *Schenck v. United States*, 249 U.S. 47, 52 (1919)) (internal quotation marks omitted). The *Schenk* Court said: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." 249 U.S. at 52.

⁹⁷ TSAI, *supra* note 1, at 53–54 (quoting *Frohwerk v. United States*, 249 U.S. 204, 209 (1919)).

⁹⁸ *Id.* at 54 (quoting *Gitlow v. New York*, 268 U.S. 652, 669 (1925)) (internal quotation marks omitted).

⁹⁹ *Id.* at 55 (quoting *Dennis v. United States*, 341 U.S. 495, 511 (1951)).

¹⁰⁰ *Id.*

¹⁰¹ *Schenck*, 249 U.S. at 52 (upholding punishment of a Socialist for urging draftees and others to oppose the draft by peaceful democratic means, such as writing their members of Congress and petitioning).

¹⁰² TSAI, *supra* note 1, at 57.

of race, color, creed, religion or gender.”¹⁰³ A juvenile had been convicted under the ordinance for burning a cross on the lawn of a black family. Writing for the majority, Justice Scalia held that the ordinance impermissibly singled out particular content within the class of unprotected fighting words, allowing supporters of one view but not the other to use unprotected fighting words. His opinion for the Court said that the city could find a way to punish such behavior “without adding the First Amendment to the fire.”¹⁰⁴

The Court invoked the new speech protective fire metaphor again in *Reno v. ACLU*¹⁰⁵—the Internet “indecentcy” case. The Communications Decency Act,¹⁰⁶ the congressional statute in question in *Reno*, banned indecent and patently offensive sexually-oriented expression, but lacked protections for material with serious value.¹⁰⁷ As a result, the Court found the Act threatened Internet discussion of a wide range of protected topics including safer sex and prison rape.¹⁰⁸ It praised the Internet as a magnificent new free speech forum, and it referred to the statute as “threaten[ing] to torch a large segment of the Internet community.”¹⁰⁸

For Tsai, the currently dominant free speech metaphor is the “marketplace of ideas.” The “free trade in ideas”¹⁰⁹ metaphor was introduced in 1919 by Justice Holmes, dissenting, in *Abrams v. United States*¹¹⁰ and reappeared in Justice Rutledge’s opinion for the Court in 1945 in *Thomas v. Collins*.¹¹¹ According to Tsai, the metaphor succeeded because it resonated with antitotalitarianism. Rutledge’s 1945 opinion “accorded the First Amendment a ‘preferred place,’ to be seen as securing ‘indispensable democratic freedoms’”; it warned against “repression”; and it cautioned that “from petty tyrannies . . . large ones take root and grow.”¹¹² Tsai sees the current “free trade in ideas” and “marketplace of ideas” rhetoric, reintro-

¹⁰³ *Id.* at 58 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 380 (1992)) (internal quotation marks omitted).

¹⁰⁴ *Id.* at 59 (quoting *R.A.V.*, 505 U.S. at 396) (internal quotation marks omitted).

¹⁰⁵ 521 U.S. 844 (1997).

¹⁰⁶ 47 U.S.C. § 223 (2006).

¹⁰⁷ *See Reno*, 521 U.S. at 870–71 & n.37.

¹⁰⁸ *Id.* at 871, 878.

¹⁰⁸ TSAI, *supra* note 1, at 39 (quoting *Reno*, 521 U.S. at 882).

¹⁰⁹ *Id.* at 61.

¹¹⁰ 250 U.S. 616, 630 (1919).

[W]hen 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.

Id.

¹¹¹ 323 U.S. 516, 537 (1945) (“Free trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts.”).

¹¹² TSAI, *supra* note 1, at 61 (quoting *Thomas*, 323 U.S. at 543).

duced by Justice Rutledge (a Franklin Roosevelt appointee), as “[i]nfused with laissez-faire ideology,” “open markets,” and “minimal governmental intervention.”¹¹³

For Tsai, there are a series of values and expectations implicit in the marketplace metaphor that lead to expansive application.¹¹⁴ “[T]he market represents an idealized conception of the public forum; joining this abstraction with a contested site implicitly benefits the latter through cognitive association.”¹¹⁵ So, “[a] seemingly natural implication—once the association is made—is that the rules governing traditional expressive settings ought to be migrated over to run on these new sites or technologies.”¹¹⁶ The metaphor promotes application of free speech principles in new sites and situations.

Tsai finds *Tinker v. Des Moines Independent School District*¹¹⁷ to be a “dramatic instance” of this effect.¹¹⁸ In *Tinker*, a public high school had suspended students for wearing black arm bands to protest the war in Vietnam and to mourn the dead.¹¹⁹ “After paying homage to the metaphorical market, the Court followed with a disquisition on the importance of expressive liberty to the implementation of sound educational philosophy.”¹²⁰ Intercommunication among students was “an important part of the educational process.”¹²¹ In subsequent cases, *Tinker* provided very substantial free speech protection for student groups in public colleges and universities.¹²² Still, more recent cases have substantially limited *Tinker*.¹²³ This

¹¹³ *Id.* at 62.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 62–63.

¹¹⁶ *Id.* at 63.

¹¹⁷ 393 U.S. 503 (1969).

¹¹⁸ TSAI, *supra* note 1, at 63.

¹¹⁹ *Tinker*, 393 U.S. at 504, 516.

¹²⁰ TSAI, *supra* note 1, at 63.

¹²¹ *Id.* (quoting *Tinker*, 393 U.S. at 512) (internal quotation marks omitted).

¹²² See, e.g., *Gay Student Servs. v. Tex. A&M Univ.*, 737 F.2d 1317, 1329 (5th Cir. 1984); *Gay Lib v. Univ. of Mo.*, 558 F.2d 848, 853 n.9 (8th Cir. 1977); *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 166 (4th Cir. 1976); *Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652, 658, 660, 662 (1st Cir. 1974); *Student Coal. for Gay Rights v. Austin Peay State Univ.*, 477 F. Supp. 1267, 1272 (M.D. Tenn. 1979).

¹²³ *Morse v. Frederick*, 551 U.S. 393, 397, 410 (2007) (upholding punishment of student for displaying a “BONG HiTS 4 JESUS” banner as students assembled on a public street to watch the Olympic Torch); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988) (upholding censorship of an article in a school newspaper dealing with student pregnancies and birth control); *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 423 (9th Cir. 2008) (upholding a school policy requiring students to wear “solid khaki-colored bottoms and solid-colored polo, tee, or button-down shirts (blue, red or white) with or without Liberty logos” which, as Justice Thomas noted in his dissent, would have the effect of banning any expression on clothing by buttons, statements, armbands, etc.). For a critique of *Clark*, see Michael Kent Curtis, *Be Careful What You Wish For: Gays, Dueling High School T-Shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431, 471–77 (2009).

suggests that other factors may be far more influential than the metaphor. Linguistic regimes may be less uniform than one might suppose.

