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A New Deal for Speech

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by
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Introduction

A New Deal is necessary for speech, one that would parallel the New Deal provided to property rights during the 1930s. [1] The goal of the New Deal should be to promote attention to public issues and diversity of view, and, in this way, to diminish the influence of money over the content of broadcasting.

To compress a long story:[2] Before the New Deal, the Constitution was often understood to be a constraint on government "regulation." In practice, this meant that the Constitution often prohibited governmental interference with existing distributions of rights. From this pre-New Deal view, existing distributions marked the boundary not only between neutrality and partisanship, but inaction and action as well. The rallying cry "laissez-faire" of course captured such ideas. The fear, and more important, the very concept of government intervention did the same.

The New Deal reformers argued that this entire framework was built on fictions. Ownership rights were a creation of law. The government did not act only when it disturbed existing distributions. It was responsible for those distributions in the first instance. What people had, in markets, was partly a function of the entitlements that the law conferred on them. The notion of "laissez-faire" thus stood revealed as a conspicuous myth.

To the reformers, different forms of governmental ordering had to be evaluated pragmatically and in terms of their consequences for social efficiency and social justice. Markets would not be identified with liberty in any a priori way; they would have to be evaluated through an examination of whether they served liberty or not. This did not mean that markets would be rejected, for they were often, as they are today, associated with liberty and productivity, and indeed with a form of equality. But interferences with markets—which are themselves made possible only by law—would be evaluated for what they did for human beings, and not taken as per se invalid.

Unfortunately, these ideas of the New Deal have played little role in the law of free speech. That is, for purposes of speech, contempo-

1. Something of this general sort is suggested in Onora O'Neill, *Practices of Toleration*, *in* DEMOCRACY AND THE MASS MEDIA 155 (Judith Lichtenberg ed., 1990); T.M. Scanlon, Jr., *Content Regulation Reconsidered*, *in* DEMOCRACY AND THE MASS MEDIA 331 (Judith Lichtenberg ed., 1990); J.M. Balkin, *Some Realism About Pluralism: Legal, Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375; Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

2. Details can be found in CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993).

rary understandings of neutrality and partisanship, or action and inaction, are identical to those that predate the New Deal. The category of government "intervention" is defined accordingly. Status quo neutrality dominates the law of free expression.

This is not to say that there is not much good in the contemporary use of pre-New Deal understandings. Free speech absolutism—even if it is wildly simplistic, even if it fails to grapple with hard cases, even if it cannot survive reflection—is an important safeguard against myopic or oppressive legislation. Nevertheless, recent First Amendment controversies in the area of broadcasting confirm the wisdom of the New Deal and show that American constitutionalism, with respect to freedom of expression, has failed precisely to the extent that it has not taken that reformation seriously enough.

I do not mean to suggest that speech rights should be freely subject to political determination, as are, say, current issues of occupational safety and health. I do not mean to suggest that markets in speech are generally abridgements of speech, or that they usually disserve the First Amendment. Nor do I mean to say that government can favor some views over others, that free speech is a myth, or that the goal of equality ought to be balanced against the goal of free speech. But I do mean to say that at a minimum, what seems to be government regulation of speech might, in some circumstances, promote free speech, and should not be treated as an abridgement at all. I mean also to argue, though more hesitantly, that what seems to be free speech in markets might, on reflection, amount to an abridgement of free speech. Consider here Robert Hale's suggestion, capturing much of my argument, that "the power to set judicial machinery in motion for the enforcement of legal duties" should "be recognized as a delegation of state power."[3] This recognition—of prime importance in the area of broadcasting—is precisely what is missing from current free speech law.

In this regard, however, I must make a general clarification. It will be tempting to think that the argument to follow amounts to a broad and perhaps bizarre plea for more regulation of speech. This might be so because many of the practices and conditions that I will challenge are commonly taken to involve private action and therefore are not considered to involve the Constitution at all. (Recall the state action doctrine, which stands for the proposition that private behavior

3. Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149, 197 (1935).

is not subject to the Constitution.)[4] For example, the outcome of the "market" for expenditures on campaigns and the practices of broadcasters and managers of newspapers raise no constitutional question because presumably no state action is involved. What is constitutionally problematic, however, is government regulation of the market.

In fact, there should be enthusiastic agreement that the First Amendment is aimed only at governmental action, and that private conduct raises no constitutional question. On this point the Constitution is clear.[5] It seems clear, too, that to find a constitutional violation, one needs to show that governmental action has "abridged the freedom of speech."[6] That action must usually take the form of a law or regulation.

But if the New Deal is taken at all seriously, it follows that governmental rules lie behind the exercise of rights of property, contract, and tort. This is so especially when the law grants people rights of exclusive ownership and use of property—and emphatically when the law grants owners or speakers such rights. But it does not follow from this that private acts are always subject to constitutional constraint, or even that legally-conferred rights of ownership violate any constitutional provision. This is so because to find a constitutional question, it is always necessary to point to some exercise of public power.[7] And to find a constitutional violation, it is necessary to show that public power has compromised some constitutional principle.[8] But it does not follow that a claim on behalf of, for example, new efforts to promote greater quality and diversity in broadcasting is a plea for government intervention where none existed before. Instead, it is a claim for a new regulatory system.

What I want to suggest first and foremost is that legal rules that are designed to promote freedom of speech and that interfere with other legal rules (e.g, the law of property) should not be invalidated if their purposes and effects are constitutionally valid.[9] In fact, it may follow that some existing rules may themselves be subject to constitutional objection, and in some surprising places, if and when such rules

4. *See generally* Lugar v. Edmundson Oil Co., 457 U.S. 927 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

5. *See generally* Hudgens v. NLRB, 424 U.S. 507 (1976).

6. *See generally* Grayned v. City of Rockford, 408 U.S. 104 (1972); Gooding v. Wilson, 405 U.S. 518 (1972).

