# Free Speech Now

*Cass R. Sunstein*†

> The radio as it now operates among us is not free. Nor is it entitled to the protection of the First Amendment. It is not engaged in the task of enlarging and enriching human communication. It is engaged in making money. And the First Amendment does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage.
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> . . .
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> The radio, as we now have it, is not cultivating those qualities of taste, of reasoned judgment, of integrity, of loyalty, of mutual understanding upon which the enterprise of self-government depends. On the contrary, it is a mighty force for breaking them down. It corrupts both our morals and our intelligence. And that catastrophe is significant for our inquiry, because it reveals how hollow may be the victories of the freedom of speech when our acceptance of the principle is merely formalistic. Misguided by that formalism we Americans have given to the doctrine merely its negative meaning. We have used it for the protection of private, possessive interests with which it has no concern. It is misinterpretations such as this which, in our use of the radio, the moving picture, the newspaper and other forms of publication, are giving the name 'freedoms' to the most flagrant enslavements of our minds and wills.[1]
>
> Alexander Meiklejohn

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[1] Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 104-05 (Harper & Brothers, 1948).

> Even when the words remain the same, they mean something very different when they are uttered by a minority struggling against repressive measures, and when expressed by a group that has attained power and then uses ideas that were once weapons of emancipation as instruments for keeping the power and wealth they have obtained. Ideas that at one time are means of producing social change have not the same meaning when they are used as means of preventing social change.[2]
>
> John Dewey

For those who believe either that the judiciary should play a limited role in American government or that the Constitution's meaning is fixed by the original understanding of its ratifiers, the First Amendment is a particular embarrassment. The current state of free speech in America owes a great deal to extremely aggressive interpretations by the Supreme Court, which has invalidated legislative outcomes on numerous occasions. These decisions cannot be justified by reference to the original understanding of the First Amendment.[3] Such decisions also involve a highly intrusive judicial role in majoritarian politics.

There is some continuity, however, between current practice and the original understanding, and between current practice and principles of democratic government. The continuity lies in the distinctive American contribution to the theory of sovereignty. In England, sovereignty lay with the King. "In the United States," as James Madison explained, "the case is altogether different. The People, not the Government, possess the absolute sovereignty."[4]

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[2] John Dewey, *The Future of Liberalism*, in John Dewey, 11 *Later Works* 291 (Southern Illinois, 1987).

[3] Indeed, the protection of free speech originally may have been thought to confer primarily a ban against "prior restraints"—licensing systems and other means of requiring prepublication permission from government. See Leonard W. Levy, *Emergence of A Free Press* 272-74 (Oxford, 1985). Under this limited conception of the First Amendment, subsequent punishment for speech usually raises no constitutional problem at all. Id.

Even if this extreme view is incorrect, it seems clear that during the founding period, much of what we now consider "speech" was thought to be unprotected, and speech could be regulated if it could be shown to cause injury or offense. Joseph Story, *A Familiar Exposition of the Constitution of the United States* §§ 445-47 at 316-18 (Regnery Gateway, 1986). In any case it is revealing that during the founding period many people thought that the infamous Sedition Act—making it a crime to libel "the government" and thus criminalizing a wide range of criticism of government—was constitutional. See Philip Kurland and Ralph Lerner, eds, 5 *The Founder's Constitution* (Chicago, 1987).

[4] James Madison, *Report on the Virginia Resolution* (Jan 1800), in Gaillard Hunt, ed, 6 *The Writings of James Madison* 386 (Putnam, 1906).

The placement of sovereignty in the people rather than in the government has important implications for freedom of speech. As Madison understood it, the new conception of sovereignty entailed a judgment that any "Sedition Act" would be unconstitutional.[5] The power represented by such an Act ought, "more than any other, to produce universal alarm; because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right."[6]

With Madison's pronouncements in mind, we might think of the American tradition of free expression as a series of struggles to understand the relationship between this conception of sovereignty and a system of free speech. The extraordinary protection now accorded to political speech can well be understood as an elaboration of the distinctive American understanding of sovereignty.

My goal in this Article is to defend this basic proposition and to evaluate the current system of free expression in light of it. As we will see, an effort to root freedom of speech in a conception of popular sovereignty shows that our current understandings are off the mark. Those understandings misdirect the basic inquiry, protect speech that should not be protected, and worst of all, invalidate democratic efforts to promote the principle of popular sovereignty under current conditions.

## I. The New First Amendment

American children watch a good deal of television—about twenty-seven hours per week[7]—and American television contains a good deal of advertising. For adults, every hour of television contains nearly eight minutes of commercials.[8] For most of its history, the Federal Communications Commission (FCC) imposed limits on the amount of advertising that broadcasters could air on shows aimed at children. In 1984, the FCC eliminated the limits.[9]

In the wake of deregulation, some stations air between eleven and twelve minutes per hour of commercials during children's pro-

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[5] Id at 386, 406.

[6] Id at 393.

[7] Geoffrey Tooth, *Why Children's TV Turns Off So Many Parents*, US News and World Rep 65 (Feb 18, 1985).

[8] Barbara Gamarekian, *Ads Aimed at Children Restricted*, NY Times D1 (Oct 18, 1990).

[9] Tom Engelhardt, *The Shortcake Strategy*, in Todd Gitlin, ed, *Watching Television* 68, 76 (Pantheon, 1986).

gramming on weekends, and up to fourteen minutes on weekdays.[10] Some shows are actually full-length commercials, because the lead characters are products.[11]

In 1990 Congress imposed, for children's programming, a limit of ten and one half minutes of television commercials per hour on weekends, and twelve minutes on weekdays. President Bush withheld his approval, invoking the First Amendment. According to the President, the First Amendment "does not contemplate that government will dictate the quality or quantity of what Americans should hear—rather, it leaves this to be decided by free media responding to the free choices of individual consumers."[12] The President did "not believe that quantitative restrictions on advertising should be considered permissible . . . ."[13]

Nonetheless, the Children's Television Act of 1990 has become law.[14] It is possible that networks will challenge it on constitutional grounds. Perhaps the constitutional attack will be successful. The plausibility of the argument has affected the debate over controls on children's advertising, and may well have deterred stronger efforts to encourage high-quality broadcasting for children.

This episode reveals that something important and strange has happened to the First Amendment. Whereas the principal First Amendment suits were brought, in the 1940s, 1950s, and 1960s, by political protestors and dissidents, many of the current debates involve complaints by commercial advertisers, companies objecting to the securities laws, pornographers, businesses selling prerecorded statements of celebrities via "900" numbers, people seeking to spend large amounts of money on elections, industries attempting to export technology to unfriendly nations, newspapers disclosing names of rape victims, and large broadcasters resisting government efforts to promote diversity in the media. How has this happened?

To attempt an answer, we must step back a bit. From about 1940 to 1970, American constitutional debate over freedom of expression was divided along clear lines: On one side were those ac-

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[10] Gamarekian, NY Times § D at 1 (cited in note 8).

[11] On the development of this practice, see Engelhardt, *The Shortcake Strategy* at 70-81 (cited in note 9).

[12] *Statement on the Children's Television Act of 1990*, 26 Weekly Compilation of Presidential Documents 42, 1611-12 (Oct 17, 1990).

[13] Id at 1612.

[14] The President did not veto the bill but allowed it to become law without his signature. He did not explain why he did not veto it. Id at 1611-12.

cepting what came to be the dominant position, a form of First Amendment "absolutism." On the other side were the advocates of "reasonable regulation." One could identify the two sides by their commitment to, or rejection of, four central ideas.

