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Stephen M. Feldman, *Free Expression and Democracy in America: A History* (U. Chi. Press 2008). Pp. 544. $55.00.

On July 10, 2010, the Orange/Sullivan County NY 912 Tea Party organized a "Freedom from Tyranny" rally in the sleepy exurb of Middletown, New York. Via the group's online Meetup page, anyone who was "sick of the madness in Washington" and prepared to "[d]efend our freedom from Tyranny" was asked to gather on the grass next to the local Perkins restaurant and Super 8 motel for the afternoon rally.[1] Protesters were encouraged to bring their lawn chairs for the picnic and fireworks to follow.

There was a time when I would have found an afternoon picnic a surprising response to "Tyranny," but I have since come to expect it. The Tea Party movement that has grown so exponentially in recent years is shrouded in irony. There is of course the business of "keep your government hands off my Medicare" and, more generally, the apparently unselfconscious effort to build a coherent community of radical individualists, what intellectual historian Mark Lilla recently called "the politics of the libertarian mob."[2] But what interests me here is the sense of victimization the movement's adherents seem to experience. Tea Party supporters tend overwhelmingly to be white, are disproportionately male, and are wealthier and better educated, on average, than the general population.[3] American tyranny has had its victims over the years, and these are not they. One could be forgiven the impression that the movement rather invents suppression, or at least seeks it out, that it may dissent.

I thought often of the Tea Party as I read Stephen Feldman's ambitious *Free Expression and Democracy in America*.[4] For one, the peculiar symbiosis between suppression and dissent is Feldman's principal subject, and it pervades part of his thesis that the American commitment to free expression at any given time is a vector forged both of legal doctrine and of the interplay between powerful and competing traditions of suppression and dissent. "Dissent," he writes, "begets suppression, which begets

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1. Randy & Sheryl Thomas, *Orange/Sullivan Cnty NY 912 Tea Party, Stop the Madness! Freedom from Tyranny Rally*, http://www.meetup.com/OrangeSullivanCounty-NY-912/calendar/13504512/ (last accessed Nov. 6, 2010).

2. Mark Lilla, *The Tea Party Jacobins*, 57 N.Y. Rev. Bks. 53, 53 (May 27, 2010).

3. Kate Zernike & Megan Thee-Brenan, *Poll Discontent's Demography: Who Backs the Tea Party*, 159 N.Y. Times A1 (Apr. 15, 2010).

4. Stephen M. Feldman, *Free Expression and Democracy in America: A History* (U. Chi. Press 2008).

dissent."[5] Justice Robert Jackson would have been at least as true to history had he called suppression of dissent rather than freedom from compelled speech - the "fixed star in our constitutional constellation."[6] Like any good foils, suppression and dissent need each other to acquire substance and heft. Dissent has become a constitutional norm, not because it is implicit in the text of the First Amendment but because it has risen from a long, striated history of political struggle that suppression has ignited.

Feldman writes within the tradition that academic lawyers identify with popular constitutionalism, and that political scientists sometimes call the political construction of judicial review. These are distinct ideas, but they hold in common the conceit that judicial adjudication of constitutional rights is no less the product of political contest than are legislative enactments or electoral victories.[7] Their common target is the naïve view that traditional legal materials text, original understanding, structure, and precedent are sufficient to understand constitutional outcomes. For Feldman, the alternating victors in the pitched battle between traditions of suppression and dissent have reflected changes in democratic politics mediated through judicial decisions. We have turned away, he says, from the "republican" notion that free expression may be restricted in the name of the common good, and towards the "pluralist" conception of free expression as necessary for, alternatively, collective self-government, the search for truth, or self-expression.[8] That transformation has been born of cultural, technological, and demographic change, and from a concomitant history of ideas that themselves have required suppression to find persuasive articulation.