7. See the "public functions" line of cases beginning with Nixon v. Herndon, 273 U.S. 536 (1927).

8. *Id.*

9. This is a complex question that I will take up below. *See infra* text accompanying notes 20-22.

"abridge the freedom of speech" by preventing people from speaking at certain times and in certain places.

I
Speech and the Pre-New Deal Understanding

While these remarks may seem uncomfortably abstract or unconventional, they have a clear foundation in no lesser place than *New York Times Company v. Sullivan*,[10] one of the defining cases of modern free speech law. The *Sullivan* Court concluded that a public official could not bring an action for libel unless he could show "actual malice," that is, knowledge of, or reckless indifference to, the falsity of the statements at issue.[11] *Sullivan* is usually taken as the symbol of broad press immunity for criticism of public officials. Even more, *Sullivan* is often understood to reflect the conception of freedom of expression advocated by Alexander Meiklejohn—a conception of self-government connected to the American principle of sovereignty.[12]

What is striking about *Sullivan*, however, is that the lower court held that the common law of tort, and more particularly libel, was not state action at all, and was therefore entirely immune from constitutional constraint.[13] A civil action, according to the lower court's view, involved a purely private dispute. The Supreme Court quickly disposed of this objection, as seems obviously right. The Court's rationale was that the use of public tribunals to punish speech is conspicuously state action.[14] What is interesting is not the Supreme Court's rejection of the no state action argument, but the fact that such an argument could be made by a state supreme court as late as the 1960s. How could reasonable judges perceive the rules of tort law as purely private?

The answer lies in the persistence of pre-New Deal understandings in which the common law simply implements existing rights, or private desires, and does not amount to "intervention" or "action" at

10. 376 U.S. 254 (1964).

11. *Id.* at 267.

12. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 14-19 (1948). The link is made explicitly in William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

13. New York Times Co. v. Sullivan, 144 So. 2d 25, 40 (Ala. 1962), *rev'd*, 376 U.S. 254 (1964). It is notable here that in *Sullivan*, the government was not a party—something that distinguishes the case from most others in which First Amendment objections had been raised. But to see this as meaning that there is no state action is simply another version of the problem discussed in the text.

14. *Sullivan*, 376 U.S. 254 (1964).

all.[15] The view that the common law of property should be taken as prepolitical and just, and as a refusal to use government power—the view that the New Deal repudiated—was the same as the view of the state supreme court in *Sullivan*. Reputation is of course a property interest,[16] and just as in the pre-New Deal era, the protection of that interest did not appear to involve government action at all.

The Supreme Court's rejection of that claim seemed inevitable in *Sullivan* itself, and indeed this aspect of the case is largely forgotten. But many aspects of current law are based on precisely the same understandings that underlie the forgotten view of that obscure court. In fact, we might generalize from *Sullivan* the broad idea that protection of property rights, through the law, must always be assessed pragmatically in terms of its effects on speech. This idea has major implications. In a regime of property rights, there is no such thing as no regulation of speech; the question is, what forms of regulation best serve the purposes of the free speech guarantee?

Consider, for example, the issues raised when people claim a right of access to the media, or seek controls on broadcasting in general. May broadcasters be required to be common carriers of local programming, as the 1992 Cable Act says?[17] Suppose that most broadcasters deal little or not at all with issues of public importance, restricting themselves to stories about movie stars or sex scandals. Suppose, too, that there is no diversity of view on the airwaves, but instead a bland, watered-down version of conventional morality.

What this suggests is that a large part of the problem for the system of free expression is the governmental grant of legal protection—rights of exclusive use—to institutions having huge resources with which to provide communication.[18] This grant of power—sometimes through the common law, sometimes through statute—is usually taken not to be a grant of power at all, but instead to be purely "private." Thus the exclusion of people and views from the airwaves is immunized from constitutional constraint on the theory that the act of

15. *See, e.g.*, Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951).

16. *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976).

17. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.) (specifically 47 U.S.C. § 534 (Supp. IV 1992)).

18. At least this is so if we assess our system of free expression by reference to two original constitutional goals: promotion of attention to public issues and opportunity to speak for diverse views. I take up the issue of scarcity and its demise below. *See infra* text accompanying notes 31-37.

exclusion is purely private; thus rights of access to the media are thought to involve governmental intervention into the private sphere.

It might be helpful in this regard to consider that in *Sullivan*, the Supreme Court said, as against a similar claim, that legal rules should be inspected for their conformity with the overriding principle that government may not restrict freedoms of speech and press: "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."[19]

We might apply this understanding to current problems. If the First Amendment is regarded as an effort to ensure that people are not prevented from speaking, especially on issues of public importance, then the commitments that currently dominate free speech law seem ill-adapted to current conditions. Above all, the concept of government regulation turns out to misstate important issues and sometimes to disserve the goal of free expression itself. With broadcasting, the form of the exclusion is rights of exclusion that prevent certain people from speaking, and that do so through law.

Consider a case in which a network decides not to sell advertising time to a group that wants to discuss some public issue or to express some dissident view. Under current law, the refusal raises no First Amendment question, in part because a number of the justices—perhaps now a majority—believe that there is no state action.[20] But broadcasters are given property rights in their licenses by government, and the grant of such rights is unambiguously state action. To be sure, it is generally good to have a system in which government creates ownership rights or markets in speech, just as it is usually good to create rights of ownership, and markets, in property. But the key point is that a right of exclusive ownership in a television network is governmentally conferred; the exclusion of the would-be speakers is backed up, or made possible, by the law of (among other things) civil and criminal trespass. It is thus a product of a governmental decision.