The first idea is that the government is the enemy of freedom of speech. Any effort to regulate speech, by the nation or the states, is threatening to the principle of free expression. More subtly, an effort to regulate speech is defined as a governmental attempt to interfere with communicative processes, taking the existing distribution of entitlements—property rights, wealth, and so on—as a given. I will discuss this point in more detail below.[15]

The second idea is that we should understand the First Amendment as embodying a commitment to a certain form of neutrality. Government may not draw lines between speech it likes and speech it hates. All speech stands on the same footing. Thus the protection accorded to speech extends equally to Communists and Nazis, the Ku Klux Klan and the Black Panthers, Martin Luther King, Jr. and George Wallace. Government should ensure that broadcasters, newspapers, and others can say what they wish, constrained only by the impersonal pressures of the marketplace. This conception of neutrality among different points of view is the government's first commitment.

The third idea is that we should not limit the principle of free expression to political speech, or to expression with a self-conscious political component. It is extremely difficult to distinguish between political and nonpolitical speech. Any such distinction is likely to reflect illegitimate partisan politics.[16] Thus the free speech principle extends to more than self-conscious efforts to contribute to democratic deliberation. It extends equally to sexually explicit speech, music, art, and commercial speech. Under this view, the First Amendment sets out a principle not limited to its particular historical wellsprings. "Speech," in the First Amendment, means all speech.

The final idea is that any restrictions on speech, once permitted, have a sinister and inevitable tendency to expand. Principled limits on government are hard to articulate; to allow one kind of restriction is in practice to allow many other kinds as well. "Slippery slope" arguments therefore deserve a prominent place in the theory of free expression. As far as possible, "balancing" ought to

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[15] See Section II.

[16] See Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* 48-53 (Harvard, 1990).

play no role in free speech law. Judges should not uphold restrictions on speech simply because the government seems to have good reasons for the restriction in the particular case. They must protect against the likely effect of the decision on future government action.

In the past quarter-century these four principles have commanded enormous respect. The press insisted on them with special enthusiasm. It was joined by many teachers in law schools and political science departments, and by numerous litigators, most notably the American Civil Liberties Union.

One can easily identify the components of the opposing position.[17] On this view, balancing is an inevitable part of a sensible system of free expression, and "reasonable regulation" should be upheld. The meaning of the First Amendment should be determined by reference to its history, in particular by reference to the relatively limited aims of the Framers and the complexities of the Supreme Court's own precedents. Certain categories of speech—advocacy of crime, especially dangerous speech, commercial speech, hate speech, sexually explicit speech, and libel—fall outside the First Amendment altogether. The government, according to this view, plays a role in maintaining a civilized society. This means that it may guard, for example, against the degradation produced by obscenity or the risks posed by speech advocating overthrow of the government. Large-scale neutrality makes no sense.

From the perspective of the 1990s, it may be hard to remember the vigor and tenacity with which the opposing camps struggled over their respective positions. The basic commitments of the absolutist view are now clichés, even dogma. Despite that view's novelty and the lack of direct historical support on its behalf, it has won a dramatic number of victories in the Supreme Court. This is so especially with restrictions of speech on the basis of its content, where special scrutiny is now routine, except in quite narrow categories of excluded speech.[18] Thus constitutional protection has been accorded to most commercial speech; to most sexually explicit speech; to many kinds of libel; to publication of the names of rape victims; to the advocacy of crime, even of violent overthrow of the government; to large expenditures on electoral campaigns; to

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[17] Much of this is stated in Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1, 21-22 (1971).

[18] Content-neutral restrictions are of course subject to a form of balancing. See generally Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U Chi L Rev 46, 48-50 (1987).

corporate speech; in all likelihood to hate speech; and of course to flag burning.[19]

It is not an overstatement to say that, taken all together, these developments have revolutionized the law of free expression. For many, the new law is an occasion for a sense of triumph and, perhaps, a belief that the principal difficulties with First Amendment law have been solved. The remaining problems are thought to be ones of applying hard-won doctrinal wisdom to ever-present threats of censorship.

In the last decade, however, the commitments that emerged from the last generation of free speech law have come under extremely severe strain. Emerging controversies have appeared over such issues as campaign finance regulation, hate speech, "dial-a-porn," the securities laws, scientific speech, nude dancing, commercial advertising, selective funding of expression, pornography, and regulation designed to produce quality and diversity in broadcasting. With these developments, previous alliances have come apart. Sometimes the new disputes seem to resurrect the belief in "reasonable regulation." Often they draw one or more of the four basic commitments of the absolutists into sharp question.

The ironies in all this are abundant. The new coalitions have spurred plausible arguments of hypocrisy, with free speech advocates claiming that the new challengers abandoned the liberal commitment to free speech as soon as the commitment became inconvenient, or required protection for unpopular causes. Indeed, it has been charged that, for many, the commitment to free speech stands revealed as contingent and convenient, and not principled at all.

On the other hand, the enthusiasm for broad application of free speech principles to the new settings is ironic as well. The constitutional protection accorded to commercial speech, for example, is relatively new. Justices Douglas and Black,[20] probably the most vigorous advocates of free expression in the history of the Court, rejected protection for commercial speech, as did many others. The notion that the First Amendment protects libel of ethnic groups, or

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[19] *Virginia Board of Pharmacy v Virginia Citizens Consumer Council*, 425 US 748, 770 (1976) (commercial speech); *New York Times Co. v Sullivan*, 376 US 254, 265-66 (1964) (libel); *Florida Star v BJF*, 491 US 524, 533-34 (1989) (names of rape victims); *Brandenburg v Ohio*, 395 US 444, 447-48 (1969) (advocacy of illegality); *Buckley v Valeo*, 424 US 1, 22-23 (1976) (campaign expenditures); *First National Bank of Boston v Bellotti*, 435 US 765, 776 (1978) (corporate speech); *Miller v California*, 413 US 15 (1973) (obscenity); *Texas v Johnson*, 491 US 397 (1989) (flag-burning).

[20] See *Valentine v Chrestensen*, 316 US 52, 54-55 (1942).

hate speech, is a quite modern development, if it is a development at all. Until recently, no one thought that the First Amendment cast any doubt on the securities laws. Until the last few decades, the states had very broad authority to regulate sexually explicit material. And the interaction of the free speech principle with campaign spending and broadcasting surely raises complex and novel issues.

Under these circumstances, it seems peculiar to insist that any regulatory efforts in these areas will endanger "the First Amendment" or inevitably pave the way toward more general incursions on speech. Insistence on the protection of all words seems especially odd when it is urged by those who otherwise proclaim the need for judicial restraint, for the freeing up of democratic processes from constitutional compulsion, and for close attention to history. These ideas would seem to argue most powerfully against reflexive invocation of the First Amendment.

Current law, then, faces a new set of constitutional problems, raising issues that have shattered old alliances and that promise to generate new understandings of the problem of freedom of expression. In this Article, I propose and evaluate two responses to the current state of affairs. The two responses have the same source. That source is the distinctive American contribution to the theory of sovereignty.

The first proposal calls for a New Deal with respect to speech. It applies much of the reasoning of the New Deal attack on the common law to current questions of First Amendment law. Such an approach would produce significant changes in existing understandings of the nature of the free speech guarantee. It would call for a large-scale revision in our view of when a law "abridges" the freedom of speech. At a minimum, it would insist that many imaginable democratic interferences with the autonomy of broadcasters or newspapers are not "abridgements" at all. The New Deal for speech would also argue that such autonomy, because it is guaranteed by law, is itself sometimes an abridgement. I believe that there is much to be said in favor of this approach, and in certain, well-defined settings, it should be accepted.

The second proposal is less dramatic. It proclaims that the First Amendment is best understood by reference to the democratic process. The overriding goal of the amendment, rightly perceived, is to protect politics from government. This view would clarify a number of current controversies without fundamentally changing existing law. I conclude that this approach should also be adopted, notwithstanding the likely apprehension from those ac-

customed to "slippery slope" arguments in the First Amendment context.