A book is not enough to tell this tale, even at close to 500 pages of text, and Feldman struggles to find focus through 300 years of political and intellectual history, not all of it obviously related to free expression. I am neither willing nor able to canvass that history in this space, but one example should give a sense of the tome's tone. The First World War was a low moment for freedom of expression in the United States. The Espionage Act of 1917,[9] as amended by the Sedition Act of 1918,[10] authorized criminal prosecution and lengthy prison terms for, among other offenses, speaking, writing, or advocating "any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution . . . or the military or naval forces of the United States or the flag."[11] More than 2,000 people were prosecuted under the Act, more than 1,000 convictions were obtained, and twenty-four people received prison sentences of twenty years or longer.[12] Eugene V. Debs, the Socialist Party leader and serial presidential candidate, received a ten-year prison sentence for advocating, indirectly if at all, that laborers avoid the draft.[13] Debs was a casualty of the Red Scare, which generally postdated hostilities but nonetheless found consistent favor with the

5. *Id.* at 152.
6. *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).
7. *See* Mark A. Graber, *Constructing Judicial Review*, 8 Annual Rev. Political Sci. 425, 428 (2005).
8. Feldman, *supra* n. 4, at 4-5.
9. Pub. L. No. 65-24, 40 Stat. 217 (1917) (repealed 1921).
10. Pub. L. No. 65-150, 40 Stat. 553 (1918) (repealed 1921).
11. *Id.* at 553.
12. Feldman, *supra* n. 4, at 251.
13. *Id.* at 262; *see also Debs v. U.S.*, 249 U.S. 211 (1919).

Supreme Court, which upheld numerous seditious-libel prosecutions during the 1918 term and beyond.[14]

And yet, the Red Scare is responsible for two of the most significant developments in the history of American dissent. First, it prompted the great civil-liberties scholar Zechariah Chafee, Jr. to publish "Freedom of Speech in War Time"[15] in the *Harvard Law Review*. Chafee argued, quoting Justice Oliver Wendell Holmes's brief unanimous opinion in *Schenck v. U.S.*,[16] that free speech, even during war, should be limited only when the words "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[17] Chafee substantially agreed with Holmes's language, but Holmes did not at the time view the test as any more rigorous than the traditional inquiry into whether the speech at issue had "bad tendencies."[18] The outcome in *Schenck*, which upheld a prosecution for circulating leaflets advocating repeal of the selective service law, is illustrative.

The Chafee article appears to have helped change Holmes's mind. Holmes read the article and even discussed it with Chafee over tea in the summer following the *Schenck* decision.[19] The next term, Holmes dissented in *Abrams v. U.S.*,[20] which upheld an Espionage Act prosecution based on a newly robust clear and present danger test.[21] Holmes was able to refashion himself as a free-speech champion in later cases,[22] and a version of the clear and present danger test as articulated by Chafee in his article and by Holmes in *Abrams* has since become the governing standard for the constitutional protection of criminal advocacy.[23]

A second important product of the Red Scare was the American Civil Liberties Union ("ACLU"), the single most influential organization in the subsequent history of American free speech. Founder Roger Baldwin had been imprisoned during the war for refusing induction and was responsible for the creation of the National Civil Liberties Bureau ("NCLB"), which advocated on behalf of conscientious objectors.[24] Motivated by the government suppression typified by the anti-Communist raids engineered by Attorney General A. Mitchell Palmer, the NCLB morphed into the ACLU after the

14. *See Schaefer v. U.S.*, 251 U.S. 466 (1920); *Abrams v. U.S.*, 250 U.S. 616 (1919); *Debs*, 249 U.S. 211; *Frohwerk v. U.S.*, 249 U.S. 204 (1919); *Sugarman v. U.S.*, 249 U.S. 182 (1919); *Schenck v. U.S.*, 249 U.S. 47 (1919); *see generally* Feldman, *supra* n. 4, at 263-266.

15. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932 (1919).

16. 249 U.S. 47.

17. Chafee, *supra* n. 15, at 967 (quoting *Schenck*, 249 U.S. at 52).

18. Feldman, *supra* n. 4, at 264. The "bad tendency" test was first articulated in *Patterson v. Colo.*, 205 U.S. 454 (1907).

19. Feldman, *supra* n. 4, at 273.

20. 250 U.S. 616.

21. *Id.* at 624 (Holmes, J., dissenting); *see* Feldman, *supra* n. 4, at 274-277.

