Bill of Rights makes us freest nation

The Bill of Rights has helped create what is arguably the freest enduring society in history.

It wasn’t always that way.

The original Constitution didn’t have a Bill of Rights.

Once the Bill of Rights was added, it didn’t apply for a century to state governments.

As recently as 90 years ago, no one had won a First Amendment free speech case against the government.

Today the Bill of Rights – with a lot of help from its post-Civil War friend, the 14th Amendment, –is a constitutional powerhouse that protects people from government abuses by public actors from mayor to president.

In the beginning

For the first 150 years, the Bill of Rights was more the “parchment barrier” of James Madison’s fears than the “impenetrable bulwark” of his hopes.

James Madison is called the father of the Bill of Rights, but like other members of the Constitutional Convention, he opposed adding a Bill of Rights. He changed his mind mainly to avoid a second constitutional convention that might make major revisions to what the first Convention drew up.

It wasn’t that the Framers were opponents of liberty. The tradition of legally guaranteed rights went back to the Magna Carta of 1215 when King John of England was forced to grant civil and political rights, including trial by jury.

The Revolutionary War leaders believed in the philosophy of John Locke, the 17th century English philosopher who thought men were born with “natural rights” the government couldn’t take away. The Declaration of Independence trumpeted these “unalienable Rights” of “Life, Liberty and the pursuit of Happiness.”

But the Convention turned down a bill of rights in August 1787. Roger Sherman of Connecticut said the states’ bills of rights should suffice.

A few weeks later on Sept. 15, the last day of debate, George Mason of Virginia said he couldn’t sign the Constitution that he had worked hard to draft because “there is no declaration of any kind, for preserving the liberty of the press, or the trial by jury in civil causes; nor against the danger of standing armies in time of peace.”

Those objections became the theme of the Anti-Federalists who opposed ratification.

John Adams and Thomas Jefferson – two prominent Americans who were out of the country at the time of the Convention, Adams in Britain and Jefferson in France – also worried about the absence of a bill of rights. “What I do not like, first the omission of a bill of rights,” Jefferson wrote Adams, “….A bill of rights is what the people are entitled to against every government on earth.”

Patrick Henry, the fiery pamphleteer of the Revolution, likened the “tyranny of Philadelphia to “the tyranny of George III.”

Alexander Hamilton of New York thought Henry was actually mad about the states losing power to a federal government and was bringing up the absence of a bill of rights to arouse the passions of Anti-Federalists – “frighten(ing) the people with ideal bugbears,” was how he put it.

George Washington, who remained at his plantation during Virginia's ratification convention, also was annoyed by the bill of rights argument because he thought it a smokescreen for other objections.

Madison opposed a bill of rights as "unnecessary and dangerous – unnecessary because it was evident that the general government had not power but what was given it – …dangerous because an enumeration which is not complete is not safe."

In Federalist 84, one of the essays written to support the Constitution – Hamilton said the whole Constitution should be understood as a bill of rights because of its checks and balances and federalism. "The people surrender nothing; and as they retain everything they have no need to particular reservations."

Henry was the most influential leader present at the Virginia convention, with Washington absent. Tall and thin with an ill-fitting wig, he said the absence of a bill of rights was a betrayal.

"Perhaps an invincible attachment to the dearest rights of man may, in these refined, enlightened days, be deemed old-fashioned." If so, he preferred to be an "old-fashioned fellow."

To win the votes needed for ratification in key states of Virginia and Massachusetts, the Federalists had to agree to resolutions calling for a bill of rights.

Madison switched to supporting the bill of rights when running for election to the first Congress in a district that included Anti-Federalist counties. Madison campaigned as a strong supporter of a bill of rights and won.

Even though he referred to it as his "nauseous project," he pushed ahead in order to "kill the opposition everywhere."

Four states had already called for a new constitutional convention. Madison knew the Bill of Rights would blunt the move for the convention. And it did.

Madison' proposals were different from the French Declaration of the Rights of Man adopted that same summer. The French Declaration threw out centuries of feudal tradition and provided a broad statement of rights. Madison's proposals guarded rights already thought to exist. And he wrote in legally enforceable language: "Congress shall make no law…."

The House eliminated some rhetorical flourishes, such as calling freedom of speech and the press "great bulwarks of liberty" and trial by jury "one of the best securities of the rights of the people."

The House also refused to add a phrase before the preamble "We the People" to make it clear the government derived from the people.