Ultimately, I argue that an insistence that the First Amendment is fundamentally aimed at protecting democratic self-government, combined with modest steps in favor of a New Deal for speech, would resolve most of the current problems in free speech law without seriously compromising the First Amendment or any other important social values. But in order to reach this conclusion, it will be necessary to abandon, or at least qualify, the basic principles that have dominated judicial and academic thinking about speech in the last generation.

## II. A New Deal for Speech?

### A. Background

Perhaps we need a New Deal for speech, one that would parallel what the New Deal provided to property rights during the 1930s, and that would be rooted in substantially similar concerns.[21] A brief review follows.

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[21] Something of this general sort is suggested in Onora O'Neill, *Practices of Toleration*, in Judith Lichtenberg, ed, *Democracy and the Mass Media* 155 (Cambridge, 1990); Thomas M. Scanlon, Jr., *Content Regulation Reconsidered*, in id at 331; Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L Rev 1405 (1986); Owen M. Fiss, *Why the State?*, 100 Harv L Rev 781 (1987); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L J 375. For reasons suggested below, I do not go so far as Fiss in this direction; my treatment overlaps with the approach outlined in O'Neill, Scanlon, and Balkin.

Many of the concerns expressed here were set out long ago in The Commission on Freedom of the Press, *A Free and Responsible Press* (Chicago, 1947). That Commission, headed by Robert Hutchins and Zechariah Chafee, Jr., included among its members John Dickinson, Harold Lasswell, Archibald MacLeish, Charles Merriam, Reinhold Niebuhr, and Arthur Schlesinger. It did not recommend legal remedies for the current situation, but it suggested the need for private measures to control novel problems.

> The press has been transformed into an enormous and complicated piece of machinery. As a necessary accompaniment, it has become big business. . . . The right of free public expression has therefore lost its earlier reality. Protection against government is now not enough to guarantee that a man who has something to say shall have a chance to say it. The owners and managers of the press determine which persons, which facts, which versions of the facts, and which ideas shall reach the public.

Id at 15-16. For a recent statement to similar effect, see James S. Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* 33 (Yale, 1991):

> [T]he system of free expression cannot be evaluated merely in terms of whether some positions are forcibly suppressed. Crucial voices may fail to achieve an effective hearing without the need to silence any of them. In a modern, technologically complex society, access to the mass media is a necessary condition for a voice to contribute to the national political debate. Unless the media permit the full range of views that have a significant following in the society to get access to the media on issues of intense inter-

Before the New Deal, the Constitution was often understood as a constraint on government "regulation." In practice, this meant that the Constitution was often invoked to prohibit governmental interference with existing distributions of rights and entitlements.[22] Hence minimum wage and maximum hour laws were seen as unjustifiable exactions—takings—from employers for the benefit of employees and the public at large.[23] The Due Process Clause insulated private arrangements from public control, especially if the government's goals were paternalistic or redistributive. In operating under the police power, government must be neutral in general, and between employers and employees in particular. A violation of the neutrality requirement, thus understood, would count as a violation of the Constitution.

On the pre-New Deal view, existing distributions marked the boundary not only between neutrality and partisanship, but between inaction and action as well. Government inaction consisted of respect for existing distributions. Government action was understood as interference with them. The rallying cry "laissez-faire" embodied such ideas. The fear of, and more important, the very conception of "government intervention" captured this basic approach.

The New Deal reformers argued that this entire framework was built on fictions. Their response is captured in President Roosevelt's references to "this man-made world of ours"[24] and his insistence that "we must lay hold of the fact that economic laws are not made by nature. They are made by human beings."[25] The pre-New Deal framework treated the existing distribution of resources and opportunities as prepolitical, when in fact it was not. It saw minimum wage and maximum hour laws as introducing government into a private or voluntary sphere. But the New Dealers

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est to proponents of those views, then the full realization of political equality has fallen short.

[22] Two qualifications are necessary. First, redistribution through taxation—most notably by way of the poor laws and other welfare measures—was permissible. Second, some forms of regulation were permissible even if they had redistributive features. The "police power," for example, extended to protection of workers' health, although the Court was sometimes skeptical that a health justification was plausible. See, for example, *Lochner v New York*, 198 US 45, 57-58 (1905).

[23] See *Adkins v Children's Hospital*, 261 US 525, 558 (1923); *Lochner*, 198 US at 57-58. Of course minimum wage and maximum hour legislation has complex redistributive consequences; it does not simply transfer resources from employers to employees.

[24] Franklin D. Roosevelt, Message to Congress, June 8, 1934, reprinted in Robert B. Stevens, ed, *Statutory History of the United States: Income Security* 61 (Chelsea House, 1970).

[25] 1 *The Public Papers of Franklin D. Roosevelt* 657 (Russell & Russell, 1938).

pointed out that this sphere was actually a creation of law. Rules of property, contract, and tort produced the set of entitlements that ultimately yielded market hours and wages.[26]

To New Deal reformers, the very categories of "regulation" and "government intervention" seemed misleading. The government did not "act" only when it disturbed existing distributions. It was responsible for those distributions in the first instance. What people owned in markets was a function of the entitlements that the law conferred on them. The notion of "laissez-faire" thus stood revealed as a conspicuous fiction.

To the extent that property rights played a role in market arrangements—as they inevitably did—those arrangements were a creature of positive law, including, most notably, property law, which gave some people a right to exclude others from "their" land and resources.[27] On this view, market wages were a result of legal rules conferring rights of ownership on certain groups. Rather than superimposing regulation on a realm of purely voluntary interactions, minimum wage laws substituted one form of regulation for another.

The fact that an existing distribution is not natural or prepolitical provides no argument against it.[28] When one regulatory system is superimposed on another, it is not true that all bets are off, or that we cannot evaluate them in constitutional terms, or for their ability to diminish or to increase human liberty, or other things we value. Here the New Deal reformers were often too cava-

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[26] Nothing said here denies that people often work for what they have. They acquire property independently of legal rules, in the sense that their own effort contributes to getting them whatever they have. While legal rules create preconditions for acquiring property and may help along the way, they do not operate in a vacuum from individual initiative. In this sense, the existing distribution of resources and opportunities is emphatically not simply the creation of law; it is instead a result of a complex interaction between law and many other things, including individual effort. The New Dealers did not deny these propositions.

[27] Dewey, 11 *Later Works* at 291 (cited in note 2). Amartya Sen, *Poverty and Famines, An Essay on Entitlement and Deprivation* (Oxford, 1981), is a striking contemporary illustration of similar ideas. Sen demonstrates that famines are not only or always a result of a decrease in the supply of food. Instead, they are a result of social choices, prominent among them legal ones, deciding who is entitled to what. Sen notes:

> Finally, the focus on entitlement has the effect of emphasizing legal rights. Other relevant factors, for example market forces, can be seen as operating *through* a system of legal relations (ownership rights, contractual obligations, legal exchanges, etc.). The law stands between food availability and food entitlement. Starvation deaths can reflect legality with a vengeance.

Id at 165-66. This claim can be understood as a special case of the New Deal understanding of "laissez-faire."

[28] See John Stuart Mill, *On Liberty and Other Essays* 182 (MacMillan, 1926) ("conformity to nature, has no connection whatever with right and wrong").

lier.[29] A system of private property is a construct of the state, but it is also an important individual and collective good. In general, a market system—for property or for speech—promotes both liberty and prosperity, and its inevitable origins in law do not undermine that fact.

To their basic point, then, the New Dealers added a claim that existing distributions were sometimes inefficient or unjust.[30] Different forms of governmental ordering had to be evaluated pragmatically and in terms of their consequences for social efficiency and social justice. The fact that markets are a creature of law meant not that they were impermissible, but that they would be assessed in terms of what they did on behalf of the human beings subject to them. Markets would not be identified with liberty in an a priori way; they would have to be evaluated through an examination of whether they served liberty or not.

The New Dealers were not socialists; they generally appreciated the contributions of markets to prosperity and freedom.[31] At the very least, however, a democratic judgment that markets constrained liberty—embodied in a law calling for maximum hours or minimum wages—was plausible and entitled to judicial respect.