22. *See e.g. Schaefer*, 251 U.S. at 482 (Brandeis & Holmes, JJ., dissenting); *Gitlow v. N.Y.*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

23. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

24. *See* Feldman, *supra* n. 4, at 257.

war.[25] The ACLU was and remains able to foster broad support by dedicating itself to the protection of political expression as such, whether by or against mainstream interests. Writes Feldman, "only after World War I and the ensuing Red Scare could one truly refer to a civil liberties 'movement.'"[26]

Feldman tells a similar story of action and reaction about a number of other speech-related episodes in American political history. Abolitionist mailings from Northern agitators led to private violence and to antimailing laws in the South.[27] The excesses of the McCarthy era led the Supreme Court to rule against the government in twelve out of twelve Communism-related cases in the 1956 term, which in turn prompted frenzied efforts to strip the Court of jurisdiction over subversive-activities investigations.[28] The aggressive and sometimes violent protests of the Vietnam War and civil rights era led to violent suppression at the 1968 Democratic Convention and were perhaps an impetus for President Richard Nixon's notorious Enemies List, but also created a climate in which the Supreme Court could issue speech-protective decisions in *New York Times Co. v. Sullivan*,[29] *Cohen v. California*,[30] and the *Pentagon Papers* case.[31] These episodes are not elaborations upon or tests of the First Amendment but rather *are* the First Amendment, each a dot in a pointillist mosaic that constitutes our higher law.

As important, the balance between suppression and dissent is a dynamic equilibrium, shifting over time as history informs our ideal conceptions of free expression and democracy. Feldman identifies the transition from republican to pluralist democracy in particular with the demographic transition wrought by immigration and the economic, technological, and cultural changes that introduced mass consumerism into the American ethos. The legal realism movement, and the positivist tradition of which it was part, questioned the idea that law was or could be responsive to an essential common good. If a just and democratic society could be measured at all, it would be measured in terms of procedural fairness; a good government was one that permitted all competing conceptions of the good to be expressed.[32]

The jurisprudential split between substantive and procedural conceptions of democratic right is most evident in the series of New Deal-era cases that led to Justice Owen Roberts's famous switch in *West Coast Hotel Co. v. Parrish*,[33] upholding Washington's minimum-wage law for women, and *NLRB v. Jones & Laughlin Steel Corp.*,[34] upholding the National Labor Relations Act as applied to steel manufacturing. In *Adkins v. Children's Hospital*,[35] which *West Coast Hotel* expressly overruled, Justice George Sutherland had complained that the minimum-wage law in that case did not

25. *Id.* at 285-288.
26. *Id.* at 290.
27. *Id.* at 123-133.
28. *Id.* at 447-449.
29. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
30. *Cohen v. Cal.*, 403 U.S. 15 (1971).
31. *N.Y. Times Co. v. U.S.*, 403 U.S. 713 (1971); *see generally* Feldman, *supra* n. 4, at 452-460.
32. *See* Feldman, *supra* n. 4, at 396.
33. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
34. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).
35. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

comport with the common good because it "takes account of the necessities of only one party to the contract."[36] This suspicion of interest-group legislation is nowhere to be found in *West Coast Hotel*. Quite to the contrary, Chief Justice Charles Hughes noted that the minimum wage at issue was "fixed after full consideration by representatives of employers, employees and the public;"[37] as such, any substantive imbalance between employees and employers was a matter of legislative prerogative.[38]

The substance-procedure dichotomy, and its overlay atop republican versus pluralist theories of democracy, is a less obvious frame for First Amendment cases, and Feldman does a service in suggesting it. The idea here is that the shift to pluralist democracy invites a presumption in favor of protecting the formation of opinions, most especially political ones, and away from permitting those opinions to be suppressed in deference to an exogenously determined common good. One might arrive at that idea either by assuming political opinions to be the very stuff of self-governance; or by believing that expression of opinions will enhance the search for the true information upon which we base our civic decision making; or by believing that individual autonomy is enhanced by lifting restrictions on self-expression. Feldman's claim is that resort to these sorts of theories became more prevalent and successful in court as our democracy became more evidently pluralist rather than republican.

Linking free expression to the dichotomy between pluralist and republican democracy is not new, but Feldman has done more work than anyone to join that dichotomy to a generally persuasive intellectual and jurisprudential history of the First Amendment. It is in any event too high a bar to require that books state new ideas, especially about matters as overtheorized as free expression and democracy. To merit our praise it is enough that a book says something correct - or at least provocative - and says it well. If enough writers do that, new generations may discover old ideas, and that is hardly a bad thing.