The Senate struck an amendment that would have required states to abide by jury trials, rights of conscience, free speech and the press. Madison thought the states were a greater threat to freedom than the federal government, and he turned out to be right.

The first two of 12 amendments were not ratified, making the third proposal the First Amendment. So it wasn't first because it was the most important, although it may be now.

Robert Henry Lee of Virginia, an anti-Federalist senator, was disappointed by the final version. He said the English language had been carefully culled to find words feeble in their nature and doubtful in their meaning.

But popular opinion favored them and they were ratified Dec. 15, 1791.

Jefferson noted the enactment of the Bill of Rights had a

healing effect and “opposition to our new Constitution has almost totally disappeared.”

Historian Leonard W. Levy wrote that “The Bill of Rights symbolized a new system of public morality based on the premise that government is but an instrument of man….a permanent reminder of its framers’ view that the citizen is the master of his government, not its subject. Americans understood that the individual may be free only if the government is not.”

First century

Seven years after ratification of the Bill of Rights, Congress violated it by passing the Alien and Sedition Acts making “scandalous” criticism of high government officials a crime.

President John Adams and his Federalist party supported England in its cold war with Napoleon’s France. Jefferson and Madison, who had formed the Democratic-Republican party, favored France.

Pro-Jefferson newspaper editors assailed Adams and belittled him for excessive pomp. Adams thought the criticisms were unpatriotic. Hamilton, an ally, said Jefferson was subverting the government and was “an atheist in Religion and a fanatic in politics.”

The Supreme Court had not yet established judicial review, so it did not rule on the constitutionality of the laws. Jefferson and Madison wrote the Kentucky and Virginia resolutions seeking state support for overturning the laws.

Jefferson’s defeat of Adams in the election of 1800 settled the issue. Congress repealed the law and Jefferson pardoned those who had been convicted.

In 1833, the Supreme Court confirmed in Barron v. Baltimore that the Bill of Rights did not apply to the states, allowing

them to violate rights without consequence.

During the Civil War, President Abraham Lincoln's State Department censored the press and a kind of secret police arrested citizens without explanation and brought them before military tribunals.

When Chief Justice Roger Taney ordered Lincoln to release John Merryman, who had been arrested for Confederate sympathies, the president didn't even acknowledge the order.

In 1866 Congress approved the 14th Amendment, which in time became the means of applying major guarantees of the Bill of Rights to the states.

Rep. John A. Bingham of Ohio, who drafted the amendment, told the House he intended "the enforcement of the Bill of Rights, touching the life, liberty and property…within every organized state."

Sen. Jacob M. Howard of Michigan told the Senate that the privileges and immunities protected by it included "the personal rights guaranteed and secured by the first eight amendments."

But in the Slaughterhouse case of 1873, the Supreme Court said the 14th Amendment did not shift control of all civil rights from the states to the federal government.

The Louisiana legislature, while controlled by Northerners, had granted Crescent City Slaughterhouse a 25-year monopoly. The Butchers Benevolent Association challenged the arrangement saying it violated their right to practice their trade.

The Supreme Court upheld the state law. It ruled that if the 14th Amendment protected rights from the states, then the court "would constitute this court a perpetual censor upon all legislation of the States on the civil rights of their own citizens, with authority to nullify such as it did not

approve.”

That was the law for the next half century.

War challenged civil liberties

Times of war pose the greatest threat to free speech as fear often leads to speech restrictions. It was true in 1799 after passage of the Alien and Sedition Act. It was true during the Civil War with Lincoln’s actions against civil liberties. And it has been true in the 20th and 21st centuries, from the Espionage Act of 1917 to the relocations of Japanese-Americans to concentration camps in the West during World War II, to the McCarthy Red Scare of the late 1940s and early 1950s to Attorney General John Ashcroft’s rounding up of 5000 Middle Eastern men after 9/11, even though there was no evidence of wrongdoing.

The federal government’s crackdown on dissidents, newspapers, immigrants and labor unions was especially severe During World War I. The resulting court cases eventually awakened the sleeping giant of the First Amendment.

The Espionage Act and its Sedition amendments passed at a time of extreme fear about the war, the Russian Revolution, political anarchists, labor unions, immigrants from southern Europe and the arrival of Blacks from the South challenging whites for jobs in the North. The Ku Klux Klan was terrorizing and lynching Blacks and came close to taking over the Indiana legislature.