## B. Theory

These ideas have played little role in the law of free speech. For purposes of speech, contemporary understandings of neutrality

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[29] There are many contemporary analogues. See, for example, Allan C. Hutchinson, *The Three "R's": Reading/Rorty/Radically*, 103 Harv L Rev 555, 558-63 (1989) (apparently arguing that contingency is a reason for change); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 Harv L Rev 985, 990-91 (1990) (same).

Compare the following statement, very much in the spirit of the New Deal, in Morris R. Cohen, *Property and Sovereignty*, 13 Cornell L Q 8, 14 (1927):

> [T]he recognition of private property as a form of sovereignty is not itself an argument against it. Some form of government we must always have. . . . At any rate it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government.

[30] Compare Robert L. Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 Pol Sci Q 470, 471-74 (1923), who rightly draws attention to coercive characteristics in the law of property, but assumes that this insight establishes more than it does. Regulatory interference with market arrangements does not disturb an otherwise prepolitical status quo, but it may produce inefficiency and unfairness. A good deal of theoretical and empirical work is necessary to assess any particular interference. Of course many of the New Deal reforms produced unanticipated adverse consequences.

[31] Not always, though, and not enough. See especially the enthusiasm for cartels in the "first" New Deal, discussed in Ellis W. Hawley, *The New Deal and the Problem of Monopoly* 270-80 (Princeton, 1966).

and partisanship, or government action and inaction, are identical to those that predate the New Deal.[32]

One response to the recent First Amendment controversies would be to suggest that they confirm the wisdom of the New Deal reformation on this score. On this view, 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 current issues of occupational safety and health, for example. I do not mean to suggest that markets in speech are generally abridgements of speech, or that they usually disserve the First Amendment. I do mean to say that in some circumstances, what seems to be government regulation of speech actually might 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, in some selected circumstances, amount to an abridgement of free speech.

A general clarification is necessary at the outset. It will be tempting to think that the argument to follow amounts to a broad and puzzling plea for "more regulation" of speech. Many of the practices and conditions I will challenge are commonly taken to involve private action, and not to implicate the Constitution at all. We generally treat the practices of broadcasters and managers of newspapers as raising no constitutional question; it is "regulation" of "the market" that is problematic. In fact there should be enthusiastic agreement—for reasons of both text and principle[33]—that the First Amendment is aimed only at governmental action, and that private conduct raises no constitutional question. The behavior of private broadcasters by itself poses no legal problem. It seems clear too that to find a constitutional violation, one needs to show that governmental action has "abridged the freedom of speech." That action must take the form of a law, a regulation, or behavior by a government official.

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[32] The major qualification is the remarkable decision in *Red Lion Broadcasting Co. v FCC*, 395 US 367, 390, 393-94 (1969), in which the Court upheld the fairness doctrine against First Amendment attack. See text accompanying notes 49-53.

[33] The text of course says that "Congress" shall make no law abridging the freedom of speech, and the Fourteenth Amendment, taken to incorporate the First, applies its proscriptions to "states." In principle, the limitation of the Constitution to state action has the salutary consequence of helping to constitute and free up a private sphere from legal disabilities. See text accompanying notes 33-34 (discussing what counts as the private sphere).

But if the lesson of the New Deal is taken seriously, it follows, not that the requirement of state action is unintelligible or incoherent, but that governmental rules lie behind the exercise of rights of property, contract, and tort, especially insofar as common law rules grant people rights of exclusive ownership and use of property. From this it does not follow that private acts are subject to constitutional constraint, or even that legally-conferred rights of exclusive ownership violate any constitutional provision. To repeat: The acts of private broadcasters raise no First Amendment issue. Private acts exist; they are not subject to the First Amendment.

To find a constitutional violation, it is necessary to identify some exercise of public power, and to show that it has compromised some constitutional principle. But property law always lies behind markets. Displacement of property law may be constitutional. New efforts to promote greater quality and diversity in broadcasting, for example, are claims for a new regulatory regime, not for "government intervention" where none existed before. And property law might itself violate the First Amendment.

Another clarification is in order. I have suggested that legal rules lie behind private behavior, and it will be tempting to think that this suggestion dissolves the state action limitation. If private exclusion of speech is made possible by law, does it not turn out that the First Amendment invalidates private behavior after all? Is not all private action therefore state action? The answer is that it is not. A private university, expelling students for (say) racist speech, is not a state actor. The trespass law, which helps the expulsion to be effective, is indeed state action. The distinction matters a great deal. The trespass law, invoked in this context, is a content-neutral regulation of speech in a place that is not plausibly a public forum. This regulation does not violate the First Amendment. By contrast, the behavior of the university is content-based, and if engaged in by a public official, would indeed violate the First Amendment. We always need to identify the exercise of public power. Without it, there is no free speech issue, even on the New Deal view. And such power, when identified, often raises no serious constitutional issue when it takes the content-neutral form of protecting ownership rights.

What I want to suggest here is, first and foremost, that legal rules that are designed to promote freedom of speech and that interfere with other legal rules—those of the common law—should not be invalidated if their purposes and effects are constitutionally valid. It may also follow that common law rules are themselves subject to constitutional objection if and when such rules "abridge

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

For the moment, these general proposals must remain abstract; I will particularize them below. And while the proposals might seem unconventional, they have a clear foundation in no lesser place than *New York Times Co. v Sullivan*,[34] one of the defining cases of modern free speech law. There the Court held that a public official could not bring an action for libel unless he could show "actual malice," defined as knowledge of or reckless indifference to the falsity of the statements at issue.[35] The *Sullivan* case is usually taken as the symbol of broad press immunity with respect to criticism of public officials. More importantly, observers often understand *Sullivan* to reflect Alexander Meiklejohn's conception of freedom of expression[36]—a conception of self-government connected to the American conception of sovereignty and built on the need to ensure that the government does not inhibit political expression.

It is striking that in *Sullivan*, 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.[37] A civil action, on this view, involves a purely private dispute. The Supreme Court quickly disposed of this objection. The use of public tribunals to punish speech is conspicuously state action.[38] What is interesting is not the Supreme Court's rejection of the argument, but the fact that the argument could even 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 the pre-New Deal understanding that the common law simply implements existing rights or private desires, and does not amount to "intervention" or "action" at all. 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

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[34] 376 US 254 (1964).

[35] Id at 280, 283.

[36] See Meiklejohn, *Free Speech and its Relation to Self-Government* at 14-19, 22-27 (cited in note 1). 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, 12-14, 19 (1965).

[37] *New York Times Co. v Sullivan*, 144 S2d 25, 40 (Ala 1962). It is notable that in *Sullivan*, the government was not a party—something that distinguishes the case from most others in which First Amendment objections have 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.

[38] *Sullivan*, 376 US at 265.

the view of the state supreme court in *Sullivan*. Reputation, after all, is a property interest. Just as in the pre-New Deal era, the state supreme court did not see the protection of that interest as involving government action at all.

The Supreme Court's rejection of that claim seemed inevitable in *Sullivan*, and this aspect of the case is largely forgotten. But courts base much of current law on precisely the forgotten view of that obscure state court. We might even generalize from *Sullivan* the broad idea that courts must always assess the protection of property rights through the common law pragmatically, in terms of its effects on speech.[39]

Consider, for example, the issues raised by a claimed right of access to the media. 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 real diversity of view on the airwaves, but instead a bland, watered-down version of conventional morality. If so, a severe problem for the system of free expression is the governmental grant of legal protection—rights of exclusive use—to enormous institutions compromising Madisonian values. Courts usually do not see that grant of power—sometimes made through the common law, sometimes through statute—as a grant of power at all, but instead treat it as purely "private." Thus the exclusion of people and views from the airwaves is immunized from constitutional constraint, on the theory that the act of exclusion is purely private. By

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[39] See O'Neill, *Practices of Toleration* at 177-78 (cited in note 21).