According to Tsai, versions of the marketplace metaphor that allowed for regulation in the interest of wider opportunity for speech or for greater equality among speakers, rather than a laissez-faire approach, “were certainly possible but rarely succeeded in juridic debate.”¹²⁴ That is so. For example, concerns about concentration of media ownership in very few hands, which led critics to argue for a right to reply for political figures and others attacked in Florida newspapers, fell on deaf ears in *Miami Herald Publishing Co. v. Tornillo*.¹²⁵ This was the case even though the Court set out the dismal and alarming facts of media concentration in some detail.¹²⁶ Tsai also finds the force of laissez-faire conceptions of free speech at work in campaign finance cases. Too often, these have upheld the right of major corporations (typically really corporate officers and boards) to spend corporate treasury funds (really stockholders’ funds) for political purposes.¹²⁷

Metaphors are an important vehicle for linguistic transformation, but Tsai cautions that too much should not be made of them. They do not substitute for rules; rather they are a “means of actuating and disseminating constitutional knowledge among a wider audience.”¹²⁸ Tsai recognizes that metaphors can have their dark side. The fire metaphor, “[i]n permitting aggressive regulation at the first hint of counterproductive consequences (‘a single revolutionary spark’) . . . treated citizens as generally helpless in the face of foreign ideologies, unable to exercise reason to help themselves.”¹²⁹ Nor does Tsai think much of the fire metaphor when turned against regulation of speech. Is he thinking about “torching” the Internet or *R.A.V.*’s warning about adding the First Amendment to the fire, or both? Both, apparently. For Tsai the rhetoric of fire has “promoted court-centered resolutions and an undifferentiated fear of authorities who might ‘torch’ the proverbial house.”¹³⁰ Tsai cautions that the point should not be overstated. Still, by the marketplace metaphor the “state is treated . . . as an interloper or, at best, empowered to correct market failure; it is never a creator whose actions (or inactions) are legitimately expressive and directive.”¹³¹ Tsai’s solution to the problem of dangerous or counterproductive metaphors is to contain the “counterproductive qualities” of “popular iterations of our

¹²⁴ TSAI, *supra* note 1, at 64.

¹²⁵ *See* 418 U.S. 241 (1974).

¹²⁶ *See id.* at 249–50.

¹²⁷ *See* TSAI, *supra* note 1, at 65.

¹²⁸ *Id.* at 75.

¹²⁹ *Id.*

¹³⁰ *Id.* at 76.

¹³¹ *Id.* at 77.

commitments” to free speech and “cultivate alternative formulations.”¹³² The suggestion would benefit from further elaboration with examples.

Tsai suggests that his story of linguistic transformation better explains constitutional change than theories of incremental change or of constitutional “moments”—moments when the Constitution is changed by a mobilized electorate outside of the Article V amendment process.¹³³ In contrast to Bruce Ackerman’s account¹³⁴ by which the New Deal era was “a decisive defeat for laissez-faire constitutionalism,” Tsai sees laissez-faire as alive and well in the influence of “the marketplace of ideas” theory that tends to defeat regulation of speech in the interest of greater equality of opportunity to be heard, such as regulations limiting corporate political power.¹³⁵ The “free market” speech discourse reflected “postwar defense of open markets” and “pursuit of an antitotalitarian mission.”¹³⁶ According to Tsai, “the grammatical patterns arose because the techniques became useful to political elites in the reconstruction of the public mind.”¹³⁷ Elite reconstruction of the public mind is in considerable tension with democratic dialogue.

In contrast to evolutionary models of law, Tsai says that his theory of linguistic regimes better explains the process of “selection” of metaphors (and rules). The theory explains why certain ideas and metaphors are dominant at particular periods.¹³⁸ By the process of “selection,” Tsai seems simply to mean the process by which certain rhetorical approaches become dominant at certain times. I am not sure that linguistic transformation explains, rather than reflects, constitutional change. It may simply be an indicator that constitutional change is taking place.

Tsai posits constitutionalism as “a species of political acculturation” developing in part through exchange of ideas about the text’s meaning.¹³⁹ So “the patterns of linguistic transformation suggest a more significant degree of fluidity to foundational discourse than one might expect”¹⁴⁰ According to Tsai, linguistic transformation—unlike originalism and unlike Ackerman’s constitutional moments of legitimate change outside the process of constitutional amendment—takes account of “the impact of social movements and cultural upheavals that have nevertheless shaped the public consciousness.”¹⁴¹ So “[t]aking the linguistic regime as the relevant unit of analysis promises greater insight” into constitutional change.¹⁴² Be-

¹³² *Id.*

¹³³ *Id.* at 68–69.

¹³⁴ BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 256–57 (1998).

¹³⁵ TSAI, *supra* note 1, at 68–69.

¹³⁶ *Id.* at 69.

¹³⁷ *Id.*

¹³⁸ *Id.* at 70.

¹³⁹ *Id.* at 71.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 72.

¹⁴² *Id.*

cause linguistic transformation “grapple[s] with comprehensiveness and historicity,” it “better accounts for the social and political dynamics that are constantly acting upon readings of text.”¹⁴³ These ideas seem central to Tsai’s thesis. Is a linguistic transformation a cause of constitutional change or simply a reflection of shifts in political and other power, or some of each?

According to Tsai, a major source of doctrinal and linguistic transformation comes through pursuit of “political pathways.”¹⁴⁴ Political pathways include multiple forms of influence including “governmental institutions, media, civic organizations, litigation, and electoral processes.”¹⁴⁵ Tsai gives two examples of transformations achieved by social movements that used political pathways: the increased protection for public protest achieved by the Civil Rights Movement¹⁴⁶ and the demolition of the metaphor of the “wall of separation” between church and state.¹⁴⁷ The demolition was promoted by religious and political groups opposed to the wall metaphor and what it stood for. The critics denounced decisions announcing, and sometimes enforcing, a “wall of separation” as hostile to religion.¹⁴⁸ The targeted decisions included bans on prayers established by school officials¹⁴⁹ and bans on public school Bible readings.¹⁵⁰ In addition, the government’s refusal to extend some government benefits to religious groups (though they enjoyed many others, including many exemptions from laws enforced against secular groups)¹⁵¹ was denounced as discriminatory.¹⁵² Through these efforts, according to Professor Tsai, the wall metaphor fell to “the mobilized sentiments of the people.”¹⁵³ One substantial breach in the supposed “wall of separation” was the five-to-four decision allowing government to provide vouchers to pay for tuition at religious schools.¹⁵⁴

Professor Tsai’s second example of political pathways is the impact on free speech law of the Civil Rights Movement and its protests, marches, assemblies, sit-ins, and public gatherings. As Tsai sees it, the Civil Rights

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 78.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 79, 83.

¹⁴⁷ *Id.* at 93.

¹⁴⁸ *Id.* at 103.

¹⁴⁹ See *Engle v. Vitale*, 370 U.S. 421, 430 (1962).

¹⁵⁰ See, e.g., *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963).

¹⁵¹ See, e.g., Charlie Savage, *Bush Aides Say Religious Hiring Doesn’t Bar Aid*, N.Y. TIMES, Oct. 18, 2008, at A1.

¹⁵² TSAI, *supra* note 1, at 103–04; cf. *Aguilar v. Felton*, 473 U.S. 402, 414 (1985) (striking down a New York aid program that provided teaching assistance to parochial schools); *Lemon v. Kurtzman*, 403 U.S. 602, 613–14 (1971) (striking down a Pennsylvania law that permitted parochial schools to receive taxpayer-funded reimbursements for textbooks, teaching materials, and related expenses).