The Espionage Act is extremely broad. Provisions make it a crime for those “lawfully having possession of” or “having unauthorized possession of” information relating to the national defense to willfully communicate or retain it.”

During the Senate debate, one senator pointed out that the language could cover a hypothetical Iowa farmer who disclosed the number of bushels of wheat or corn raised in that state,

thus providing possibly useful information to the enemy.

If these laws mean what they say and are constitutional, press reports since World War II have been full of criminality. The front pages of the New York Times, Washington Post and Los Angeles Times arguably contain information several times a week the dissemination of which violates a literal reading of the Espionage Act. Yet no reporter or publisher has been convicted, even though a few have been threatened with prosecution. It is the officials leaking the secrets who are prosecuted.

Julian Assange, publisher of WikiLeaks, is the first journalist – if he is a journalist and not a hacker – who faces criminal prosecution under the Espionage Act.

The Sedition Act amendments to the Espionage Act made it a crime to speak abusive language about the flag, Constitution, armed forces or government. More than 1,000 people, most pacifists, were arrested and some newspapers censored in the World War I era.

Eugene V. Debs, the Socialist leader who got 6 percent of the popular vote in the 1912 election, found himself in prison with a 10-year sentence. His crime: an anti-war speech at an Ohio fairground likening the draft to slavery. Even though his speech would be protected today, none of the justices on the court voted then to protect it. Oliver Wendell Holmes Jr., who later became a champion of free speech, said Debs speech had the "natural tendency and reasonably probable effect to obstruct the recruiting services."

In another free-speech decision that same year – Schenck v. U.S., upholding the conviction of anti-draft pamphleteers – Holmes famously said that free speech was far from absolute. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. The question in every case is whether the

words used…are of such a nature as to create a clear and present danger…”

Holmes’ opinion was criticized by a young Harvard law professor, Zechariah Chaffe Jr., who suggested to Holmes that he should have been more protective of free speech.

Possibly in reaction to Chaffee’s criticism, Holmes wrote the powerful, pro-speech dissent the next court term in Abrams v. U.S., a case in which six Russian Jewish immigrants had distributed leaflets, printed in English and Yiddish, which were thrown out of a fourth- floor factory window in New York. The leaflets criticized President Woodrow Wilson for acting against the Russian Revolution. Abrams, who helped print them, was sentenced to 20 years in prison and the Supreme Court upheld the conviction.

Holmes, in dissent, toughened his “clear and present danger test” and said no one could think the protesters’ silly leaflet would have an impact. “It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion,” he wrote. “Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man without more, would present any immediate danger….”

All of these cases were playing out in an America where Wilson was criticizing hyphenated Americans and Attorney General Mitchell Palmer’s young director of the future FBI, J. Edgar Hoover, was rounding up anarchists, immigrants and dissidents.

After Palmer’s Chevy Chase home was bombed by an anarchist in 1919, the government rounded up thousands of immigrants, anarchists and other dissidents without proof of crimes.

One congressionally created committee, the Committee on Public Information, removed favorable references to Germany from history texts. Another agency, the State Councils of defense,

organized committees that investigated and harassed German-American shopkeepers. They even banned Bach and Beethoven at concerts.

Nebraska was one of 22 states that outlawed the teaching of German in school. It said the law was needed so “that the sunshine of American ideals will permeate” pupils’ lives.

Incorporation of the Bill of Rights

In 1925, Benjamin Gitlow, a member of the Socialist Party, was prosecuted under New York’s criminal anarchy law. His crime was publishing the Left Wing Manifesto criticizing mild socialism and calling for revolutionary socialism. The Supreme Court upheld the conviction. But Holmes and Louis Brandeis dissented, saying Gitlow did not pose a present danger.

However, there was one positive step for the First Amendment in Gitlow. For the first time the court said the First Amendment applied to state laws. This was the beginning of the incorporation of portions of the Bill of Rights against the states. The court based this decision on the 14th Amendment’s command that states not deprive “any person of…liberty…without due process of law.”

Two years later Brandeis set out in the most eloquent terms, the importance of the First Amendment to democracy. Charlotte Whitney, a socialite from a well-known California family, had helped form the Communist Labor Party of America. The state claimed the party advocated the violent overthrow of the government and thus violated the state criminal syndicalism law.

While Whitney denied being involved in violence, she lost in court. But Brandeis’ opinion, joined by Holmes, is one of the great defenses of free expression. Brandeis said the founders of the nation “believed that the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth…the greatest menace to

freedom is an inert people….