> [N]o society can institutionalize zero-regulation of public discourse. The choice can only be between differing patterns of regulation. . . . No society can guarantee that all communicators will be able to express every possible content in every possible context. Supposed attempts to do this by laissez-faire communications policies merely assign the regulation of communication to nonstate powers. They secure a particular configuration of freedom of expression, which may leave some unable to find their voices and does not guarantee the expression of diverse views. A better and less abstract aim for a democratic society is a set of practices that enables a wide range of communication, especially of public communication, for all.

There is a difference between *Sullivan* and the cases that follow. In *Sullivan*, the property right was not asserted by someone who was simultaneously speaker and owner. In cases that involve a claimed right of access to the media, the ownership right that prevents others from speaking is held by someone who is himself expressing something. But it is unclear why this difference should be decisive. The question is whether the legal vindication of the property right is constitutionally acceptable.

Note also that the shopping center cases, see notes 117-19, really are close to *Sullivan*, for they too involve the use of a property interest protected at common law to stop speech. The only differences are that (a) libel law is content-based, as property law is not, and (b) libel law is aimed particularly at speech whereas property law allows the exclusion of everyone, whether a speaker or not.

contrast, rights of access to the media are thought to involve governmental intervention into the private sphere.[40]

In *Sullivan*, the Supreme Court said, as against a similar claim, that courts should inspect common law rules for their conformity with the 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."[41]

We can apply this understanding to current problems. If we regard the First Amendment as an effort to ensure that people are not prevented from speaking, especially on issues of public importance, then current free speech law seems ill-adapted to current conditions. Above all, the conception of government "regulation" misstates certain issues and sometimes disserves the goal of free expression itself. Some regulatory efforts, superimposed on the established regulation through common law rules, may promote free speech. Less frequently, the use of statutory or common law rules to foreclose efforts to speak might themselves represent impermissible content-neutral restrictions on speech. We must judge both reform efforts and the status quo by their consequences, not by question-begging characterizations of "threats from government."

It is tempting to understand this argument as a suggestion that the New Dealers were concerned about private power over working conditions, and that modern courts should take more interest in the existence of private power over expression or over democratic processes.[42] But this formulation misses the real point, and does so in a way that suggests its own dependence on pre-New Deal understandings. The problem is not that private power is an obstacle to speech; even if it is, private power is not a subject of the First Amendment. Nor would it be accurate to say that employer power was the true concern for the New Dealers. The real problem is that public authority creates legal structures that restrict speech, that new exercises of public authority can counter the existing restrictions, and that any restrictions, even those of the common law, must be assessed under constitutional principles precisely because they are restrictions.

Consider, for example, a case in which the owners of a large shopping center exclude from their property war protestors who

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[40] See text accompanying notes 56-57.

[41] *Sullivan*, 376 US at 265.

[42] It is sometimes so argued. See David Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum L Rev 334, 361-68 (1991).

believe that the center is the best place to draw attention to their cause. The Supreme Court has said that the situation does not implicate the First Amendment, since it does not involve government regulation of speech. Private property owners have simply barred people from their land.[43]

In fact, this is a poor way to understand the situation; it was the state court's view in *Sullivan*. The owners of the shopping center may exclude the protestors only because government has conferred on them a legal right to do so. The conferral of that right is an exercise of state power. It is *this* action that restricts the speech of the protestors. Surely it is a real question whether the grant of exclusionary power violates the First Amendment, at least in circumstances in which it eliminates the only feasible way of making a protest visible to members of a community.

Or 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."[44] But government gives broadcasters property rights in their licenses, and their exercise of those rights is a function of law in no subtle sense. It is generally salutary to have a system in which government creates ownership rights or markets in speech, just as in property. The point is not that markets are bad, but that a right of exclusive ownership in a television network is governmentally conferred. The exclusion of the would-be speakers is made possible by the law of civil and criminal trespass, among other things. It is thus a product of a governmental decision.

A market system in which only certain speakers express only certain views is a creation of law. The questions are (1) whether reform efforts eliminating adverse effects of exclusive ownership rights by conditioning the original grant are consistent with the First Amendment, or (2) whether the government grant of exclusive ownership rights itself violates the First Amendment. We cannot answer such questions by saying that ownership rights are governmental; we need to know the purposes and effects of the grant.

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[43] *Lloyd Corp. v Tanner*, 407 US 551, 570 (1972); *Hudgens v NLRB*, 424 US 507, 519-21 (1976).

[44] *CBS, Inc. v Democratic National Committee*, 412 US 94 (1973). There only three Justices said that there was no state action. Id at 114-210. But those three justices may now represent the majority view. See *Flagg Bros., Inc. v Brooks*, 436 US 149, 163 (1978).

And we cannot answer that question a priori or in the abstract; we need to know a lot of details.

One might respond that the Constitution creates "negative" rights rather than "positive" ones, or at least that the First Amendment is "negative" in character, granting a right to protection against the government, not to subsidies from the government. The claim certainly captures the conventional wisdom, and an argument for a New Deal for speech must come to terms with it.

There are two responses. First, and most fundamentally, no one is asserting a positive right in these cases. Instead, the claim is that government sometimes cannot adopt a content-neutral rule that imposes a (negative) constraint on who can speak and where they can do so. When someone with view X cannot speak on the networks, it is because the civil and criminal law prohibits him from doing so. This is the same problem that underlies a wide range of familiar claims in content-neutral cases. Consider a ban on door-to-door soliciting. An attack on content-neutral restrictions is not an argument for "positive" government protection. It is merely a claim that courts must review legal rules stopping certain people from speaking in certain places under First Amendment principles. In fact the response that a New Deal for speech would create a "positive right" trades on untenable, *Lochner* era distinctions between positive and negative rights.[45]

The second response is that the distinction between negative and positive rights fails to explain even current First Amendment law.[46] There are two obvious counterexamples. 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

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[45] 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. I argue here 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, and is therefore about a negative right. See generally, Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L Rev 295, 304-15 (1991) (arguing that property law invades negative rights of the homeless).

[46] It also fails to explain constitutional law in general. The Eminent Domain Clause creates a positive right to governmental protection of property. The Contracts Clause creates a right to governmental protection of contractual agreements. In both cases, the Constitution is violated by a governmental withdrawal from the scene.

a number of police officers to come to the scene.[47] The right to speak may well include a positive right to governmental protection against a hostile private audience.

The area of libel provides a second example. By imposing constitutional constraints on the common law of libel, the Court in effect has held that those who are defamed must subsidize speakers, by allowing their reputations to be compromised to the end of broad diversity of speech. Even more, the Court has held that government is under what might be seen as an affirmative duty to "take" the reputation of people whom the press defames in order to promote the interest in free speech. The First Amendment requires a compulsory, governmentally produced subsidy of personal reputation (a property interest) for the benefit of speech.[48]

These cases reveal that the First Amendment, even as currently conceived, is no mere negative right. It has positive dimensions. These dimensions consist of a command to government to take steps to ensure that legal rules according exclusive authority to private persons do not violate the system of free expression. In a hostile audience case, the government is obliged to protect the speaker against private silencing. In the libel cases, the government is obliged to do the same thing—to provide extra breathing space for speech even though a consequence is an infringement on the common law interest in reputation. It is incorrect to say that the First Amendment creates merely a right to fend off government censorship as conventionally understood.

In any case, a broadcasting system in which government confers on networks the right to exclude certain points of view might well raise a constitutional question. The creation of that right is parallel to the grant of a right to a hostile audience to silence controversial speakers, subject only to the speakers' power of self-help through the marketplace (including the hiring of private police

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[47] See, for example, *Kunz v New York*, 340 US 290, 294-95 (1951); *Edwards v South Carolina*, 372 US 229, 231-33 (1963); *Cox v Louisiana*, 379 US 536, 550 (1965); *Gregory v Chicago*, 394 US 111, 111-12 (1969). See also Scanlon, *Content Regulation Revisited* at 337-39 (cited in note 21); and Fiss, 100 Harv L Rev at 786 (cited in note 21), discussing this point.