¹⁵³ TSAI, *supra* note 1, at 108.

¹⁵⁴ *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002).

Movement expanded and entrenched free speech rights of demonstrators and marchers. (Of course, speakers, writers, and film producers also got substantial protection during this period.¹⁵⁵) “[T]he experience validated the belief that the First Amendment existed to facilitate vigorous, sometimes contentious, public debate.”¹⁵⁶ Speech “on matters of public concern would again be poised on the ‘highest rung of the hierarchy of First Amendment values.’”¹⁵⁷

As Tsai’s qualifications suggest, many of these protections had substantial prior doctrinal support from the Court’s earlier liberal period in the 1930s and 1940s¹⁵⁸ and from dissenting opinions during the period of retrenchment in the 1950s.¹⁵⁹ Some decisions were clearly innovative, such as the free speech right to quietly sit in at a public library to protest segregation¹⁶⁰ and the recognition that litigation aimed at social impact is a form of expression.¹⁶¹ In the case of the Civil Rights Movement, the Court that received the free speech claims of the movement was already inclined to be

¹⁵⁵ See, e.g., *Bond v. Floyd*, 385 U.S. 116 (1966) (protecting candidate elected to state legislature from being denied his seat based on his very harsh spoken criticism of the war in Vietnam); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (protecting a sexually explicit description in a novel of a young woman’s experience in a whorehouse); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (protecting advertisement in the *Times* supporting Dr. King and civil rights demonstrators); *Kingsley Int’l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684 (1959) (protecting a movie that portrayed adultery as acceptable in certain circumstances); *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (per curiam) (citing *Roth v. United States*, 354 U.S. 476 (1957)) (protecting a magazine dealing with homosexual sex). The per curiam reversal did not explain the reason for the decision, but the following passage from *Roth* provides a probable explanation: “All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.” 354 U.S. at 484 (1957).

¹⁵⁶ TSAI, *supra* note 1, at 92.

¹⁵⁷ *Id.*

¹⁵⁸ See, e.g., *Bridges v. California*, 314 U.S. 252, 278 (1941) (providing a very strong version of the clear and present danger standard; holding that free speech and press rights limit common law contempt power of the courts); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (holding that assembly organized by the Communist Party to protest economic concerns was protected by the First Amendment); *Herndon v. Lowery*, 301 U.S. 242 (1937) (finding First Amendment protection for Communist literature calling for a separate state for black people in the black belt of the South).

¹⁵⁹ See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250, 267–68 (1952) (Black, J., dissenting) (insisting on a broad right to petition the government and call for political change though the petition was racist and treated by the Court as group libel); *Feiner v. New York*, 340 U.S. 315, 326–27 (1951) (Black, J., dissenting) (rejecting the heckler’s veto and insisting that the free speech guarantee requires police to protect the speaker from threatened violence).

¹⁶⁰ TSAI, *supra* note 1, at 91 (citing *Brown v. Louisiana*, 383 U.S. 131 (1966)).

¹⁶¹ *Id.* at 92 (citing *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 7 (1964); *NAACP v. Button*, 371 U.S. 415, 431 (1963)).

extraordinarily speech protective—across the ideological spectrum.¹⁶² The Court was also clearly sympathetic to the cause of racial equality.¹⁶³

One of Professor Tsai's most interesting accounts of transformation is the Court's reversal, discussed earlier, of *Minersville School District v. Gobitis*.¹⁶⁴ In *Gobitis*, the Court upheld expulsion of Jehovah's Witness children from public schools for refusal to salute the flag.¹⁶⁵ Just three years later, the decision was reversed by *West Virginia Board of Education v. Barnette*.¹⁶⁶

Why did this remarkable transformation happen? Tsai credits both internal factors (reconsideration by some Justices in light of experience and in light of their free speech views) and external factors (the increasing emphasis by President Franklin Roosevelt on liberties such as freedom of speech and religion in response to the onward march of Nazi totalitarianism).¹⁶⁷ Tsai gives more credence to the external. He regards this reversal as "a constitutional transformation resulting from a discursive convergence between the political branches and the Judiciary."¹⁶⁸ The major themes of the resulting constitutional transformation included "the First Amendment as the main armament in the struggle to rid the world of totalitarianism; . . . the establishment of the First Amendment in a 'preferred' position vis-à-vis other constitutional rights; . . . and . . . the production of popular rhetorical forms with which to disseminate these norms."¹⁶⁹

Shortly before the *Gobitis* decision, Hitler's legions were overrunning Europe. In 1939 and 1940, in response to this calamity, President Franklin Roosevelt had stressed the importance of national unity for the preservation of democracy.¹⁷⁰ But Roosevelt had also emphasized the values threatened by totalitarianism: "our spiritual values"; "the blessed right of being able to say what we please"; the right not to have "capital confiscated"; "freedom of religion"; the value of not "being afraid to walk down the street with the wrong neighbor"; and the right not to be "cast into a concentration camp" for exercising these freedoms.¹⁷¹ The *Gobitis* Court saw the liberty to refuse to pledge allegiance to the flag as a potential threat to national unity and

¹⁶² See *supra* notes 73–78 and accompanying text (discussing the Court's protections for racist speech).

¹⁶³ See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down Virginia's ban on interracial marriage); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (striking down segregation in public education).

¹⁶⁴ 310 U.S. 586 (1940).

¹⁶⁵ *Id.* at 598.

¹⁶⁶ 319 U.S. 624, 642 (1943).

¹⁶⁷ TSAI, *supra* note 1, at 114.

¹⁶⁸ *Id.* at 123.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 116–17.

¹⁷¹ *Id.* at 118–19.

survival.¹⁷² It chose national unity.¹⁷³ After the decision was handed down, mobs persecuted Jehovah's Witnesses. Commentators roundly condemned the decision in the press, in religious journals, and in law reviews.¹⁷⁴

In January 1941, in his State of the Union address, Roosevelt focused on liberty, not in opposition to, but as rationale for national unity.¹⁷⁵ President Roosevelt "committed the nation to building a 'world founded upon four essential human freedoms': 'freedom of speech and expression—everywhere in the world'; 'freedom of every person to worship God in his own way—everywhere in the world'; 'freedom [from] want . . . —everywhere in the world'; and 'freedom [from] fear . . . —anywhere in the world.'¹⁷⁶ Roosevelt later reiterated the Four Freedoms as among the nation's war objectives in 1942, after the attack on Pearl Harbor.¹⁷⁷

According to Tsai, the Four Freedoms speech was a virtual repudiation of *Gobitis*. A constitutional transformation followed the speech, one that resulted from "a discursive convergence between the political branches and the Judiciary."¹⁷⁸ Tsai sets out some of the background for the shift. Justices Black, Murphy, and Douglas had been rethinking their decision in *Gobitis* after its disastrous aftermath and its critical reception.¹⁷⁹ On June 8, 1942, in another religious liberty case, they announced that they now believed *Gobitis* was wrongly decided.¹⁸⁰ Shortly thereafter, Wiley Rutledge replaced Justice James Byrnes, increasing the likelihood that there were at least five votes for reversal.¹⁸¹ The reversal came in the *Barnette* decision in 1943, where Justice Jackson used his "constitutional constellation" metaphor to affirm the central importance of First Amendment freedoms.¹⁸²

Ultimately, according to Tsai, the role of judges like Justice Jackson is not simply to report decisions of the Framers or even to translate the Constitutional text into a modern context.¹⁸³ Instead he sees their role not as "passively describing governing language" but as "actively using it" and in

¹⁷² *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 595 (1940) ("We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security.")