A system in which only certain views are expressed or made available to most of the public is a creation of law. The constitutional question is whether reforms eliminating exclusive ownership rights—or, more precisely, reforms eliminating an element of such rights by conditioning the original grant, perhaps by creating common carrier obligations—are consistent with the First Amendment. Or, to put it another way, the question is whether the government grant of exclu-

19. New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

20. CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 114-21 (1973). There only three Justices said that there was no state action. But those three Justices may now represent the majority view. *See* Flagg Bros. v. Brooks, 436 U.S. 149, 163 (1978).

sive ownership rights violates the First Amendment. We cannot answer such questions merely by saying that ownership rights are governmental. We need to know the purposes and effects of the grant. That question cannot be answered *a priori*, or in the abstract. We need to know a lot of details.

A tempting response to these questions might be that the Constitution creates "negative" rights rather than "positive" ones, or at least that the First Amendment is negative in character—a right to protection from the government, not a right to help from the government. So stated, the claim certainly captures the conventional wisdom. Any argument for a New Deal for speech must come to terms with the view that the Constitution does not create positive rights and should not be understood to do so.

There are two replies to this view. The first and most fundamental is that no one is asserting a positive right in these cases. Instead the claim is that government sometimes cannot adopt a legal rule that imposes a (negative) constraint on those who can speak and where they can do so. When someone with view X is unable to state that view on certain stations, it is because the civil and criminal law prohibits him from doing so. Negative liberty is indeed involved.

This is the same problem that underlies a wide range of familiar constitutional claims; consider a ban on door-to-door soliciting. An attack on content-neutral restrictions of this kind is not an argument for positive government protection. It is merely a claim that legal rules that stop certain people from speaking in certain places must be reviewed under First Amendment principles. In fact, the response that a New Deal for speech would create a positive right trades on untenable, pre-New Deal distinctions between positive and negative rights.[21]

The second point is that the distinction between negative and positive rights fails even to explain current First Amendment law. There are two obvious counter examples. The Supreme Court has come very close to saying that when an audience becomes hostile and threatening, the government is obligated to protect the speaker. Under current law, reasonable crowd control measures are probably constitutionally compelled, even if the result is to require a number of

21. To say this is not to say that the distinction itself is untenable. We can understand a positive right as one that requires for its existence some act by government, and a negative right as one that amounts merely to an objection to some such act. There is nothing incoherent about this distinction. The argument in text is directed against the view that an objection to rights of exclusive ownership is a call for a positive right; in fact that objection is mounted against something that government is actually doing.

police officers to come to the scene.[22] The right to speak thus includes a positive right to governmental protection against a hostile private audience.

Or return to the area of libel. By imposing constitutional restraints on the common law of libel, the Court has held, in effect, that those who are defamed must subsidize speakers by allowing their reputation to be sacrificed to the end of broad diversity of speech. Even more than this, the Court has held that government is under what might be seen as an affirmative duty to "take" the reputation of people who are defamed in order to promote the interest in free speech. The First Amendment requires a compulsory, governmentally produced subsidy of personal reputation for the benefit of speech.[23]

Cases of this sort reveal that the First Amendment, even as currently conceived, is no mere negative right. It has positive dimensions as well. Those positive dimensions consist of a command to government to take steps to ensure that the system of free expression is not violated by legal rules giving too much authority to private persons. In the hostile audience case, government is obliged to protect the speaker against private silencing; in the libel cases, government is obliged to do the same thing, that is, to provide an extra breathing space for speech even though one of the consequences is to infringe on the common law interest in reputation.

In any case, a constitutional question might well be raised by a broadcasting system in which government confers on all stations the right to exclude certain points of view. In principle, the creation of that right is parallel to the grant of a right to a hostile audience to silence a controversial speaker, subject only to the speaker's power of self-help through the marketplace (including the hiring of private police forces). In the hostile audience setting, it is insufficient to say that any intrusion on the speaker is private rather than governmental. It is necessary instead to evaluate the consequences of the system by reference to the purposes of the First Amendment—just as it is necessary

22. *See, e.g.*, Gregory v. City of Chicago, 394 U.S. 111, 111-12 (1969); Cox v. Louisiana, 379 U.S. 536, 550 (1965); Edwards v. South Carolina, 372 U.S. 229, 231-33 (1963); Kunz v. New York, 340 U.S. 290, 294-95 (1951). *See also* Scanlon, *supra* note 1, at 338-39; Fiss, *supra* note 1, at 1416-19 (both discussing this point).

23. A qualification is necessary here. To decide whether there is a subsidy, one always needs a baseline. To see reputation as part of the initial set of endowments is to proceed under the common law baseline. The social contract version of this idea (the state must protect certain rights in return for the decision of citizens to leave the state of nature) might support it. But it would of course be possible to say that on the right theory, people do not have such a right to reputation, and that therefore no subsidy is involved in the libel cases.

to evaluate the consequences of any system in which property rights operate to hurt some and benefit others.

None of this demonstrates that the creation of property rights in broadcasting fails to produce broad diversity of views and an opportunity to speak for opposing sides. Especially in a period without much scarcity, we might expect a great deal of diversity and a great deal of attention to public issues. If we have these things, the market system created by law is constitutionally unobjectionable. But it is surely imaginable that a market system will have less fortunate consequences.