[48] See Richard Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U Chi L Rev 782 (1986) (discussing libel as a form of "taking"). A qualification is necessary here. To decide whether there is a subsidy one needs a baseline. To see reputation as part of the initial set of endowments is to proceed in good common law fashion; and any 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) supports the same view. But it would be possible to say that on the correct theory, people do not have such an antecedent right to reputation, and therefore no subsidy is involved in the libel cases.

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 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 for opposing sides to speak. If property rights do produce these effects, a market system created by law is constitutionally unobjectionable on the merits. This is a question of fact, on which courts should give considerable deference to other branches. But it is imaginable that a market system will have less fortunate consequences—an issue to which I return below. At least a legislative judgment opposed to free markets might, on the appropriate factual record, warrant judicial respect.

Consider the Court's remarkable opinion in the *Red Lion* case.[49] There the Court upheld the fairness doctrine, which required[50] broadcasters to give attention to public issues and provide a chance for those with opposing views to speak. In *Red Lion*, 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," for free expression would be disserved by "unlimited private censorship operating in a medium not open to all."[51] The Court suggested that:

> [A]s 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.

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[49] *Red Lion Broadcasting Co. v FCC*, 395 US 367 (1969).

[50] For the most part, the requirement was theoretical only. In practice the doctrine was rarely enforced. See Robert M. Entman, *Democracy Without Citizens* 104-06 (Oxford, 1989).

[51] *Red Lion*, 395 US at 375, 392.

> . . .
> [T]he 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, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.[52]

This vision of the First Amendment does not stress the autonomy of broadcasters with current ownership rights. Instead it emphasizes the need to promote democratic self-government by ensuring that people are presented with a broad diversity of views about public issues. A market system may compromise this goal. It is hardly clear that "the freedom of speech" is promoted by a regime in which people may speak if and only if other people are willing to pay enough to hear them.

This argument applies most conspicuously to broadcasters, since the role of the government in allocating licenses is obvious. But it has force with respect to newspapers as well: Their property rights also amount to a legally-conferred power to exclude others. Simply as a matter of fact,[53] that power is a creature of the state. In general, this is hardly bad; but we must assess the resulting system in terms of its consequences for speech.

If all this is correct, the first two commitments of current First Amendment law come under severe strain. The idea that threats to

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[52] Id at 389-90 (citations omitted). Compare this suggestion:

> 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.

Bernard D. Nossiter, *The FCC's Big Giveaway Show*, The Nation 402 (Oct 26, 1985) (statement of Mark Fowler, former Chairman of the Federal Communications Commission).

[53] This point is not a criticism of a system of private property. To say that a system is state-created is not to disparage it. See text accompanying notes 28-31. A system of private property is an individual and collective good—in large part because it immunizes citizens from dependence on the state and in that way creates the preconditions for prosperity, democracy, and citizenship. This point is not in any way inconsistent with those suggested in the text.

speech come from government is correct, but as conventionally understood, it is far too simple. Sometimes threats come from what seems to be the private sphere, but those threats are fundamentally a product of legal entitlements that enable some private actors but not others to speak and to be heard. When this is so, these legal entitlements pose a large risk to a system of free expression, one not readily visible to current law.

Second, the idea that government should be neutral among all forms of speech seems correct in the abstract. But as frequently applied it is as implausible as the idea that government should be neutral between the associational interests of blacks and those of whites under conditions of segregation,[54] or between the freedom of employers and workers under conditions in which market pressures drive hours dramatically up and wages dramatically down.[55] The difficulty with this conception of neutrality is that it takes existing distributions of resources and opportunities as the baseline for decision.

The most important problem here is that neutrality between different points of view is frequently thought to be exemplified in the use of economic markets to determine access to the media and thus an opportunity to be heard. This form of neutrality actually embodies a collective choice. The choice is captured in the use of the market and the creation of particular legal standards for its operation that ensure that some will be unable to speak or to be heard, and at the same time that others will be permitted to dominate expressive outlets. Markets are generally good things, both for ordinary products and for speech. But when the legal creation of a market has harmful consequences for free expression—and it sometimes does—then we must reevaluate it in light of free speech principles.

## C. Practice

A core insight of the *Red Lion* case is that the interest in legally protected private autonomy from government is not always connected with the interest in democratic self-governance. To immunize broadcasters from government control may not be consistent with quality and diversity in broadcasting. If so, it is not consistent with the First Amendment's own commitments.

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[54] See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1, 13-14, 33-34 (1959).

[55] *Lochner*, 198 US at 52-53, 64; *Adkins*, 261 US at 558, 560-61.

We could generate, from the suggested First Amendment "New Deal," a large set of proposals for constitutional reform. I describe those proposals in summary fashion here. A more detailed discussion would be necessary in order fully to come to terms with any one of them.

1. Regulation of broadcasting.

For much of its history, the Federal Communications Commission ("FCC") has imposed on broadcast licensees the "fairness doctrine." As noted, the fairness doctrine requires licensees to devote time to issues of public importance, and it creates an obligation to broadcast speech by people of diverse views.

The last decade has witnessed a mounting constitutional assault on the fairness doctrine. One reason for the doctrine was the scarcity of licenses, but licenses are no longer scarce; indeed, there are far more radio and television stations than major newspapers. The FCC recently concluded that the fairness doctrine violates the First Amendment because it is a government effort to tell broadcasters what they may say. On this view, the fairness doctrine represents impermissible government intervention into voluntary market interactions.[56] It violates the government's obligation of "neutrality," defined as respect for market outcomes. Influential judges and scholars have reached the same conclusion.[57] The mode of analysis, in particular the notions of neutrality and inaction, is the same as that of the pre-New Deal Court.

The Constitution forbids any "law abridging the freedom of speech."[58] But is the fairness doctrine such a law? Certainly we cannot establish the proposition merely by a reference to the constitutional text. To its defenders, the fairness doctrine promotes "the freedom of speech" by ensuring more access to the airwaves and more diversity of views than the market provides. The fact that the market responds to consumption choices does not solve the problem.[59] The FCC's attack on the fairness doctrine closely parallels pre-New Deal understandings. It asserts, without a full look at the real-world consequences of different regulatory strate-

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[56] See *In re Complaint of Syracuse Peace Council*, FCC 88-131, FCC Rcd 2035, 64 Rad Reg (P&F) 1073 (Apr 7, 1988); Entman, *Democracy Without Citizens* at 102-03 (cited in note 50) (statement of Chairman Dennis Patrick).

[57] See Lucas A. Powe, Jr., *American Broadcasting and the First Amendment* 214-15 (California, 1987).

[58] US Const, Amend I.

[59] See text accompanying notes 106-07.

gies, that the doctrine involves governmental interference with an otherwise purely law-free and voluntary private sphere.

Those entrusted with interpreting the Constitution should instead deal with the fairness doctrine by exploring the relationships among a market in broadcasting, alternative systems, and the goals, properly characterized, of a system of free expression.[60] On the one hand, a market will provide a fair degree of diversity in available offerings, especially in a time of 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 command-and-control regulation, at least if such a system sharply constrains choice. Markets do offer a range of opinions and options. A 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 argues in favor of governmental foreclosure of political speech.