“ …Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.” For speech to be punished, Brandeis and Holmes said, it must threaten a serious evil and be an imminent danger.

During this same decade of the 1920s, a wave of Ku Klux Klan violence in the South resulted in hundreds of lynchings. The Supreme Court also upheld the forced sterilization of women considered immoral or mentally feeble under authority of Virginia’s Racial Integrity Law of 1924.

Holmes, despite his civil libertarian beliefs, wrote the opinion in the 1927 sterilization case, Buck v. Bell, justifying the forced sterilization of Carrie Buck. “Three generations of imbeciles is enough,” he wrote.

Finally, in 1931 in Near v. Minnesota, the Supreme Court for the first time threw out a state law that violated the First Amendment – 140 years after the Bill of Rights was passed and 65 years after the 14th Amendment applied it to the states.

Minnesota’s “gag law” gave courts the power to stop publication of a “malicious, scandalous and defamatory newspaper.”

J.M. Near’s Saturday Press in Minneapolis fit the bill. Near was anti-Semitic, anti-black, anti-labor and anti-Catholic, among other negatives. He claimed that “Jewish gangs” were running the county. The governor went to court and got an order stopping publication.

In First Amendment parlance, the injunction was a “prior restraint.” A sacred principle of the First Amendment is that the government cannot stop the presses. It can punish a publication after distribution, but not beforehand.

The protection of news organizations from prior restraints set

the precedent for the Supreme Court's rejection four decades later of President Richard M. Nixon's attempt to block publication of the Pentagon Papers.

The year after Near, the Supreme Court went beyond the First Amendment by incorporating the Sixth amendment right to counsel against the states. It took the action in the case of the "Scottsboro Boys," nine young black men 13 to 21 accused of raping two young white girls on a freight train passing through Scottsboro, Alabama.

They didn't have a lawyer until the day of the trial, even though they faced the death penalty. And that reluctant lawyer didn't talk to them. An all-white jury convicted them and they were sentenced to death. The Supreme Court said the right to counsel applied in all capital cases. In a retrial one of the white girls admitted the boys and men had not raped them. But the new jury convicted them anyway, although they were not executed.

Ordered liberty

In 1937 the court tried to explain how it decided what parts of the Bill of Rights applied to the states.

In Palko v. Connecticut Justice Benjamin N. Cardozo said the 14th Amendment only required the states to comply with rights essential to a "scheme of ordered liberty. – rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

The First Amendment rights of free speech and assembly were fundamental but not jury trials and double jeopardy. Connecticut could try Palko twice for a murder. The court followed up by saying the right to a lawyer was not fundamental unless it was a capital case like the Scottsboro boys. Nor was the right to remain silent fundamental, the court said in 1947.

Justice Hugo Black led four dissenters who said all the protections of the Bill of Rights should be incorporated against the states. Black lost the battle but won the war because the court incorporated almost all of the protections of the Bill of Rights against the states.

Cardozo’s formulation of fundamental rights rooted in the nation’s traditions and conscience was a main point that Justice Samuel Alito made in the majority decision in Dobbs, maintaining the abortion right did not pass the test.

Fred Korematsu, center, sits with members of his legal team. He lost his challenge to interment camps for Japanese-Americans during World War II. Photo courtesy of the family of Fred T. Korematsu

The Red Scare

Even though the Supreme Court had begun breathing life into

the Bill of Rights, that didn't stop the internment of 115,000 persons of Japanese descent during World War II – most American citizens. Nor did it stop a wave of redbaiting after the war.

The Supreme Court upheld the detention of the Japanese-American citizens as falling under the president's war powers in a case involving Fred Korematsu.

Again, it was fear that provoked red-baiting – fear of the Soviet Union, which had quickly obtained a nuclear weapon when the United States had thought it had a monopoly on the Bomb.

President Harry S Truman implemented a loyalty policy that resulted in 7,000 resignations. The Supreme Court upheld a provision of the Taft-Hartley Act requiring union officers to swear they were not communists. The court also upheld the Smith Act, which had been used to imprison Communist Party officials for advocating the overthrow of the government.

In the Smith Act decision, Dennis v. U.S., the court said the country did not have to "wait until the putsch is about to occur" before acting.

Meanwhile, Sen. Joseph McCarthy, a Republican from Wisconsin, was destroying careers and spreading fear through Washington and Hollywood with unsubstantiated claims that thousands of communists had infiltrated the Army, State Department and other parts of the government. Leading actors, directors and screenwriters were blacklisted in Hollywood and could not find work.