Note, too, that in merely identifying the robust free expression protected by the First Amendment as historically constructed, Feldman breaks ranks with the Tea Party. Tea Partiers frequently claim to be constitutional originalists. According to the website of the Tea Party Patriots, one of the largest Tea Party affiliated groups, among the foundational principles of the movement is that "it is possible to know the original intent of the government our founders set forth," and Tea Party Patriots "stand in support of that intent."[39] Feldman's book helps us to understand what this view, taken seriously, means in the realm of free expression. A return to the original intent behind the First Amendment may not be such a happy reunion for Tea Partiers. According to an April 2010 CBS News/*New York Times* poll, fifty-nine percent of Tea Party supporters either affirmatively believe President Barack Obama was born in another country or are not persuaded that he was born in the United States.[40] There is loose (though not unanimous)

36. *Id.* at 557.

37. *W. Coast Hotel Co.*, 300 U.S. at 396.

38. *Id.* at 399-400.

39. Tea Party Patriots, *Mission Statement and Core Values*, http://www.teapartypatriots.org/Mission.aspx (last accessed Nov. 4, 2010).

40. Stephanie Condon, *Poll: "Birther" Myth Persists Among Tea Partiers, All Americans*, http://www.cbsnews.com/8301-503544_162-20002539-503544.html?tag=contentMain;contentBody (posted

agreement among constitutional historians, Feldman included, that as originally understood the First Amendment would not have prevented someone publicly calling the president a fraud from being prosecuted for seditious libel.

The widely held view of many leading citizens at the time of the founding was that the First Amendment protected against prior restraints but prevented neither criminal punishment nor civil liability for seditious statements that called public figures into disrepute or threatened to disturb public order. The 1798 Sedition Act[41] held criminal the writing, printing, uttering, or publishing of "any false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States."[42] Famously, the legislatures of Virginia and Kentucky issued resolutions,[43] written respectively by James Madison and Thomas Jefferson, opposing the Act as unconstitutional. But the crux of the states' objection was not that seditious libel could never be proscribed, but rather that Congress was not constitutionally empowered to enact laws related to speech. As the third Kentucky Resolution stated, "all lawful powers respecting [speech] did of right remain, and were reserved, to the states or the people: . . . thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom."[44] The argument, then, was grounded not in civil liberties but in federalism, and indeed Jefferson endorsed *state* prosecutions for seditious libel once he became president.[45] A minority report to the Virginia Resolutions, likely authored by future Chief Justice John Marshall, gave the traditional common law definition of freedom of the press: "a liberty to publish, free from previous restraint, any thing and every thing at the discretion of the printer only, but not the liberty of spreading with impunity false and scandalous slanders which may destroy the peace and mangle the reputation of an individual or of a community."[46] Talk of death panels would have been meet for suppression.

Of course, we have since come to understand contemptuous political statements as archetypal protected speech, but it is an embarrassment for originalists generally unacknowledged that their theory does not agree. As Feldman and others have shown, the Sedition Act controversy is responsible for early articulations of a more libertarian First Amendment,[47] and over the last several decades the libertarian reading has been dominant both within the literature and on the Court, but that reading is strained as a matter of original understanding. The absolute best one could offer is that the constitutionality of seditious-libel prosecutions at the founding was perfectly

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Apr. 14, 2010, 6:30 p.m. EDT).

41. Ch. 74, 1 Stat. 596 (1798).

42. *Id.* at § 2.

43. *Kentucky Resolutions* (Dec. 3, 1799) (available at http://avalon.law.yale.edu/18th_century/kenres.asp); *Virginia Resolutions* (Dec. 24, 1798) (available at http://avalon.law.yale.edu/18th_century/virres.asp).

44. Thomas Jefferson, *Drafts of the Kentucky Resolutions of 1798*, in *The Writings of Thomas Jefferson* vol. 7, 189, 194 (Paul Leicester Ford ed., G.P. Putnam's Sons 1896).

45. *See* Thomas Jefferson, Speech, *Second Inaugural Address* (D.C., Mar. 4, 1805), in *Thomas Jefferson: Writings* 518-522 (Lib. Am. 1984); *see also* Feldman, *supra* n. 4, 109-110.

46. Feldman, *supra* n. 4, at 86 (quoting *Report of the Minority on the Virginia Resolutions* (Jan. 22, 1799)); *see also* Leonard W. Levy, *Origins of the Bill of Rights* 111-121 (Yale U. Press 1999).