¹⁷³ TSAI, *supra* note 1, at 114.

¹⁷⁴ *Id.* at 123. For a discussion of *Gobitis* and *Barnette* and the reaction to *Gobitis*, see Michael Kent Curtis, Introduction, *Reading the Constitution by the Light of the Burning Flag*, in *THE CONSTITUTION AND THE FLAG: THE FLAG SALUTE CASES xxxvii-xxxiv* (1993).

¹⁷⁵ TSAI, *supra* note 1, at 117.

¹⁷⁶ *Id.* (internal quotation marks omitted).

¹⁷⁷ *Id.* at 120.

¹⁷⁸ *Id.* at 123.

¹⁷⁹ *Id.* at 114.

¹⁸⁰ *Id.* at 122.

¹⁸¹ *Id.*

¹⁸² See *supra* note 39 and accompanying text.

¹⁸³ TSAI, *supra* note 1, at 141 & n.1 (citing Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165, 1173, 1209 (1993)) (rejecting Lessig's view).

doing so “reshaping its meaning.”¹⁸⁴ Reshaping goes beyond simply translating principles from one era (such as the Fourth Amendment’s security for “persons, houses, papers, and effects”¹⁸⁵ against unreasonable searches) to new situations that arise in a later era (such as wiretapping). Judges are facilitators of dialogue, not translators. This, Tsai says, is what judges have always done. The idea of the “judge as facilitator”¹⁸⁶ shapes Tsai’s conception of the appropriate role of the judge. To be good facilitators, judges should “communicate in accessible terms.”¹⁸⁷ On this, but not too much else, he agrees with Justice Hugo Black, who once told one of his clerks that he wanted to write so his opinions would be understood by people in barbershops and by the clerk’s mother.¹⁸⁸ The tools for the job of judge as facilitator include methods commonly used in judicial opinions: “reasoning from text, structure, precedent, or ethos.”¹⁸⁹ “History” should be added to the list. Because of the needs of democracy, judges “must err on the side of transparency” in explaining their decisions.¹⁹⁰ This transparency is essential for social accountability and for purposes of instruction.¹⁹¹

According to Tsai, judges should not “rhetorically exclude others from the law” because constitutionalism should be an “interactive process.”¹⁹² They must “portray the system in pluralistic and interactive terms rather than rely upon clichés about judicial authority.”¹⁹³ In Tsai’s view, courts should be “institutions dedicated to the development and maintenance of a democratic vocabulary.”¹⁹⁴ Accordingly, the judicial role includes “[h]armonizing popular discourses; . . . [b]uilding a people’s political vocabulary; . . . [m]anaging and nurturing a society’s organizing beliefs; and . . . [e]nabling other constitutional actors to speak on behalf of the people’s interests.”¹⁹⁵ Still, for Tsai, “the facilitative tradition endorses a presumption in favor of judicial participation” in constitutional decision-making.¹⁹⁶ A contrary vision that sees judges as intruders “contradicts the text of the Constitution” and the design of the founders.¹⁹⁷ However, courts cannot and should not resolve all potential constitutional issues. Instead, courts can and should “craft rulings with an eye toward empowering others

¹⁸⁴ TSAI, *supra* note 1, at 142.

¹⁸⁵ U.S. CONST. amend. IV.

¹⁸⁶ TSAI, *supra* note 1, at 144.

¹⁸⁷ *Id.* at 142.

¹⁸⁸ ROGER K. NEWMAN, HUGO BLACK, A BIOGRAPHY 325 (1994).

¹⁸⁹ TSAI, *supra* note 1, at 144.

¹⁹⁰ *Id.* at 165.

¹⁹¹ *Id.* at 145.

¹⁹² *Id.*

¹⁹³ *Id.* at 165.

¹⁹⁴ *Id.* at 145.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 165.

¹⁹⁷ *Id.*

better situated to translate constitutional text into action.¹⁹⁸ (In this context, I think of the Warren Court's decisions upholding the Civil Rights Act of 1964 and the Voting Rights Act of 1965 and, on the other side of the ledger, the Court's decisions hobbling the anti-Klan statutes during Reconstruction and striking down the Violence Against Women Act more recently.)¹⁹⁹ Finally, judges should avoid "obsolescence and ensur[e] social grounding for text," because "rules suited for one historical moment—even as they relate to a single subject matter—might not be optimal at a later point in time."²⁰⁰

There are no permanent defining "moments" in Tsai's vision. Instead, Tsai embraces "the logic of popular sovereignty" in which current social support is the most important determinant of constitutional meaning.²⁰¹ As a result, "no judicial reading of text can be insulated from the politics of reimagination."²⁰² Far from being rootless, however, Tsai insists that this fluid facilitative tradition is historically authorized.²⁰³ He quotes Hamilton: rights, in the end, "must altogether depend on public opinion, and on the general spirit of the people and of the government."²⁰⁴ This is the "only solid basis of all our rights."²⁰⁵ That is so. Rights will wither without social support.

II. EVALUATION

A. *Prediction, Causation, and Explaining Constitutional Transformation*

I have doubts about the scope and meaning of linguistic transformations or linguistic regimes. That they happen is clear and that they serve as a useful marker of constitutional change seems true. That multiple influences can bring them about also seems true.

What else is true about them? What exactly is the significance of linguistic transformations? Do they, at first, simply signal that a shift in judicial doctrine (often as a result of political shifts and new court appointments) has occurred? Once established do they also shape analysis? Do they do both? How closely do they correlate with popular will? For

¹⁹⁸ *Id.* at 165–66.

¹⁹⁹ See *United States v. Morrison*, 529 U.S. 598 (2000) (striking down a portion of the Violence Against Women Act); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding the 1965 Voting Rights Act, which re-enfranchised Americans of African descent in the South); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding the ban on discrimination in public accommodations in the 1964 Civil Rights Act); *United States v. Cruikshank*, 92 U.S. 542 (1875) (hobbling congressional statutes responding to Klan-type political terrorism).

²⁰⁰ TSAL, *supra* note 1, at 166.

²⁰¹ *Id.* at 149.

²⁰² *Id.*

²⁰³ *Id.* at 149–62.

²⁰⁴ *Id.* at 157.

²⁰⁵ *Id.*

Tsai, it is overly simplistic to think the correlation is always close. Still, whatever its exact dimensions, the concept has undoubted descriptive value. Professor Tsai has enriched our understanding of judicial opinions, of the role of rhetoric, and of the evolution of constitutional doctrine.