In 1954 the Senate censured McCarthy. The press, notably CBS's Edward R. Murrow, played a major role in exposing his demagoguery. In St. Louis, Post-Dispatch editorial editor Irving Dilliard campaigned against McCarthy so zealously that Joseph Pulitzer Jr. suggested he let a week pass without McCarthy's name in an editorial.

Fear of communists in government gradually eased and by 1957 the court had stepped back from Dennis, ruling that second-tier Communist Party officials could not be jailed. The court ruled that advocating the violent overthrow of the government is different from inciting an actual revolution.

Mary Beth Tinker, who wore an armband to school as a child to protest the Vietnam War, speaks at the E.W. Scripps School of Journalism at Ohio University. Her Supreme Court case, Tinker v. Des Moines, established that a student has free speech rights in public schools. Photo by Eli Hiller

The Warren Court

Chief Justice Earl Warren's court was now in full swing, bringing about the most rapid expansion of individual, civil and criminal rights in history. A flood of decisions followed the momentous Brown v. Board of Education decision in 1954 overturning segregation of public schools. In a little more than a decade, the Warren Court:

- Protected the press from libel laws, making it hard for

public officials and figures to win. The press and democracy needed breathing room to make mistakes, the court said in New York Times v. Sullivan. The decision protected the northern media from the attempts of segregationist politicians to bankrupt them for aggressive reporting during the Civil Rights Movement.

- Declared a student does not lose First Amendment rights at the schoolhouse gate, backing the right of Mary Beth Tinker to wear an armband protesting the Vietnam War.
- Upheld in Brandenburg v. Ohio the First Amendment right to hateful speech, such as Nazi and KKK protests, unless it is directed at inciting or producing **imminent** lawless action and is **likely** to produce that action. Clarence Brandenburg's pathetic KKK rally in an Ohio field with a Nazi sympathizer threatened no one.
- Protected vulgar speech in California v. Cohen, where a man wore a jacket through a courthouse bearing "Fuck the draft." Justice John Marshall Harlan wrote, "one man's profanity is another man's lyric."
- Protected the right to keep pornography in one's home.
- Barred state-sponsored prayers in the public schools and threw out laws that banned teaching evolution and requiring the teaching of creationism.
- Recognized in Gideon v. Wainwright the Sixth Amendment right to a lawyer in state court. Clarence Gideon, a career criminal born in Hannibal, Mo., appealed his conviction for breaking into a pool hall, saying he should have had a lawyer. The Supreme Court agreed.
- Applied the exclusionary rule to the states in Mapp v. Ohio, excluding illegally obtained evidence to force police compliance with the Fourth Amendment rules on unreasonable searches.
- Required in Miranda v. Arizona that police warn suspects of their Fifth Amendment right to remain silent and Sixth Amendment right to a lawyer.
- Recognized a right to privacy guaranteeing women access to contraceptives.

- Ruled in Loving v. Virginia the right of privacy and equality protected the interracial marriage of Mildred and Richard Loving, a decision that some 50 years later provided the basis for constitutional protection of same-sex marriage.

Hoover and COINTELPRO

A few blocks down Pennsylvania Avenue from Capitol Hill, J. Edgar Hoover, 40 years after the notorious Palmer raids of the Wilson administration, was busy on the 1960s version of his war on protesters.

Hoover placed FBI Agent William Sullivan in charge of the COINTELPRO – CounterIntelligence program – targeting anti-war and civil rights leaders, including the Rev. Martin Luther King Jr.

Hoover and Sullivan had a different reaction than most Americans to the "I have a Dream Speech" during the 1963 March on Washington. Sullivan wrote: "In the light of King's powerful demagogic speech. … We must mark him now if we have not done so before, as the most dangerous Negro of the future in this nation from the standpoint of communism, the Negro, and national security."

One of Sullivan's tactics was to send a hateful anonymous letter to King telling him to kill himself because of his "countless acts of adulterous and immoral conduct lower than that of a beast."

The old St. Louis Globe-Democrat was complicit. One 1968 FBI document read: "The feeding of well chosen information to the St. Louis Globe-Democrat, a local newspaper, whose editor and associate editor are extremely friendly to the Bureau and the St. Louis Office, has also been utilized in the past and it is contemplated that this technique might be used to good advantage in connection with this program."