We might look in this connection at the Court's remarkable opinion in *Red Lion Broadcasting Co. v. FCC*.[24] There the Court upheld the fairness doctrine, which required attention to public issues and a chance to speak for opposing views. (At least it required these in theory; it was rarely enforced in practice.[25]) In *Red Lion Broadcasting*, the Court actually seemed to suggest that the doctrine was constitutionally compelled. According to the Court, the fairness doctrine would "enhance rather than abridge the freedoms of speech and press,"[26] for free expression would be disserved by "unlimited private censorship operating in a medium not open to all."[27] The Court suggested that

> as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.[28]

Thus the Court emphasized that

> the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial

24. 395 U.S. 367 (1969).
25. *See* ROBERT M. ENTMAN, DEMOCRACY WITHOUT CITIZENS 104-06 (1989).
26. *Red Lion Broadcasting*, 395 U.S. at 375.
27. *Id.* at 392.
28. *Id.* at 389.

here. That right may not constitutionally be abridged either by Congress or by the FCC.[29]

Compare this suggestion from the head of the Federal Communications Commission (FCC) in the 1960s: "It was time to move away from thinking about broadcasters as trustees. It was time to treat them the way almost everyone else in society does—that is, as businesses. . . . [T]elevision is just another appliance. It's a toaster with pictures."[30]

The *Red Lion Broadcasting* vision of the First Amendment stresses not the autonomy of broadcasters (made possible only by current ownership rights), but instead the need to promote democratic self-government by ensuring that people are presented with a broad range of views about public issues. I do not mean to defend the fairness doctrine itself, about which we need not be enthusiastic. But in a market system, basic democratic goals may be compromised. It is hardly clear that "the freedom of speech" is promoted by a regime in which people are permitted to speak if and only if other people are willing to pay enough to allow them to be heard.

II
Practice

A core insight of *Red Lion Broadcasting* is that the interest in private autonomy from government is not always the same as the interest in free speech through democratic self-governance. To immunize broadcasters from legal control may not promote quality and diversity in broadcasting. In fact, it may be inconsistent with the First Amendment's own commitments. The question, then, is what sorts of regulatory strategies have the most beneficial effects for the system of free expression.

We might be able to generate a First Amendment "New Deal" with proposals for legal reform. Begin with the fact that for much of its history, the FCC has imposed on broadcast licensees the so-called "fairness doctrine." As noted, the fairness doctrine requires licensees to spend some time on issues of public importance, and it creates an obligation to allow access by people of diverse views.

The last decade, however, has witnessed a mounting constitutional assault on the fairness doctrine. One reason for this is that licenses are no longer technologically scarce; indeed, there are far

29. *Id.* at 390 (citations omitted, including a reference to the Brennan article referred to earlier).

30. Bernard D. Nossiter, *The F.C.C.'s Big Giveaway Show*, THE NATION, Oct. 26, 1985, at 402 (quoting Mark Fowler, former Chairman of the FCC).

more radio and television stations than there are major newspapers. Also, under President Reagan the FCC concluded that the fairness doctrine violates the First Amendment because it involves an effort, by government, to tell broadcasters what they may say.[31] According to this view, the fairness doctrine represents a form of impermissible government intervention into voluntary market interactions. For this reason, it is a violation of the government's obligation of neutrality and a reflection of government's respect for market outcomes. Influential judges and scholars have reached the same conclusion.[32]

Note, however, that the Constitution forbids any "law . . . abridging the freedom of speech."[33] Consequently, we must examine whether the fairness doctrine is such a law. To its defenders, the fairness doctrine promotes "the freedom of speech," by ensuring diversity of views on the airwaves, diversity that the market may fail to bring about. In response, the FCC's attack asserts, without a sufficiently full look at the real-world consequences of different regulatory strategies, that the doctrine involves governmental interference with an otherwise purely law-free and voluntary private sphere.[34] This response is far from adequate.

It is possible, however, to adopt a presumption against rigid command-and-control approaches of the kind exemplified by the fairness doctrine without thinking that the doctrine or alternatives violates the First Amendment to the Constitution. Those entrusted with interpreting the Constitution should deal with the fairness doctrine by exploring the relationships between a market in broadcasting, alternative systems, and the goals, properly characterized, of a system of free expression.

It seems clear that a market will provide diversity in available offerings, especially in a period with numerous outlets. So long as the particular view is supported by market demand, it should find a supplier. The broadcasting status quo is far preferable to a system of centralized government regulation, at least if such a system sharply constrains choice. Markets do offer a range of opinions and options.

31. The key decision is *In re* Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York, *Memorandum Opinion and Order*, 2 FCC Rcd. 5043, 5057 (1987), *aff'd sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

32. *See* LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 214-15 (1987).

33. U.S. CONST. amend. I, § 1.

34. *In re* Inquiry into Section 73.1910 of the Comm'ns Rules and Regs. Concerning the Fairness Doctrine Obligations of Broadcast Licensees, *Report*, 102 F.C.C.2d 145, 147 (1985).

The enormous expansion of technology means that the number of stations may be close to infinite for all practical purposes. Perhaps people will be able to see whatever they want. A government command-and-control system, if it restricted diversity of view and attention to public affairs, would indeed abridge the freedom of speech. Nothing I have said, or will say, argues in favor of governmental foreclosure of political speech.

We should therefore distinguish among three possible scenarios. First, the market might itself be unconstitutional if it produces little political discussion or little diversity of view. For reasons suggested below, courts should be cautious here, in part because the issue turns on complex factual issues not within the competence of judges. Second, government regulation of the market might well be upheld, as against a First Amendment challenge, if the legislature has made a considered judgment, based on a record, that the particular regulation will indeed promote free speech goals. (For reasons taken up below, this judgment may be right even in a period in which scarcity is not a problem.) Such a judgment is least objectionable if there is a problem of monopoly. Third, regulation of the market might be invalidated if it discriminates against certain viewpoints, or if it is demonstrated that the regulation actually diminishes attention to public affairs or diminishes diversity of view. On this latter, highly factual question, the legislature is entitled to a presumption of constitutionality.[35]

A market will of course make it unnecessary for government officials to oversee the content of speech in order to assess its value. The fact that a market removes official oversight surely counts strongly in its favor. The restrictions of the market are content-neutral, in the sense that the content of the speech is not directly relevant to the application of property law. But the restrictions of the fairness doctrine, or any similar alternative, are content-based in the sense that any such doctrine would have to be applied with government attention to the content of the speech.