Tsai claims that his theory of linguistic transformation has the virtues of predictability and historical accuracy. If one takes “predictability” literally and very specifically, I doubt that any model can offer much predictability—except perhaps at a very general level. One might safely predict, for example, that the understanding of the meaning of constitutional provisions will change over time, and that we will have constitutional revolutions, reactions, and counterrevolutions. Tsai shows that these general changes will often be accompanied by changes in rhetoric and in ruling metaphors.

But predictability in terms of what will happen and when is elusive. History is a bus, not a tram; it does not run on tracks to predetermined destinations.²⁰⁶ Since history does not run on tracks, and since so many factors influence its direction, its route is simply not predictable in any specific way. A combination of often unpredictable factors such as depressions, wars, oil boycotts, revolution, seizure of American diplomats as hostages, presidential sex scandals, terrorist attacks, and emerging social movements can produce shifts in political power that may become long term political realignments. These realignments, in turn, produce long term shifts in key judicial appointments. Once in power, leaders can influence reigning understandings and appoint judges, as Tsai describes. Disentangling complex factors and accurately predicting specific outcomes and linguistic regimes is not possible.

What Tsai seems to have in mind is different. He focuses on identifying stages of constitutional regimes and constitutional revolutions and their rhetorical character. Tsai does suggest stages in the life of a “linguistic regime,” which he characterizes as “a stable union of political beliefs, governing rules, and popular language.”²⁰⁷ And he identifies “linguistic transformation” as a “genus of constitutional revolution.”²⁰⁸ In his broad description of stages of change, Tsai is definitely on to something. But this is description—not prediction in any specific sense. Tsai’s description of stages in the rise and fall of the “wall of separation” metaphor is an illuminating example, quite appropriately contained in a chapter entitled “Political Pathways.”²⁰⁹

²⁰⁶ I believe that Karl Popper used the phrase, though I have been unable to provide a citation. At any rate, the phrase is used in a review of Popper’s *The Open Society and Its Enemies*. Gilbert Ryle, *Popper: The Open Society and Its Enemies*, Vol. 56, No. 222 MIND 167, 167 (1947) (book review). On this point, see generally KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (5th ed.1966) [hereinafter POPPER, *OPEN SOCIETY*]; KARL POPPER, *THE POVERTY OF HISTORICISM* (1964).

²⁰⁷ TSAI, *supra* note 1, at 52.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 93–111.

To his credit, Tsai avoids single-factor explanations. He recognizes that multiple factors shape changes in constitutional meaning, including the efforts of social movements, shifts in political power, and new appointments to the Court.²¹⁰ While Tsai recognizes the complex factors that cause linguistic and constitutional transformation, the idea of a unified linguistic transformation tied to rhetoric is too simple. Tsai describes the triumphal march of the “marketplace of ideas” metaphor in free speech discourse—one characterized by a laissez-faire approach to speech regulation. There is clearly something to this. One can see laissez-faire’s influence in the Supreme Court’s recent defense of the power of corporate executives to use corporate treasury funds (typically stockholders’ money) in political battles.²¹¹

But the “free trade in ideas” metaphor was reintroduced by Justice Wiley Rutledge in 1945.²¹² Rutledge was a Roosevelt appointee. Did use of the phrase “free trade in ideas” by a dedicated New Dealer really connote a return to laissez-faire constitutionalism—even in the speech sphere? I doubt it. From Tsai’s account, one might infer a fairly linear triumph of free market ideology in free speech discourse. The reality is more complex. Judges in the progressive tradition (and some more conservative ones) limited the reach of the laissez-faire version of the “marketplace of ideas” metaphor in free speech cases. These Justices applied antitrust laws to the Associated Press²¹³ and upheld the Fairness Doctrine, a doctrine that required media owners to air divergent views.²¹⁴ As recently as 1990, the Court recognized that “the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants” limitation on the use of corporate funds in political campaigns.²¹⁵ What happened between Justice Rutledge’s opinion and the Roberts Court’s broad embrace of a corporate perspective was the triumph of a political movement very closely allied with corporate power. Recently the Court has made a dramatic change on the issue of corporate funding as a result of a change of one Justice on the Court.²¹⁶ The metaphors of “free trade in ideas” and “the marketplace of ideas” were fairly constant. But the meaning of the metaphor and the

²¹⁰ *Id.* at 129–31.

²¹¹ *See, e.g.,* *FEC v. Wis. Right to Life*, 551 U.S. 449, 457 (2007) (allowing nonprofit corporations to use contributions from for-profit corporations to run advertisements targeting political candidates’ issue stances, but upholding certain prohibitions on advertisements calling on voters to support or defeat particular candidates).

²¹² *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (“‘Free trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts.”).

²¹³ *Associated Press v. United States*, 326 U.S. 1, 12 (1945).

²¹⁴ *Red Lion Broad., Inc. v. FCC*, 395 U.S. 367, 375 (1969).

²¹⁵ *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990).

²¹⁶ *Compare* *McConnell v. FEC*, 540 U.S. 93 (2003) (limiting corporate and union donations to political parties), *with* *Wis. Right to Life*, 551 U.S. at 457 (substantially reversing course by protecting corporate expression after Justice Alito replaced Justice O’Connor).

course of decisions shifted significantly. So, as Tsai says elsewhere, the triumph of a metaphor tells at most a part of the story. The metaphor and the linguistic transformation of which it is a part are less predictive and determinative than the philosophy of the judges who wield the metaphor and put it into operation.

As Tsai recognizes, “free trade in ideas” is hardly self-defining. The idea that the best understandings come from multiple perspectives rather than authoritative selection is in considerable tension with consolidation of television, cable, books, radio, and movies in a few corporate hands, and with the demise of the Fairness Doctrine and concurrent atrophy of concerns about consolidation. As Tsai suggests, government action can facilitate free trade in ideas. Paul Starr, in his book, *The Creation of the Media*, describes the alternate press paths of the telegraph (a natural, virtual monopoly) in Britain and the United States.²¹⁷ In the United States the Western Union telegraph monopoly made exclusive arrangements with the Associated Press so that only the limited class of AP members could have access to the telegraph.²¹⁸ In Britain the telegraph became part of the government’s postal service open to all comers.²¹⁹ The result in England was multiple news services with access to the telegraph: Labor, Liberal, Conservative, and others.²²⁰

The problem with a laissez-faire corporate constitutional regime is highlighted by another metaphor, that of agency. From the Levellers of the English Revolution to the Founding generation, agency (or trusteeship) was a common metaphor for the relation of government officials to those they represented.²²¹ By this metaphor, the agent (the president, a federal or state legislator, a governor, etc.) has a fiduciary duty to his principal (the people). The duty requires the agent to serve the best interests of the people. The problem in all agency relationships is the danger that the agent will be seduced to pursue an interest that differs from that of his principal. Campaign contributions linked to corporate power or to great wealth can have this seductive effect—by giving special political access to big contributors. Hearing regularly and predominantly from a limited segment of the population can affect a politician’s understanding of the world and so result in policies skewed toward large economic interests. Recent history suggests that this

²¹⁷ PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATION* 153–89 (2004).

²¹⁸ *Id.* at 183–84.

²¹⁹ *Id.* at 183.

²²⁰ *Id.* at 179.