We might therefore distinguish among three scenarios. First, the market might itself be unconstitutional if it could be shown that existing property rights produce little political discussion or exclude certain views.[61] For reasons suggested below, courts should be cautious here, in part because the issue turns on complex factual issues not easily within judicial competence. Second, 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 promote First Amendment goals.[62] Third, regulation of the market might be invalidated if it discriminates on the basis of viewpoint, or if it can be shown 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.[63]

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[60] See Scanlon, *Content Regulation Reconsidered* at 350 (cited in note 21):

> The case for or against such powers must be made out on the basis of their consequences. Statutes requiring that opponents of newspaper or television editorials be given the opportunity to reply are not, on the face of it, inconsistent with the right of freedom of expression. Everything depends on what the consequences of such statutes would be as compared with the likely alternatives.

See also Commission on Freedom of the Press, *A Free and Responsible Press* at 23-24 (cited in note 21) ("the great agencies of mass communication should regard themselves as common carriers of public discussion. . . . all the important viewpoints and interests in the society should be represented in its agencies of mass communication").

[61] See text accompanying notes 111-13.

[62] See text accompanying notes 66-109.

[63] See *Red Lion*, 395 US 367.

Importantly, a market will make it unnecessary for government officials to oversee the content of material in order to assess its value. The fact that a market removes official oversight counts strongly in its favor. The restrictions of the market are content-neutral. The restrictions of the fairness doctrine, or any similar alternative, are content-based.

On the other hand, a market in communications generates a range of problems. Imagine, for example, that we allocated the right to speak to those people whose speech other people are willing to pay to hear—in other words, through a pricing system, like that used to allocate soap, or cereal, or cars. This system would prevent people from speaking if other people were not willing to pay enough for them to do so. Surely this would seem a strange parody of democratic aspirations—the stuff of science fiction, rather than self-government. It would be especially perverse insofar as it would foreclose dissident speech—expression for which people are often unwilling to pay. But in many respects, this is precisely the system we have. The FCC allocates broadcasting licenses very much on the basis of private willingness to pay.[64]

In one respect our system is even worse, for programming content is affected not merely by consumer demand, but also by the desires of advertisers. Viewers are thus the product as well as the users of broadcasting, and this introduces some additional distortions.[65] In any case, the First Amendment issues must depend in large part on the details.

*a) The facts.* Much information has been compiled on the content of local television news, which began, incidentally, as a direct response to the requirements of the FCC's fairness doctrine.[66] Local news programming devotes very little time to genuine news. Instead, it covers stories about movies and television programs and sensationalized disasters of little general interest.[67] "The search for emotion-packed reports with mass appeal has led local television news to give extensive coverage to tragedies like murders, deaths in

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[64] To be sure, there are many ways to present speech regardless of willingness to pay; for example, one can distribute leaflets. If those ways were sufficient to serve Madisonian ideals, there would be no reason to worry about the broadcast media. But in practice, it seems unlikely that there is sufficient attention to public affairs, and diversity of view, in other media to pick up the slack.

[65] See Section II.C.1.b.

[66] See Phyllis Kaniss, *Making Local News* 102 (Chicago, 1991).

[67] See Entman, *Democracy Without Citizens* at 110-15 (cited in note 50).

fires, or plane crashes, in which they often interview survivors of victims about 'how they feel.' "[68]

During a half-hour of news programming, no more than eight to twelve minutes involves news. Each story that does involve news typically ranges from twenty to thirty seconds.[69] Even the news stories tend to focus on fires, accidents, and crimes instead of issues of government and policy.[70] Discussions of governmental policy are further de-emphasized during the more popular evening show.[71] Coverage of government does not tend to describe the content of relevant policies, but instead focuses on sensational and often misleading "human impact" anecdotes.[72] In addition, there has been great emphasis on "features"—dealing with popular actors, or entertainment shows, or even stories focusing on the movie immediately preceding the news.[73] Economic pressures seem to be pushing local news in this direction even if reporters might prefer to deal with public issues more seriously.

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 had momentum—while about thirty percent involved issues and qualifications. In the crucial period from January to June, 1980, one network offered about 450 minutes of campaign coverage, of which no less than 308 minutes dealt with the "horse race" issues.[74]

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.[75] There is little sustained coverage of the substance of candidate speeches; instead attention is placed on how various candidates are doing. Citizenship is exceedingly unlikely to flourish in this environment.

There has been an increase in stories about television and movies and a decrease in attention to questions involving government and its obligations. In 1988, there was an average of thirty-eight minutes per month of coverage of arts and entertainment

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[68] Kaniss, *Making Local News* at 110 (cited in note 66).

[69] Id at 111. If a reporter is giving the story, the range is one to three minutes. Id.

[70] Id at 114.

[71] Id at 118.

[72] Id at 120-21.

[73] Id at 129-30.

[74] Fishkin, *Democracy and Deliberation* at 63 (cited in note 21).

[75] Kiku Adatto, *Sound Bite Democracy: Network Evening News Presidential Campaign Coverage, 1968 and 1988* 4 (Research Paper R-2) (Harvard, John F. Kennedy School of Government, 1990) (on file with U Chi L Rev).

news; in the first half of 1990, the average was sixty-eight minutes per month.[76] 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."[77] 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 how 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."[78]

There is evidence as well of advertiser influence over programming content, though at the moment the evidence is largely anecdotal.[79] No conspiracy theory appears plausible; but some recent events are quite disturbing. There are reports that advertisers have a large impact on local news programs, especially consumer reports. In Minneapolis, a local car dealer responded to a story about consumer problems with his company by pulling almost one million in advertisements. He said: "We vote with our dollars. If I'm out trying to tell a good story about what I'm doing and paying $3000 for 30 seconds, and someone's calling me names, I'm not going to be happy."[80] 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"; according to another, "I won't do the car-repair story, or the lemon story . . . . It's not worth the hassle."[81]

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, a group representing the logging community did not want TBS to air it. As a result, all of the eight advertisers (including Ford, Citicorp, Exxon, and Sears) pulled their sponsorship of the program. TBS aired the program, but lost the $100,000 spent on production.[82] And NBC had severe difficulties

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[76] J. Max Robins, *Nets' Newscasts Increase Coverage of Entertainment*, Variety 3, 63 (Jul 18, 1990).

[77] Id at 3.

[78] Id at 63.

[79] See the discussion of a forthcoming report from the Center for the Study of Commercialism in G. Pascal Zachary, *All the News? Many Journalists See A Growing Reluctance to Criticize Advertisers*, Wall St J A1 (Feb 6, 1992). The report describes growing newspaper attentiveness to advertiser views on stories.

[80] Steven Waldman, *Consumer News Blues*, Newsweek 48 (May 20, 1991).

[81] Id.

[82] *Advertisers Drop Program About the Timber Industry*, NY Times 32 (Sep 23, 1989).

finding sponsors for its television movie, "Roe v. Wade." Fearful of boycotts by religious groups, hundreds of sponsors solicited by NBC refused to participate.[83] It seems highly unlikely that advertisers could be found for any program adopting a "pro-life" or "pro-choice" perspective, or even for a program attempting a balanced discussion of the issues.[84]

Consider children's television. Educational programming for children simply cannot acquire sponsors; such programming can be found mostly on PBS.[85] 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."[86] In 1974, it concluded that "broadcasters have a special obligation to serve children," and thus pressured the industry to adopt codes calling for educational and informational programs.[87] In 1981, the new FCC Chair, Mark Fowler, rejected this approach. For Fowler, "television is just another appliance. It's a toaster with pictures."[88]

Shortly thereafter, network programming for children dramatically decreased,[89] and programs based on products increased. According to one critic, by 1986 children's television had become "a listless by-product of an extraordinary explosion of entrepreneurial life forces taking place elsewhere—in the business of creating and marketing toys."[90] In 1983, cartoons based on licensed characters accounted for fourteen programs; by 1985, the number rose to over forty.[91] It continued to increase. Most of the resulting shows for children are quite violent, and the violence has increased since 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 in children's programs, whereas after 1980, the number

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[83] Verne Gay, *NBC v Sponsors v Wildmon Re: Telepic "Roe v Wade"*, Variety 71 (May 10, 1989).

[84] Id at 82.