On the other hand, a market in communications could create many problems. Take first the case of a natural monopoly. If cable companies have a natural monopoly—a complex question—government "access rights" might well be justified on the simple ground of ensuring an outcome closer to that which would be provided by a well-functioning competitive system. The problem of "bottleneck control" over access suggests that the Supreme Court should uphold must-carry, at least if these rules can be shown to help ensure access

35. *See* Regan v. Time, Inc., 468 U.S. 641, 652 (1984).

to free programming.[36] Those rules are viewpoint-neutral; they do not favor any particular standpoint. More generally, the Court lacks the expertise to second-guess a plausible legislative judgment that a natural monopoly exists, even if that judgment is ultimately wrong. (Of course an implausible legislative judgment would be invalid.) If, then, we have a reasonable legislative judgment of monopoly, and a viewpoint-neutral response, there should be no constitutional difficulty.

Suppose, however, that there is no monopoly, but instead a property rights regime with a well-functioning competitive system. Even under these circumstances, the constitutional issue would not be at an end. A system of competitive markets is not ordained by the First Amendment to the Constitution.[37] Imagine, for example, if someone proposed that the right to speak should be given to those people to whom other people were willing to pay enough to qualify them to be heard. Suppose, in other words, that the allocation of speech rights was decided through a pricing system, like the allocation of soap, or cars, or candy. It would follow that people would be prevented from speaking if other people were not willing to pay enough to entitle them to speak.

Surely this would be a strange parody of democratic aspirations—the stuff of science fiction, rather than self-government. It would be especially perverse insofar as it would ensure that dissident speech—expression for which people are often willing to pay—would be foreclosed. But in many respects, this is precisely what a competitive system would produce, and indeed it is the system we now have to the extent that it is competitive. Broadcasting licenses and speech opportunities are allocated very much on the basis of private willingness to pay.

In one respect our current system is even worse, for programming content is produced not merely by consumer demand, but also by the desires of advertisers. Viewers are in this way the product as well as its users. This introduces some large additional distortions. In any case, First Amendment issues must depend in part on the details.

III
Some Facts

Much information has now been compiled on local news, which began, incidentally, as a direct response to the FCC's fairness doc-

36. Must-carry rules are codified at 47 C.F.R. § 76.57, -.59, -.61 (1984). For a general discussion of must-carry, see Cass R. Sunstein, *The First Amendment in Cyberspace*, YALE L.J. (forthcoming Spring 1995).

37. *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 113 (1992).

trine. In fact, very little of local news is devoted to genuine news. Instead it deals largely with stories about movies and television and with sensationalized disasters of little general interest. "The search for emotion-packed reports with mass appeal has led local television news to give extensive coverage to tragedies like murders, deaths in fires, or plane crashes, in which they often interview survivors of victims about 'how they feel.'"[38]

During a half-hour of news, no more than eight to twelve minutes involves news at all.[39] Each story that does involve news typically ranges from twenty to thirty seconds.[40] Even the news stories tend not to involve issues of government and policy, but instead focus on fires, accidents, and crimes. Government stories are further de-emphasized during the more popular evening show. And even coverage of government tends to emphasize not the content of relevant policies, but instead sensational and often misleading "human impact" anecdotes. In addition, there has been greater emphasis on "features"—dealing with popular actors, or entertainment shows, or even stories focussing on the movie immediately preceding the news. Economic pressures seem to be pushing local news in this direction even when reporters would prefer to deal with public issues in a more serious way.[41]

With respect to network news, the pattern is similar. In 1988, almost sixty percent of the national campaign coverage involved "horse race" issues—who was winning, who has momentum—while only about thirty percent involved issues and qualifications.[42] In the crucial period from January to June 1980, there were about 450 minutes of campaign coverage, of which no less than 308 minutes dealt with the "horse race" issues.[43]

It is notable in this regard that for presidential candidates, the average block of uninterrupted speech fell from 42.3 seconds in 1968 to only 9.8 seconds in 1988.[44] A statement of more than ten seconds is therefore unlikely to find its way onto the major networks. There is little sustained coverage of the substance of candidate speeches. Instead, attention is placed on how various people are doing.

38. PHYLLIS C. KANISS, MAKING LOCAL NEWS 110 (1991).

39. *Id.* at 111.

40. *Id.*

41. *Id.* at 46-70.

42. *Id.* at 114.

43. *See generally* JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION 63 (1991).

44. Jon Margolis, *Politicians Bypass Press, Go Straight to Voters*, CHI. TRIB., Feb. 28, 1994, at 1.

There has been an increase as well in stories about television and movies, and a decrease in attention to public questions.[45] In 1988, there was an average of thirty-eight minutes per month of coverage of arts and entertainment news; in the first half of 1990, the average was sixty-eight minutes per month.[46] According to one person involved in the industry, "By the necessity of shrinking ratings, the network news departments have had to, if not formally then informally, redefine what is news."[47] According to the Executive Producer of NBC's Nightly News,

> [a] lot of what we used to do is report on the back and forth of where we stood against the Russians. But there is no back and forth anymore. I mean nobody is talking about the bomb, so you have to fill the time with the things people ARE talking about.[48]

Note the problem of circularity here: What people are talking about is in part of function of what sorts of things are presented on the popular media.