²²¹ See generally EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN AMERICA* 20 (1988); Michael Kent Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 CONST. COMMENT. 359, 367–69 (1991) (discussing Levellers and the metaphor of agency and trust); *id.* at 390 (stating that the Pennsylvania Constitution of 1776 referred to government officials as trustees and servants).

does happen, sometimes with most unfortunate effects.²²² Examples range from the deregulation and lack of oversight that made the Enron fraud possible, to the elimination of New Deal safeguards and corresponding deregulation that have contributed to the present economic disaster.²²³

The marketplace of ideas is not the only area where I have concerns about the explanatory power of linguistic transformations. Does the concept threaten to blind us to a more differentiated view of what is going on? Professor Tsai's presentation of the First Amendment and linguistic transformation might lead a reader to see, in recent years, a broad and linear triumph of free expression principles. That view has much to be said for it. But the picture is complex. A broad view of the public forum was rolled back by the Burger and Rehnquist Courts.²²⁴ Those Courts restricted protection of sexually oriented materials.²²⁵ The free speech rights of high school students have suffered substantial erosion in the lower courts in recent years,²²⁶ and the Tinkers were the last students to win in the Supreme Court.²²⁷ Though not discussed, these changes are entirely consistent with Professor Tsai's larger view of the life cycle of judicial conceptions. They are, however, in tension with a view of the general triumph of free expression or the dominance of a broad free speech linguistic transformation.

²²² See, e.g., Mark Lange, Op-Ed., *A Tumor at the Heart of Medicare*, N.Y. TIMES, Mar. 21, 2009, at A17 (describing how corporate interests structured the Medicare prescription drug benefit to benefit drug companies and insurance companies in ways that undermine the general welfare).

²²³ The reader may think of other and perhaps better examples. On Enron, see Richard A. Oppel Jr. & Stephen Labaton, *Enron's Collapse: The Overview*, N.Y. TIMES, Jan. 25, 2002, at A1. As for the path from New Deal to financial crisis, see Peter S. Goodman, *The Financial Crisis and America's Casino Culture*, N.Y. TIMES, Sept. 19, 2009, at WK1 (New York ed.), available at <http://www.nytimes.com/2009/09/20/weekinreview/20goodman.html?scp=4&sq=financial%20crisis&st=cse>.

²²⁴ See, e.g., *United States v. Kokinda*, 497 U.S. 720, 722–23 (1990) (holding a public sidewalk surrounding a post office was not a free speech forum); compare *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 309 (1968) (finding common areas of a “private” shopping center are a free speech forum), with *Lloyd v. Tanner*, 407 U.S. 551, 570 (1972) (reversing the decision, finding a private shopping center is not a forum for free speech).

²²⁵ See, e.g., *Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 54 (1986) (upholding a zoning law for adult establishments that had the effect of virtually excluding the establishment from the City of Renton); *Miller v. California*, 413 U.S. 15, 36–37 (1973) (using a less protective test for obscenity); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57–58 (1973) (finding no right for adults to view “obscene” sex films in a theater from which juveniles are excluded). For an earlier more protective approach, see *Memoirs v. Massachusetts*, 383 U.S. 413, 418–420 (1966) (plurality opinion), which held that the crime of obscenity required that the item be utterly without redeeming social value.

²²⁶ By adopting a school uniform policy, public school districts may apparently ban armbands, buttons, and any other slogan on the person of the student. See, e.g., *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 423 (9th Cir. 2008) (upholding a general ban). All the Des Moines district needed was a uniform policy banning “the wearing of all symbols of political or controversial significance.” See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510–11 (1969).

²²⁷ See *Tinker*, 393 U.S. at 504, 516 (holding that the suspension of students for wearing black armbands to protest the Vietnam War was a violation of their First Amendment rights).

B. *The Popular Sovereignty Metaphor*

Tsai's theory emphasizes popular sovereignty, but as Tsai recognizes, judicial power can threaten popular sovereignty as well as facilitate it. The Court can block popularly supported changes for generations, thanks to the great difficulty of overriding Court decisions by constitutional amendment. So, we may well be stuck for quite some time with campaign finance decisions that facilitate corporate political influence and undermine the agency relation at the heart of a healthy democratic process. Judicial obstruction of democratic change is not new. For years, the Court blocked the national abolition of child labor.²²⁸ The current situation may be worse because it may create a self-perpetuating cycle: the Court furthers corporate economic domination of the political process, which results in more corporation-friendly judicial nominees, which in turn results in decisions that further corporate domination, thereby producing still more corporation-friendly nominees. Of course, since history does not run on a track, nothing is inevitable.

It is no answer to these concerns to suggest that they have been the result of popular sovereignty. There is no indication that the people have embraced such changes or supported them when they picked their president and congressmen.²²⁹

C. *The People and the "Wall of Separation" Metaphor*

What "the people" embrace, and when, is a complicated question. Professor Tsai, for example, sees the destruction of the metaphorical "wall of separation" between church and state as an achievement of the people themselves.²³⁰ Maybe that was what happened. Or perhaps a political coalition achieved power, a segment of which included religious conservatives, and this coalition changed the law in ways that sometimes would, and sometimes would not, be approved by "the people." Linguistic transformation is not necessarily coextensive or consistent with popular sovereignty any more than judicial review is. Professor Tsai sometimes describes linguistic transformation as involving democratic dialogue; at other times he refers to elite manipulation. No doubt he is right both times.

²²⁸ See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918). As late as 1937, President Franklin Roosevelt complained that, "It has cost twenty years already, and no one knows how many more are to come—to obtain a constitutional interpretation that will let the nation regulate the shipment in national commerce of goods sweated from the labor of little children." President Franklin Delano Roosevelt, Address on Constitution Day (Sept. 17, 1937), reprinted in MICHAEL KENT CURTIS, J. WILSON PARKER, DAVISON DOUGLAS, & PAUL FINKELMAN, *CONSTITUTIONAL LAW IN CONTEXT* 157, 159 (2d ed. 2006). *Hammer* was overruled in 1941. See *United States v. Darby*, 312 U.S. 100, 116–17 (1941).

²²⁹ See generally THOMAS FRANK, *WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA* (2004) (explaining how less affluent voters were motivated to vote against their economic interest).

²³⁰ See TSAI, *supra* note 1, at 107.

Professor Tsai mixes his description with evaluation. In the case of establishment of religion, his evaluation is quite critical of the “wall of separation” metaphor. In spite of the demise of the wall metaphor and what it stood for, he tells us that “a good number of people continued to cling to the word-picture’s romantic promise of a world free of religious difference. But separation as an organizing principle was significantly discredited for its antiseptic characterization of our actual political life and for its capitulation to Americans’ paranoid style”²³¹

Of course, there is a quite different way to see the demise of the metaphor and what it stood for: government programs are turned over to churches that are then permitted to pervasively discriminate based on religion as to who is employed to carry out the programs.²³² The result can be a new political–religious patronage regime.²³³ As the metaphorical and always exaggerated “wall” crumbles, the battle moves from the question of whether it is the role of government to be involved in purveying religious doctrine and promoting religious causes into a battle about whose religious doctrine and whose cause it will be. In this brave new world, government power or patronage can be used to reward politically favored churches.²³⁴ Contrary to Professor Tsai’s stance, the “wall” was never about creating an “antiseptic” world free of religious difference, but about whether the government would be involved in choosing, directly or indirectly, which religious views and institutions to support. As history shows, fusion of politics and religion has not worked well.