And another document:“The St. Louis Globe-Democrat has been especially cooperative with the Bureau in the past. Its publisher [name deleted] is on the Special Correspondents List.”

In 1968, the FBI circulated a memo to “cooperative news media sources.” The House Assassinations Committee concluded the FBI ghost editorial resulted in a Globe-Democrat editorial two days later, right down to the misspelling of capital.

“Memphis may only be the prelude to civil strife in our Nation’s Capitol [sic].—FBI memorandum, March 28, 1968

Memphis could be only the prelude to a massive bloodbath in the Nation’s Capitol [sic] …—Globe-Democrat editorial, March 30, 1968

The House Assassinations Committee concluded that James Earl Ray didn’t read the editorial. He was in Birmingham that day buying the rifle he used to kill King.

COINTELPRO, like the Palmer raids, illustrates that Americans’ civil liberties can be violated without the Supreme Court ever getting a chance to do anything about it.

Cathy Kuhlmeier holds her student newspaper.

Burger, Rehnquist

Two of the biggest expansions of civil liberties occurred after the end of the Warren Court. Roe v. Wade established an abortion right in 1973 during the Burger Court and Obergefell v. Hodges established the right to same-sex marriage during

the Roberts Court.

The Pentagon Papers decision of 1971 during the Burger Court was a big triumph for the press. It invalidated prior restraint against publication of the Pentagon Papers, the 47-volume secret history of the Vietnam War. The top secret documents disclosed presidents from Eisenhower to Nixon lying about Vietnam.

During the Rehnquist court the speech of outsiders continued to flourish with protection of flag-burning, Margaret Gilleo's anti-war sign in the window of her Ladue home and the ribald parody that Hustler magazine printed of the Rev. Jerry Falwell having sex "for the first time" with his mother in an outhouse. It turned out that Rehnquist was a fan of cartooning and parodies. He said Hustler's parody was a poor cousin of the great political cartoons but still deserved the protection of New York Times v. Sullivan.

But there were pullbacks as well. During the Burger Court Justice Byron R. White wrote two decisions that hurt the press. One, Branzburg v. Hayes, ruled that journalists could not invoke the First Amendment to protect confidential news sources. Most states now have "shield laws" that allow reporters to protect sources in state courts, but there is no federal shield law.

The other White decision that hurt the press was Zurcher v. Stanford Daily upholding a police search of the Stanford Daily's files to look for evidence to prosecute anti-war demonstrators. Congress reversed the Stanford Daily decision passing the Privacy Protection Act that requires authorities to use less intrusive subpoenas to obtain evidence – keeping police out of news rooms and giving the media a chance to contest any request for photos, notes or files.

Justice White issued a more damaging decision in 1988 during the Rehnquist court – Hazelwood v. Kuhlmeier – in which the

court limited its protection of student speech by ruling that school administrators could censor the speech of students in school expressive activities such as the school newspaper.

The principal of Hazelwood North had removed a two-page spread from the Hazelwood East Spectrum newspaper. It was a well-reported look into issues affecting students' lives – student pregnancy, contraceptive care, the impact of divorce.

Fourteen states have passed laws overturning Hazelwood and restoring rights of student journalists. Illinois is one of the states; Missouri is not.

(Congress and state legislatures can pass a law to overturn Supreme Court decisions – such as Branzburg, Zurcher and Hazelwood – as long as they are expanding rights, not contracting them. The rights guaranteed by the Constitution are a floor but not a ceiling.)

Rehnquist also wrote Washington v. Glucksburg in 1997 holding that there was no 14th Amendment right to physician assisted suicide because it was not part of the nation's history or tradition. Alito cited this decision in Dobbs.

In the Roberts era, the winners in First Amendment cases have more often been powerful, established interests.

Corporations making political expenditures, pharmaceutical firms seeking to use big data for marketing efforts, corporations such as Hobby Lobby objecting on religious grounds to Obamacare rules on contraceptives. Labor unions, already threatened by expansion of right to work laws, are losing the power to charge union dues to workers who say union activities violate their free speech rights.

The other big conservative rights decision has been the broad expansion of the 2nd Amendment gun rights, first for protection in the home and more recently for protection on the street.

The court’s liberal justices wrote the great free speech decisions of the 60s and 70s. On the Roberts court, it is the conservative justices who are in the forefront of expanding free speech rights for corporations and established interests.

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William H. Freivogel is a professor and former director of the School of Journalism at SIUC. He is the publisher of Gateway Journalism Review.