There is evidence as well of advertiser influence over programming content, though at the moment the evidence is largely anecdotal.[49] No conspiracy theory will have plausibility. But some recent events are disturbing. There are reports, for example, that advertisers are having a large impact on local news programs, especially with respect to consumer reports. In Minneapolis, a local car dealer responded to a story involving consumer problems with his company by pulling more than one million dollars in advertisements.[50] He said: "We vote with our dollars. If I'm out trying to tell a good story and paying $3000 for 30 seconds, and someone's calling me names, I'm not going to be happy."[51] Consumer reporters have increasingly pointed to a need for self-censorship. According to one, "We don't even bother with most auto-related stories anymore."[52] According to another, "I won't do the car repair story, or the lemon story . . . . It's not worth the hassle."[53]

Educational programming for children sometimes cannot acquire sponsors. It is for this reason that such programming can be found

45. J. Max Robins, *Nets' Newscasts Increase Coverage of Entertainment*, VARIETY, July 18, 1990, at 3, 63.

46. *Id.*

47. *Id.*

48. *Id.* at 63.

49. The best discussion is C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097 (1992).

50. Steven Waldman, *Consumer News Blues: Are Advertisers Stifling Local TV Reporting?*, NEWSWEEK, May 20, 1991, at 48.

51. *Id.*

52. *Id.*

53. *Id.*

mostly on PBS.[54] A revealing recent episode involved the effort by Turner Broadcasting Systems (TBS) and the Audubon Society to produce a program dealing with the "spotted owl" controversy between loggers and environmentalists in the Pacific Northwest. Believing that the program was biased, members of the logging community did not want it to be aired; all of the eight advertisers (including Ford, Citicorp, Exxon, and Sears) pulled their sponsorship of the program. TBS aired the program in any event, but was forced to lose the $100,000 spent on production.[55] NBC had severe difficulties in finding sponsors for its television movie, "Roe v. Wade." Fearful of boycotts by religious groups, hundreds of sponsors solicited by NBC refused to participate.[56] It seems highly unlikely that advertisers could be found for any program adopting a "pro-life" or "pro-choice" perspective.

We might look as well at children's television. On ordinary commercial networks, high-quality television for children has been practically unavailable. Instead children's television has been designed largely to capture attention and to sell products. In the 1960s, the FCC issued recommendations and policy statements calling for "programming in the interest of the public" rather than "programming in the interest of salability."[57] In 1974, it concluded that "broadcasters have a special obligation to serve children,"[58] and thus pressured the industry to adopt codes calling for educational and informational programs. In 1984, the new FCC Chair, Mark Fowler, rejected this approach.[59]

Shortly thereafter, network programming for children dramatically decreased, and programs based on products took its place.[60] Thus, children's television became "a listless by-product of an ex-

54. *Children and Television: Hearing Before the House Subcomm. on Telecommunications, Consumer Protection, and Finance*, 98th Cong., 1st Sess. 36-37 (1983) (statements of Bruce Christenson, President of the National Association of Public Television Stations).

55. *Advertisers Drop Program About the Timber Industry*, N.Y. TIMES, Sept. 23, 1989, at 32.

56. Verne Gay, *NBC v. Sponsors v. Wildman Re: Telepic 'Roe v. Wade,'* VARIETY, May 10, 1989, at 71, 82.

57. *See* Tom Engelhardt, *The Shortcake Strategy*, *in* WATCHING TELEVISION 75 (Todd Gitlin ed., 1986).

58. *In re* Petition of Action for Children's Television for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14-Hour Quota of Children's Television Programs, *Report and Policy Statement*, 50 F.C.C.2d 1, 6 (1974), *recon. denied*, 55 F.C.C.2d 691 (1975), *aff'd sub nom.* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).

59. *In re* Children's Television Programming and Advertising Practices, *Report and Order*, 96 F.C.C.2d 634, 644-45 (1984), *aff'd sub nom.* Action for Children's Television v. FCC, 756 F.2d 899 (D.C. Cir. 1985).

60. *See* Henry John Uscinski, Comment, *Deregulating Commercial Television: Will the Marketplace Watch Out for Children?*, 34 AM. U. L. REV. 141, 142 n.14 (1984).

traordinary explosion of entrepreneurial life forces taking place elsewhere—in the business of creating and marketing toys."[61] In 1983, cartoons based on licensed characters accounted for fourteen programs; by 1985, the number rose to over forty.[62] It has increased since.[63]

Most of the resulting shows are quite violent, and the violence increased in the period after deregulation. Statistical measures will of course be inadequate, but it is at least revealing that before 1980, there were 18.6 violent acts per hour for children's programs, whereas after 1980, the number increased to 26.4 acts per hour.[64] Children's daytime weekend programs have been consistently more violent than prime-time shows. Few of these shows have educational content.

More generally, there is a high level of violence on television.[65] Seven of ten prime time programs depict violence; during prime time in 1980, there was an average of between five and six violent acts per hour. By 1989, the number increased to 9.5 acts per hour. In 1980, ten shows depicted an average of more than ten acts of violence per hour; by 1989, the number was sixteen; the high mark was in 1985, with twenty-nine such shows.[66] Violence on children's television has been found to increase children's fear and also to contribute to their own aggression.[67]

IV
Potential Correctives—and the First Amendment

Regulatory strategies cannot solve all of these problems. But they could help with some of them. Some such strategies should not be treated as abridgements of the freedom of speech.

At this point it might be suggested that in an era of cable television, the relevant problems disappear. People can always change the channel. Some stations even provide public affairs broadcasting around the clock. Both quality and diversity can be found among the dazzling array of options made available by modern technology. In this light, a concern about the broadcasting market might seem to be a

61. Engelhardt, *supra* note 57, at 68. *See generally* AMY GUTMANN, DEMOCRATIC EDUCATION 241-44 (1987) (discussing children's television).

62. *See* Engelhardt, *supra* note 57, at 70.

63. *Id.*

64. For this discussion, see George Gerbner & Nancy Signorielli, *Violence Profile 1967 Through 1988-89: Enduring Patterns*, BROADCASTING, Dec. 4, 1989.

65. *Id.* at 97.