47. *See* Feldman, *supra* n. 4, at 80, 90.

ambiguous.[48] The freedom to dissent through angry and incautious language, so essential to the Tea Party's vitality, was not protected by the framers' Constitution. This may be the Tea Party's ultimate irony.

An additional layer of irony invites discussion of what I regard as Feldman's most controversial set of claims. The Tea Party explicitly rejects the notion that constitutional norms evolve, even as that evolution enables the movement itself. But aspects of Tea Party rhetoric also appear to reject pluralism itself, the engine of that evolution. That is so even bracketing the birther movement, with its outsized attention to the President's origins. The frequent charges of racism leveled at the Tea Party movement are only circumstantially substantiated, but when, following the election of the country's first black president, an almost all-white movement angrily vows to "take our country back" and openly harkens to an age marked by chattel slavery, the question of race is unavoidable.[49]

Even beyond the particular provenance of Tea Party anger, however, the question of race is unavoidable in discussions of originalism itself. The "dead hand" argument is a frequent criticism of originalism. The basic charge usually objects to reliance on original understanding on the ground that those who drafted and ratified the Constitution cannot adequately represent the living, in part because they lived in a society that was formally, and radically, unequal. This argument is somewhat misplaced as I have stated it: the problem is not that the framers did not represent us *then* in a demographic sense; the dead hand problem would persist even if the demographics of the electorate and of civil society perfectly mirrored that of the present age. The problem, rather, is that originalist argument fails to represent us *today*. I have written elsewhere that originalism is most persuasive insofar as it enables us to imaginatively represent the normative commitments of today as keeping faith with the framers.[50] For many Americans, the framers embody the political ideals that define Americanness, and the rhetorical purchase of originalist argument extends as far as the appeal of their age as sadly lost. For other Americans, however, the framers also embody ideals of unspeakable and irreconcilable cruelty, and the failure of originalist argument extends as far as the lament of their age as sadly unrealized. The authority of the founding era does not equally resonate for all Americans, and originalism's principal appeal lies in its resonance.[51]

Feldman offers delicious fodder for the view that the framers do not deserve unqualified admiration. Usually when claims of that sort are made, proponents offer evidence that the framers did not live up to the expectations that their ideals suggest. But it is possible to read Feldman as suggesting that those ideals were themselves defective. A corollary to Feldman's argument that we have shifted gradually from a republican to a pluralist democracy is that republican democracy encourages the exclusion of outsiders. "During the framing era, Americans constructed republican democratic governments

48. *See* Levy, *supra* n. 46, at 118.

49. For discussion of efforts to demonstrate empirically that Tea Party supporters harbor "racial resentment," see e.g. Arian Campo-Flores, *Are Tea Partiers Racist?*, http://www.newsweek.com/-2010/04/25/are-tea-partiers-racist.html (Apr. 26, 2010).

50. *See* Jamal Greene, *On the Origins of Originalism*, 88 Tex. L. Rev. 1, 8-9 (2009).

51. *Id.* at 75 n. 524.

grounded on the assumed existence of a common good for a homogenous people,"[52] Feldman writes. "But how did these Americans maintain homogeneity? By excluding other Americans from belonging to and participating in the polity."[53] There are at least three distinct ways of understanding this claim, and they mirror the three principal ways in which we understand discrimination more generally. Feldman could be arguing that the republican conception of democracy was selected precisely because it lends itself to, and indeed acts as a pretext for, exclusion; that it was selected with full knowledge of its exclusive capacity, but with no specific intention to exclude; or that it was selected notwithstanding its unfortunate tendency to exclude. Feldman does not make clear which he means.

The usefulness of revolutionary-era rhetoric to serve the nefarious ends of the framers was once more frequently advanced in mainstream legal and historical scholarship. Charles Beard's landmark *An Economic Interpretation of the Constitution of the United States*[54] argued that economic self-interest rather than republican spirit motivated the men who attended the Constitutional Convention. But Beard's "because of not in spite of" claim has fallen deeply out of favor since the middle of the last century, in part based on the work of scholars like Bernard Bailyn, Gordon Wood, and Akhil Amar. Bailyn's Pulitzer Prize winning *The Ideological Origins of the American Revolution*[55] offered what many regard as a decisive rebuttal to Beard's skepticism about the framers' true motives, but, significantly, in his discussion of slavery he suggests that revolutionary ideas helped doom the institution.[56] Wood likewise has argued that "the Revolution suddenly and effectively ended the cultural climate that had allowed black slavery, as well as other forms of bondage and unfreedom, to exist throughout the colonial period without serious challenge."[57] Contrast these views with those of Feldman, who writes that "republican democracy facilitated long-term exclusion" of African Americans and Native Americans from political power.[58]