D. Mixed Metaphors

There are a few other jarring passages in this remarkable book. The most incongruous is the invocation of Plato’s *Republic*. Tsai cites the *Republic* in connection with democratic idioms. Plato’s *Republic* is described as a city of “political equals”:²³⁵

In *The Republic*, a well-timed shift to figurative language draws listeners and readers into the *very ideal* state that Plato describes; the characters’ verbal ex-

²³¹ *Id.*

²³² See Savage, *supra* note 151.

²³³ See Laurie Goodstein, *Minister, A Bush Ally, Gives Church Site for Alito Rally*, N.Y. TIMES, Jan. 5, 2006, at A14. A black Philadelphia minister who supported George W. Bush and received a one million dollar faith-based initiative grant to run a housing project for the poor offered his church as the site of a political rally to support the nomination of Samuel Alito to the Supreme Court in advance of his confirmation hearings; the minister agreed to host the rally “out of loyalty to Mr. Bush” more than support for Alito. *Id.* See also Eric Lichtblau, *Bush Plans to Let Religious Groups Get Building Aid*, N.Y. TIMES, Jan. 23, 2003, at A1. In addition, to help their political allies, officials could dole out special favors and exemptions to all religious schools, daycare centers, and similar institutions exempting them from requirements applied to their secular competitors. Diana B. Henriques, *Religion Trumps Regulation As Legal Exemptions Grow*, N.Y. TIMES, Oct. 8, 2006, at A1.

²³⁴ See Goodstein, *supra* note 233.

²³⁵ TSAI, *supra* note 1, at 29–30.

changes constitute the community by populating and ordering the city. Moreover, Plato himself models the behavior expected of every citizen in a democracy: an ability to deploy popular language in order to interact with others, a willingness to experiment with political forms, the desire to enter into a lasting fellowship.²³⁶

Maybe this simply means that figurative language employed by Plato to support his antidemocratic and totalitarian state is also important in a democracy. Still, in a book about free speech and democracy, this is puzzling. Plato, after all, gives us an “ideal” state in which the greatest injustice is for ordinary people to be involved in decisions about how the city is to be governed. They must not meddle in the business that should be reserved for philosopher kings. Music and poetry must be strictly censored. Castes are to be established and maintained by selective breeding.²³⁷ Rulers will “find a considerable dose of falsehood and deceit necessary for the good of their subjects.”²³⁸ This is a system remarkably opposed to democracy, free speech, and the model of popular sovereignty that Professor Tsai endorses.

E. History, Free Speech, and the First Amendment: The Uses of the Past?

Tsai focuses on today’s popular understandings and warns against trying to find our present free speech commitments simply in the past. Of course, he is right. It is dangerous, Tsai notes, to think that judicial doctrine of any period is the final word. Professor Tsai writes:

Of all the foundational aspirations Americans have chosen to live by, the First Amendment has arguably ventured the farthest from its English and colonial origins. Whereas the nation’s intellectual forefathers were most troubled by the coercive force of prior restraints, today freedom of expression extends to all manner of postpublication actions taken by the state that might unduly impede the free flow of information.²³⁹

The past is different, but Tsai overstates the difference. In this passage, Tsai’s vision of the past is paradoxically judge-centered. His description of freedom of expression as historically concerned mostly or solely with prior restraint fits the judicial analysis of press freedom by Federalist judges upholding the Sedition Act of 1798 and Justice Holmes’ disastrous opinion

²³⁶ *Id.* at 30–31 (emphasis added).

²³⁷ For a critique of the strikingly antidemocratic nature of Plato’s ideal state, see generally 1 POPPER, *OPEN SOCIETY*, *supra* note 206, at 39, 41–45, 53, 86–90. See also PLATO, *THE REPUBLIC*, Book V at 179 (Benjamin Jowett trans., Random House 1966) (community of husbands, wives and children); *id.* at 181–85 (selective breeding controlled by rulers); *id.* at 203 (philosophers must be kings in the ideal state).

²³⁸ PLATO, *supra* note 237, at 182.

²³⁹ TSAI, *supra* note 1, at 11–12.

in *Patterson v. Colorado*.²⁴⁰ But that view was hotly contested and aptly ridiculed in public and political discussion at least from the 1790s on. As Professor Tsai's vision of constitutional dialogue suggests, ideas of free speech, press, assembly, and petition were not, as a matter of history, the sole property of judges.

There is more instruction and enlightenment about freedom of expression to be found in the past than the "just-prior-restraint" assumption suggests. In significant ways, the First Amendment and state constitutional protections for speech, press, and assembly were a sharp break from the English background. The text of the First Amendment limited the Congress. While English law has some protections for free expression such as freedom of debate in Parliament and a right to petition, it did not limit Parliament's ability to repeal them.²⁴¹ Early American conceptions of freedom of the press and freedom of religion also differed from English traditions. Blackstone's view was that freedom of the press only protected the press against prior restraint of publication. It did not restrict punishment after publication for expression with a "bad tendency" or that was critical of rulers.²⁴² But Zenger's case, the classic colonial free speech case, was not about prior restraint. It was about whether the printer Zenger could be punished for publishing true criticisms of New York's colonial governor.²⁴³ The jury broke with common law and the judge's instructions and found for Zenger.

There are other reasons to be dubious of the just-prior-restraint analysis. Prior restraint had ended in both Britain and America long before the American Revolution and the adoption of the First Amendment. The matter was not settled. Blackstone's ideas lingered. The 1798 Sedition Act made it a crime to publish "false, scandalous, and malicious" writing critical of President Adams or the Federalist Congress, though not of his likely oppo-

²⁴⁰ *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (assuming without deciding that the Fourteenth Amendment might embrace expressive liberties such as those in the First Amendment, but holding that free press is limited to a protection against prior restraint); see also, e.g., CURTIS, *FREE SPEECH*, *supra* note 62, at 77 (Justice Iredell upholding the Blackstonian view that free press was merely a guarantee against prior restraint).

²⁴¹ James Madison raised this issue when proposing the federal Bill of Rights in 1789, stating:

"I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in [Parliament] . . . invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British constitution."

1 THE DEBATES AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES 435–36 (Joseph Gales & W.W. Seaton eds., 1834) (June 8, 1789) (Speech of James Madison) (emphasis added); see also 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1028 (Leon Friedman et al. eds., Chelsea House 1971) (reprinting Madison's speech).

²⁴² 4 WILLIAM BLACKSTONE, COMMENTARIES *151–52 (Univ. of Chicago Press 1979).

²⁴³ See *Rex v. Zenger*, 17 St. Trials (Howell) 675 (1735).

ment in 1800, Vice President Thomas Jefferson.²⁴⁴ In this controversy, Federalists endorsed the Blackstone view and supported the Act.²⁴⁵ Republicans rejected nothing-but-protection-against-prior restraint and effectively ridiculed it.²⁴⁶ Even the Federalist supporters of the Sedition Act did not advocate prior censorship of the press.