66. *Id.*

67. *See* Jerome L. Singer et al., *Family Patterns and Television Viewing as Predictors of Children's Beliefs and Aggression*, 34 J. COMM. 73, 87-88 (1984).

puzzling, even bizarre rejection of freedom of choice. Ought not government foreclosure of expressive options be thought to infringe on freedom of speech?

There are several answers. First, and most simply, we may have a situation of natural monopoly or "bottleneck control" over stations, at least with respect to cable. If government is responding to such a situation in a viewpoint-neutral manner, usually there should be no constitutional problem.

Second, information about public affairs has many of the characteristics of a "public good," like national defense or clean air.[68] It is well-known that if we rely entirely on markets, we will have insufficient national defense and excessively dirty air. The reason is that both defense and clean air cannot be feasibly provided to one person without simultaneously being provided to many or all. In these circumstances, each person has inadequate incentives to seek, or to pay for, the right level of national defense or clean air. Acting individually, each person will "free ride" on the efforts of others. No producer will have the right incentives. The result will be unacceptably low levels of the relevant goods.[69]

Much the same is true of information, especially with respect to public affairs. The benefits of a broad public debate, yielding large quantities of information, accrue simultaneously to many or all people.[70] Once information is provided to one person, or to some of them, it is also provided to many others too, or it can be so provided at minimal cost. The production of information for one or some person thus yields large additional benefits for other people as well. But—and this is the key point—the market provides no mechanism to ensure that these benefits will be adequately taken into account by those who produce the information, in this case the newspaper and broadcasting industries.

At the same time, the benefits of informing one person—of making him an effective citizen—are likely to accrue to many other people as well, through that person's contribution to multiple conversations and to political processes in general. But these additional benefits, for each person, will not be taken into account in individual consumption choices.

68. *See* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 558-62 (1991). Information is not a pure public good, for it is often feasible to provide it to those who pay for it, and copyright and patent laws can guarantee appropriate incentives for its production. But it does have much in common with pure public goods.

69. *Id.*

70. *Id.*

Because of the "public good" features of information, no single person has sufficient incentive to "pay" for the benefits that he receives. The result will be that the market will produce too little information. Reliance on free markets in information will therefore have some of the same problems as reliance on markets for national defense or environmental protection. For this reason, a regulatory solution to the public good problem might be justified.[71]

So much for the public good issue. The third problem with reliance on the large number of outlets is that sheer numbers do not explain why there is a constitutional objection to democratic efforts to increase quality and diversity by ensuring better programming on individual stations. Even with a large number of stations, there is far less quality and diversity than there might be. Of course people can change the channel. But why should the Constitution bar a democratic decision to experiment with new methods for achieving their democratic goals?

Fourth, it is important to be extremely cautious about the use, for constitutional and political purposes, of the notion of consumer sovereignty. Consumer sovereignty is the conventional economic term for the virtues of a free market, in which goods are allocated through consumer choices, and these goods are measured by how much people are willing to pay for things. Those who invoke the notion of free choice in markets are really insisting on consumer sovereignty. But Madison's conception of "sovereignty" is the relevant one.[72] That conception has an altogether different character.

In the Madisonian view, sovereignty entails respect not for private consumption choices, but for the considered judgments of a dem-

71. It might be thought that the distinctive characteristics of the broadcasting market provide at least a partial solution. Because advertisers attempt to ensure a large audience, viewers are commodities as well as, or instead of, consumers. In these circumstances, it is not as if individual people are purchasing individual pieces of information. Instead, advertisers are aggregating individual preferences in seeking popular programming and, in that sense, helping to overcome the collective action problem.

The problem with this response is that the advertisers' desire to attract large audiences does not adequately serve the goal of overcoming the public good problem with respect to information about public affairs. A program with a large audience may not be providing information at all; consider most of network television. As we have seen, advertisers may even be hostile to the provision of the relevant information. Their economic interests often argue against sponsorship of public service or controversial programming, especially if the audience is relatively small, but sometimes even if it is large. The external benefits of widely-diffused information about politics are thus not captured in a broadcasting market. The peculiarities of the broadcasting market do overcome a kind of collective action problem by providing a system for aggregating preferences, but they do not overcome the crucial difficulty.

72. *See* SUNSTEIN, *supra* note 37, at 14-16.

ocratic polity. In a democracy, laws frequently reflect those judgments, or what might be described as the aspirations of the public as a whole. Those aspirations can and often do call for markets themselves. But they might also call for intrusions on markets—a familiar phenomenon in such areas as environmental law, protection of endangered species, social security, and antidiscrimination law. Democratic liberty, then, should not be identified with "consumer sovereignty." And in the context at hand, the people, acting through their elected representatives, might well decide that democratic liberty is more valuable than consumer sovereignty.

Finally, private broadcasting selections are a product of preferences that are a result of the broadcasting status quo, and not independent of it. In a world that provides the existing fare, it would be unsurprising if people generally preferred to see what they are accustomed to seeing. They have not been provided with the opportunities of a better system. When this is so, the broadcasting status quo cannot, without circularity, be justified by reference to preferences. Preferences that have adapted to an objectionable system cannot justify that system. If better options are put more regularly in view, it might well be expected that at least some people would be educated as a result. They might be more favorably disposed toward programming dealing with public issues in a serious way.

It is tempting but inadequate to object that this is a form of "paternalism" unjustifiably overriding private choices. If private choice is a product of existing options, and in that sense of law, the inclusion of better options, through new law, does not displace a freely produced desire. At least this is so if the new law has a democratic pedigree. In that case, the people, in their capacity as citizens, are attempting to implement aspirations that diverge from their consumption choices. I do not suggest that preferences should be ignored. I do not say that as a matter of policy, government should disregard preferences for broadcasting fare. But I do suggest that democratic judgments that are viewpoint-neutral, but inconsistent with consumption choices, should not be per se invalid under the Constitution, so long as they are based on a plausible record and represent an effort to promote attention to public issues or diversity of view.