It is difficult to know quite what to make of this claim. Feldman is frustratingly imprecise in his discussions of race and exclusion, and he leaves more on the table than the subject deserves. He may be arguing that, inasmuch as republican democracy requires virtuous citizens in order to be successful, it invites or perhaps even requires discrimination against those perceived to be lacking in virtue.[59] His reference to the "republican democratic *propensity* toward exclusion"[60] certainly suggests such a reading. But if this is what he means, he has dropped a stealth atom bomb. In more sympathetic hands, the republican democratic tradition rather empowers minorities and otherwise marginalized speakers. For Owen Fiss, a more republican conception of democracy can help us better understand the great costs of allowing uninhibited

52. Feldman, *supra* n. 4, at 5.

53. *Id.*

54. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (Macmillan Co. 1913).

55. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Belknap Press 1967).

56. *Id.* at 246.

57. Gordon S. Wood, *The Radicalism of the American Revolution* 186 (Alfred A. Knopf, Inc. 1991).

58. Feldman, *supra* n. 4, at 105.

59. *See id.* at 170-171.

60. *Id.* at 211 (emphasis added).

corporate speech in a capitalist age.[61] Cass Sunstein emphasizes the contemporary republican democratic obsession with equality of political power, robust participation, and inculcation of (republican rather than political) citizenship.[62]

Feldman may instead espouse the more traditional view that republican democracy does not inherently support exclusion but that it has been used pretextually to do so. He writes that "[t]he social homogeneity that had [during the revolutionary era] grounded the republican democratic common good"[63] was "always in part a pretense,"[64] but there is no elaboration on what is meant by that. Likewise, drawing implicitly on the work of Derrick Bell, Feldman drifts in and out of discussion of a kind of "interest convergence"[65] between elite interests and the beneficiaries of many of the Court's First Amendment cases, but does not subject the claim to serious analytic rigor. Feldman says that "[t]he fact that only a small minority of Americans voted for the delegates to the state ratification conventions for the proposed Constitution was neither surprising nor accidental."[66] By this he means that approval of the Constitution was generally limited to white, male, property owners in order to preserve republican virtue, but what does Feldman make of the fact that, as Amar has noted, the election of delegates to the constitutional ratifying conventions was the most participatory process the world had ever known, with eight states relaxing their ordinary property requirements for legislative voting?[67]

Feldman argues that elites pursued a "strategy"[68] of supporting the Court after the 1937 switch in time because they "recognized that the judicial enforcement of constitutional rights could provide a potential bulwark against the majoritarian threat posed by the (pluralist) democratic empowerment of peripheral groups,"[69] and he later states that, after 1937, "the Court rarely resolved free-expression issues contrary to elite or mainstream views."[70] These are remarkable statements, too remarkable for the limited support Feldman provides. To back the first claim, Feldman cites to two bar-association addresses,[71] neither of which even tangentially suggests elite preoccupation with a majoritarian threat by out groups, and to Professor Ran Hirschl's article elaborating a similar theory of the impetus behind rights-protecting judicial review in Israel, Canada, New Zealand, and South Africa![72]

The second statement is in the nature of an empirical claim and relies, for example,

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61. *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405 (1986).

62. *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539 (1988).

63. Feldman, *supra* n. 4, at 180-181.

64. *Id.* at 181.

65. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980).

66. Feldman, *supra* n. 4, at 24.

67. *See* Akhil Reed Amar, *America's Constitution: A Biography* 7 (Random House 2005).

68. Feldman, *supra* n. 4, at 366.

69. *Id.*

70. *Id.* at 409.

71. *See* Richard W. Steele, *Free Speech in the Good War* 11 (St. Martin's Press 1999) (quoting a 1938 speech by ABA president-elect Frank Hogan); Grenville Clark, *Conservatism and Civil Liberty*, 24 ABA J. 640 (1938).

72. Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons of Four Constitutional Revolutions*, 25 L. & Soc. Inquiry 91, 95-103 (2000).

on the Court's many cases protecting Jehovah's Witnesses, who were virulently anti-Catholic.[73] It is a leap of some distance, though, from harboring anti-Catholic feelings to possessing an "interest" in having handbills thrust in one's face on one's doorstep[74] or anti-Catholic slurs piped through loudspeakers in one's neighborhood.[75] And what of *Taylor v. Mississippi*,[76] decided the same day as *Barnette*,[77] which reversed the World War II sedition convictions of three Jehovah's Witnesses who had been accused of sowing disloyalty by encouraging resistance to compelled flag salutes?[78] Or *Beauharnais v. Illinois*,[79] unmentioned entirely by Feldman, in which the Court upheld Illinois's group libel prohibition against a man who had distributed literature urging Chicago officials to "halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro?"[80] One could argue, perhaps, that the *Beauharnais* Court was simply protecting elite interests in favor of civil rights, but then what of *Feiner v. New York*,[81] argued one term earlier, in which the Court upheld civil-rights activist Irving Feiner's prosecution for incitement based on a heckler's veto theory? Did elite interests shift, or was the Court in both cases protecting an interest in avoiding violent racial confrontation? We never learn. I do not deny the quasi-tautological claim that, across a range of doctrinal areas, elites rarely support jurisprudence or political projects that conflict with their material or aesthetic self-interest. But this seems rather less common in the First Amendment context than in many others.

These challenges would have been better left unprompted than unanswered or, for that matter, answered too casually. Feldman's asides about ethnic exclusion and interest convergence confound more than they enlighten. I will admit, though, that the effort is understandable. It would feel incomplete in a study of this sort to ignore the politics of exclusion, in effect to offer a theory of democracy without a theory of distrust. So many of the historical flashpoints of suppression and dissent revolve around hyperbolic suspicion of outsiders. I find particularly illuminating Feldman's discussion of the Populists of the late nineteenth and early twentieth century.[82] They were largely evangelical Protestants and harbored deep skepticism about urbanization, immigration, and the corrupt politics of Washington. They believed the "'plain people' of 'the Republic'"[83] needed a third party free from the captured Democrats and Republicans, and they harkened back to the party-free republican politics of the founding:

> [T]he Populists' agenda revolved around a "bad apple" conception of republican politics. The people, for the most part, were hardworking, imbued with common sense, and

73. *See* Feldman, *supra* n. 4, at 410; *see e.g. Murdock v. Pa.*, 319 U.S. 105 (1943); *Cantwell v. Conn.*, 310 U.S. 296 (1940).
74. *See e.g. Martin v. City of Struthers*, 319 U.S. 141 (1943); *Schneider v. N.J.*, 308 U.S. 147 (1939).
75. *See Saia v. N.Y.*, 334 U.S. 558 (1948).
76. *Taylor v. Miss.*, 319 U.S. 583 (1943).
77. 319 U.S. 624.
78. *Taylor*, 319 U.S. at 590.
79. *Beauharnais v. Ill.*, 343 U.S. 250 (1952).
80. *Id.* at 252.
81. *Feiner v. N.Y.*, 340 U.S. 315 (1951).
82. Feldman, *supra* n. 4, at 187-190.
83. *Id.* at 188.

> grounded on solid Protestant values; in a word, the people were virtuous. Thus, they just needed to dump the bad apples who had seized control of the government - to throw the rascals out of office - and to elect instead men like Jefferson and Jackson.[84]

They began, Feldman says, "to view themselves as 'victims.'"[85]

This should sound familiar. For all its self-contradiction - that is, despite itself - the Tea Party movement manages to be distinctly American. As Jack Balkin has argued, Americans across many generations have framed their normative agendas through rhetoric, alternately, of redemption or restoration.[86] Feldman tells us a great deal about the origins of free expression that movements like the Tea Party seek to connect to their own ends, but also helps us understand the origins of the Tea Party itself. It is enabled precisely by a tradition of dynamic constitutional development, despite its attraction to originalism. Like many Americans before them, Tea Partiers have constructed history in their own image, eliding it with an ethical commitment to dissent that has itself evolved through a mixture of doctrine, culture, and politics. The movement's challenge is to identify something to dissent *from* that also resonates with our traditions. For as Feldman reminds us, without suppression, efforts at dissent fall as flat as a picnic blanket on a lazy summer's day.

84. *Id.*

85. *Id.* at 187.

86. *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. Rev. 549, 609-611 (2010).

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