Many and probably most free speech and press cases today are Fourteenth Amendment (incorporated rights) cases—cases about state action abridging the freedoms.²⁴⁷ By 1866, when leading Framers of the Fourteenth Amendment attempted to apply free speech values as a limit on the states, few people understood free speech to be merely a protection against prior restraint.²⁴⁸

In the years leading up to the Fourteenth Amendment, many citizens were deeply involved in free speech and press discussions, and some of their ideas, such as rejection of the “bad tendency” analysis and insistence on a public forum for speech, went beyond judicial orthodoxy.²⁴⁹ Though people did not use those words, concerns about the “chilling effect” of libel laws that protect a public figure go back at least to the Sedition Act debates, as does the rejection of the “bad tendency” test for suppression of speech.²⁵⁰ Of course, on such questions, history rarely speaks with only one voice.

That these valuable ideas that arose largely outside of the judicial process have become bedrock judicial doctrine (if, in light of Professor Tsai’s analysis, such a thing still exists) illuminates the value of the broader dialogue Tsai cherishes. It shows that nonspecialists can make very substantial contributions to our understanding of the meaning of free expression. But it qualifies his view of the value of history. Free speech history is consistent with Professor Tsai’s wise insistence on the crucial role of democratic discussion of free speech values, though inconsistent with his assumption that history provides little guidance as to the better understanding of the guarantees.

This history also warns of the dangers of a purely doctrinal, court-centered approach. For example, when antislavery minister and newspaper editor Elijah Lovejoy was killed defending his printing press from an antiabolition mob, a very common refrain in the press and public meetings was that the mob was attacking the fundamental, national, constitutional right to free speech and press.²⁵¹ None of this fits with court doctrine then, or even

²⁴⁴ An Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (1798) (expired 1801).

²⁴⁵ *E.g.*, CURTIS, *FREE SPEECH*, *supra* note 62, 64–65.

²⁴⁶ *See, e.g., id.* at 71, 75, 77–78.

²⁴⁷ This stands to reason since most cases come from the states and involve the incorporated right.

²⁴⁸ *See id.* at 271–300.

²⁴⁹ *Id.* at 208, 244–48.

²⁵⁰ *Id.* at 68–69 (chilling effect); *id.* at 387 (bad tendency).

²⁵¹ *Id.* at 227–31 (discussing the reaction to Lovejoy’s death as an attack on the constitutional principle of free speech).

now, because the Court currently holds that the First and Fourteenth Amendments only protect against government action. Still, this popular claim about the central importance of practical enjoyment of free speech and press and about the danger of private suppression is a valuable contribution. It should still resonate, at least for those who have not suffered the handicap of a legal education.

F. Judging and the Role of Rights

In the end, it is silly to criticize a fine author for not writing a different or longer book. Still, as to Tsai's proposals for improved judicial methodology and better analysis of rights, the book gives little in the way of concrete examples. Lack of concrete examples makes some of the general principles harder for me to understand.

This is a very fine, thought-provoking book. In the end, I am of two minds. What will be the long-term effect if most begin to see rights as merely temporary judicial constructs produced by politics and as things to be argued about, rather than as things to be preserved? Of course, the idea that rights are precious things to be preserved is itself part of the democratic argument. But if free speech ideas are akin to religious belief, what is the appropriate metaphor for Professor Tsai's analysis—Historic Biblical criticism? Professor Tsai seems to criticize judicial opinions that rely on fixed external authority. Some, such as *West Virginia Board of Education v. Barnette* acknowledge change, but even *Barnette* appeals to the fixed star. What should we make of the fact that few judicial opinions follow his model?

Tsai warns against broad statements of rights. But without broadly protective free speech rights that limit discretion, how will the rights of dissenters fare in times of fear and crisis, or even in ordinary times, when judges, presidents, legislators, and many citizens, confronted with expression they find threatening, tend to overreact? If analysis becomes less fixed, how will this affect the vulnerable? How secure would once-despised and persecuted minorities, such as gays, have been in their rights of association and expression? Gays fared well as a result of the rhetoric and reality of broadly defined and strongly judicially defended rights to free expression and association.

Broad rights to free speech and association, to the extent they are accepted, constrain judges. Professor Tsai speaks of rhetorical constraints on judges and others, but this idea is far less developed than his description of, for example, the role of metaphor. As a result, it is hard to know to what extent and how these constraints constrain. He points out that free speech rights have contracted in times of perceived crisis.²⁵² Does this reflect an appropriate judicial attention to context? Or, is it, as in the case of the ex-

²⁵² TSAI, *supra* note 1, at 57.

termination of the right to criticize the institution of slavery in the South before the Civil War, a failure to adhere to a basic right that should have been preserved as a fixed principle in order to keep open avenues for peaceful abolition of a crime against humanity? Or finally, is it merely a fact of life to be observed?

Differing understandings of free speech rights emerge over time. As we have seen, during World War I, the Court upheld the jailing of a Socialist for sending draftees and others a leaflet attacking the draft and urging its abolition through peaceful democratic measures.²⁵³ And it upheld jailing another Socialist, Eugene Debs, for criticizing the war.²⁵⁴ In another time of crisis and fear, the Warren Court upheld Julian Bond's right to criticize the draft and the Vietnam War—although Bond's criticism was at least as harsh as that of Eugene Debs. Bond endorsed a statement suggesting that the United States was murdering Vietnamese peasants, and expressing sympathy and support for those men who refused to respond to the draft.²⁵⁵ The *Bond* decision helped to establish (for a time at least) a broadly protective free speech doctrine, even in a time of war and crisis.²⁵⁶ The Warren Court's rights revolution offered substantial protections to gay people—particularly in terms of freedom of expression and association.²⁵⁷ Broad and strong rights can make a difference for expressive freedom for once-despised minority groups. But Professor Tsai is right, of course, that context matters and protection ebbs and flows. It is a puzzle.

CONCLUSION

This book, with its illuminating emphasis on rhetoric and metaphor, is of great value for lawyers, for all who study the law, and for ordinary people as they construct and employ arguments about our fundamental rights. Whether or not one accepts Professor Tsai's conclusion that constitutional discourse inside and outside of the courts is and should be a form of politics, his study has implications for all who care about constitutional issues. The struggle to preserve or advance a constitutional vision cannot safely be left to the judges. It is a struggle in which all citizens have an interest, and all have a legitimate role in the dialogue. That is a central point of this very fine book, and it is a point we should never forget.

²⁵³ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

²⁵⁴ *Debs v. United States*, 249 U.S. 211, 216 (1919).

²⁵⁵ *Bond v. Floyd*, 385 U.S. 116, 118–22 (1966).

²⁵⁶ *See id.* at 132–33.

²⁵⁷ William Eskridge has noted that “the criminal, [F]irst [A]mendment, and equality rights the Warren Court created . . . were directly applicable to gay people Contrary to its critics, rights discourse . . . tangibly worked to the benefit of the most despised minority in America” WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 100, 145–46 (2002). *See generally id.* at 111–32 (regarding the sometimes mixed story of First Amendment law and gays).