For those skeptical about such arguments, it may be useful to note that many familiar democratic initiatives are justified on precisely these grounds. As against the two-term rule for the president, it is hardly decisive that voters can reject the two-term president in individual cases if they choose. The whole point of the rule is to reflect a precommitment strategy. And to those who continue to be skeptical,

it is worthwhile to emphasize that the Constitution is itself a precommitment strategy, and that this strategy includes the First Amendment itself.

What approaches might emerge from considerations of this sort? Here we should be frankly experimental. Flexible solutions, supplementing market arrangements, should be presumed preferable to government command-and-control.[73] In circumstances of natural monopoly or "bottleneck control," must-carry rules are unobjectionable, at least insofar as they are designed to promote attention to public issues, even if these are local ones. There is also a strong case for public provision of high-quality programming for children, or for obligations, imposed by government on broadcasters, to provide such programming. Regulation of violence on children's television ought not to be thought objectionable, so long as the regulation is both narrow and clear.[74] The FCC should begin with advice and recommendations, and hope that these will be sufficient. If self-regulation fails, narrow and clear guidelines, and even mandates, ought not to be invalid, at least if they are protective of children. Moreover, the provision of free media time to candidates would be especially helpful, simultaneously providing attention to public affairs and diversity of view, while overcoming the distorting effects of "soundbites" and financial pressures.

More generally, government might award "points" to license applicants who promise to deal with serious questions, or provide public affairs broadcasting even if unsupported by market demand. A point system might well be adapted as a more flexible means of promoting the policies of the "must-carry" rules. Or government might require purely commercial stations to provide financial subsidies to public television, or to commercial stations that agree to provide less profitable but high quality programming. It is worthwhile to consider more dramatic approaches as well—such as rights of reply, reductions in advertising on children's television, content review of such television by nonpartisan experts, or guidelines to encourage attention to public issues and diversity of view.

Of course there will be room for discretion, and abuse, in making decisions about quality and public affairs. There is thus a legitimate concern that any governmental supervision of the sort I have outlined would pose risks more severe than those of the status quo. The mar-

73. *See* DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT (1992); SUNSTEIN, *supra* note 37.

74. Narrow regulation of "indecent" or sexually explicit speech should also be upheld, though it is not easy to draw up an adequate standard.

ket, surrounded by existing property rights, will indeed restrict speech. But at least it does not entail the sort of substantive approval or disapproval, or overview of speech content, that would be involved in the suggested "New Deal." Surely it is plausible to say that the relative neutrality of the market minimizes the role of public officials in a way that makes it the best of the various alternatives.

There are two responses. The first is that the current system is worse than imperfect; it creates extremely serious obstacles to a well-functioning system of free expression. The absence of continuous government supervision should not obscure the point. With respect to attention to public issues, and diversity of view, the status quo badly disserves democratic goals.

The second point is that it does indeed seem plausible to think that the key decisions can be made in a nonpartisan way, as indeed is currently the case for public television. Regulatory policies have helped greatly in the past. They are responsible for the very creation of local news.[75] They have helped increase the quality of children's television. Public television, which has a wide range of high quality fare, needs government help. We have no basis for doubting that much larger improvements could be brought about in the future. If the regulatory policies do show bias, or if they fail in practice, they should be changed or even invalidated.

How might all this bear on the constitutional question? It seems quite possible that a law that contained regulatory remedies would promote, rather than undermine, "the freedom of speech," at least if we understand that phrase in light of the distinctive American contribution to the theory of sovereignty. The current system does not plausibly promote that understanding, but instead disserves and even stifles citizenship.

V
Qualifications and Conclusions

I have not argued that government should be free to regulate broadcasting, whether network or cable, however it chooses. There remain hard policy and legal questions. At the legal level, regulation designed to eliminate a particular viewpoint would of course be out of bounds. All viewpoint-discrimination would be banned. Government could not say that feminists or the religious right must be represented; it must be neutral on this count. Must-carry rules are neutral in this

75. *See* KANISS, *supra* note 38, at 102. I discuss a range of possibilities in Sunstein, *supra* note 36.

way, as is the fairness doctrine. This is a necessary condition for constitutional validity.

Moreover, many viewpoint-neutral but content-based restrictions would be unacceptable. For one thing, more draconian controls than those I have described—for example, a requirement of public affairs broadcasting around the clock—would raise quite serious questions. For another, some content-based restrictions would suggest illegitimate motivations. Consider a requirement of media attention to the problem of homelessness, or to the issue of national defense, or to the problem of AIDS. Requirements of this kind would suggest a governmental effort to focus public attention in its preferred fashion. Such efforts should not be permitted.

At the policy level, there are serious risks of elitism and futility. Regulation should not be designed to cater to the interests of a self-appointed elite with, for example, special interest in classical music or British television shows. Moreover, any efforts must be monitored for efficacy. If public affairs programming is required, little will be gained if people simply change the channel. Aspirational efforts may not work at all. The possibility of failure is real, and if existing policies do not succeed, they should be changed.

None of this, however, defeats the case for a New Deal for speech. At the very least, natural monopoly may be regulated on a viewpoint-neutral basis. Only slightly more ambitiously, government may control the power of advertisers over programming content. Slightly more ambitiously still, government may protect children, through incentives designed to require high-quality broadcasting and to diminish violence. My most controversial suggestions involve democratic goals—most notably the interest in attention to public issues and in exposure to diverse views. It is here that I think that common carrier obligations are least objectionable, because they conform so closely to some of the basic goals of the First Amendment itself. Viewpoint-neutral controls on broadcasters, designed to promote those goals, fit well with the purposes of the free speech guarantee, however much they might conflict with principles of neoclassical economics. It would be most ironic, and most unfortunate, if the First Amendment itself were to be invoked to prevent experimentation of this kind.