[85] Children and Television, Hearing before the Subcommittee on Telecommunications, Consumer Protection, and Finance, House of Representatives, 98th Cong, 1st Sess 36-37 (Mar 16, 1983) (statements of Bruce Christensen, President of the National Association of Public Television Stations).

[86] Englehardt, *The Shortcake Strategy* at 75 (cited in note 9).

[87] Id.

[88] Nossiter, The Nation at 402 (cited in note 52).

[89] From 11.3 to 4.4 hours per week; there was no regularly scheduled children's series during the usual after-school time slot. Englehardt, *The Shortcake Strategy* at 76 (cited in note 9).

[90] Id at 70.

[91] Id.

increased to 26.4 acts per hour.[92] Children's daytime weekend programs have consistently been more violent than prime-time shows.[93] Few of these shows have educational content. They are often full-length advertisements for products.

More generally, there is a high level of violence on all television programming.[94] 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. Violence on children's television has been found to increase children's fear and also to contribute to their own aggression.[95]

Empirical studies show that news and entertainment programming sometimes discriminates on the basis of sex. A 1986 study of network news stories found that when women appear as "private individuals," they are most frequently depicted as falling in the category "family members; that is, they were the mothers or other relatives of hostages, gunmen, spies, afflicted children, and the like."[96] Next most frequent was the appearance of women as victims, including battered women, stabbing victims, and residents of areas affected by earthquakes and toxic waste sites.[97] When women are used as speaking subjects on a public issue, it is often to speak against a position traditionally associated with women. Thus Christie Hefner was used as a prominent critic of an anti-pornography report, and a woman doctor was used to defend a company policy of transferring women out of jobs dealing with hazardous chemicals.[98] One study of situation comedies and crime drama programs in 1975 found that women were often portrayed in subordinate roles.[99]

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[92] Sources for this discussion are George Gernber and Nancy Signorielli, *Violence Profile 1967 through 1988-89: Enduring Patterns* 9 (Pennsylvania, 1990).

[93] Id.

[94] Id at 9-10.

[95] See Jerome L. Singer, and Dorothy G. Singer, and Wanda S. Rapaczynski, *Family Patterns and Television Viewing as Predictors of Children's Beliefs and Aggression*, 34 J Commun 73, 87-88 (1984).

[96] Lana F. Rakow and Kimberlie Kranich, *Woman As Sign in Television News*, 41 J Commun 8, 14 (1991).

[97] Id.

[98] Id at 17.

[99] Judith Lemon, *Women and Blacks on Prime-Time Television*, 27 J Commun 70, 73 (1977).

Children's programming frequently consists exclusively of male characters, and when a female character is added "a group of male buddies will be accented by a lone female, stereotypically defined."[100] On this pattern, "the female is usually a little-sister type," or "functions as a girl Friday to . . . male superheroes."[101] Thus "[g]irls exist only in relation to boys."[102] Of major dramatic characters in one survey, women made up only sixteen percent, and "females were portrayed as younger than males, more likely to be married, less active and with lower self-esteem."[103]

*b) Correctives and the First Amendment.* Regulatory strategies cannot solve all of these problems, but they could help. At least some regulatory strategies should not be treated as abridgements of the freedom of speech.

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. In this light, a concern about the market status quo might seem to amount to a puzzling rejection of freedom of choice. Both quality and diversity can be found in light of the dazzling array of options made available by modern technology. Why should we not view a foreclosure of expressive options as infringing freedom of speech?

There are several answers. First, information about public affairs has many of the characteristics of a public good, like national defense or clean air.[104] 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 appropri-

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[100] Katha Pollitt, *The Smurfette Principle*, NY Times 6-22 (Apr 7, 1991).

[101] Id.

[102] Id.

[103] John Corry, *Briefs on the Arts: Children's TV Found Dominated by White Men*, NY Times C14 (Jul 15, 1982).

[104] 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.

ate incentive for production. The result will be unacceptably low levels of the relevant goods.

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—through coverage of public issues, disclosure of new facts and perspectives, and diversity of view—accrue simultaneously to many or all people. 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 any person thus yields large external 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—making him an effective citizen—are likely to accrue to many other people as well, through that person's contribution to multiple practices and conversations, and to political processes in general. But the external benefits, for each person, will not be taken into account in individual consumption choices.

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 media markets will therefore have some of the same difficulties as reliance on markets for national defense or environmental protection. For this reason, a regulatory change, solving the collective action problem, is justified, at least in principle.

It might be thought that the distinctive characteristics of the broadcasting market provide at least a partial solution. Because advertisers attempt to ensure large audiences, 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. Under this view, any kind of regulatory change is therefore unnecessary.

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 respond to the crucial difficulty. Thus far, then, it seems plain that the broadcasting market will produce insufficient information about public issues.

So much for the public good issue. The second 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. Perhaps people can generate at least a partial solution by changing the channel. But why should the Constitution be thought to foreclose a collective decision to experiment with new methods for achieving their Madisonian goals?

The third problem with relying on decreasing scarcity is that 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 commodities are allocated through consumer choices, as measured through the criterion of private willingness to pay. Those who invoke free choice in markets are really insisting on consumer sovereignty. But Madison's conception of "sovereignty" is the relevant one for First Amendment purposes, and that conception has an altogether different character.

On the Madisonian view, sovereignty entails respect not for private consumption choices, but for the considered judgments of the citizens. In a well-functioning polity, laws frequently reflect those judgments—what might be described as the aspirations of the public as a whole.[105] Those aspirations can and often do call for markets themselves. But they might also diverge from consumption choices—a familiar phenomenon in such areas as environmen-

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[105] See Howard Margolis, *Selfishness, Altruism, and Rationality, A Theory of Social Choice* 17-25 (Cambridge, 1982); Jon Elster, *Ulysses and the Sirens* 141-46 (Cambridge, 1979).

tal law, protection of endangered species, social security, and antidiscrimination law. Democratic aspirations should not be disparaged. Democratic liberty 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, calling for quality and diversity of view in the mass media, is more valuable than consumer sovereignty.

Finally, private broadcasting selections are a product of preferences that are themselves 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 the preferences.[106] Preferences that have adapted to an objectionable system cannot justify that system. If better options are put more regularly in view, we might well expect that at least some people would be educated as a result, and 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 choice. 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 such a case, the people, in their capacity as citizens, are attempting to implement aspirations that diverge from their consumption choices.

For those skeptical about such arguments, it may be useful to note that many familiar democratic initiatives—including, for example, term limitations for elected offices—are justified on precisely these grounds. The fact that voters can reject a two-term president is hardly a decisive argument against the two-term rule. The whole point of the rule is to reflect a precommitment strategy. To those who continue to be skeptical, it is worthwhile to emphasize that the Constitution is itself a precommitment strategy, and that this Constitution includes the First Amendment.

What strategies might emerge from considerations of this sort? There is a strong case for public provision of high quality programming for children, or for obligations, imposed by govern-

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[106] See Jon Elster, *Sour Grapes* 109-40 (Cambridge, 1983).

ment on broadcasters, to provide such programming.[107] 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. Government might require purely commercial stations to provide financial subsidies to public television or to commercial stations that agree to provide less profitable high quality programming.

It is worthwhile to consider more dramatic approaches as well. These might include a compulsory hour of public affairs programming per evening, rights of reply, reductions in advertising on children's television, content review of children's 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 market, surrounded by existing property rights, may 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 respond 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 three responses. The first is that the current system itself 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 disserves Madisonian goals.

The second point is that it does indeed seem plausible to think that such decisions can be made in a nonpartisan way, as 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 in the first instance. They have helped increase the quality of children's television. Public television, which offers a

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[107] See Amy Gutmann, *Democratic Education* 238-55 (Princeton, 1987).

wide range of high quality fare, owes its existence to governmental involvement. We have no basis for doubting that much larger improvements could be brought about in the future. Nor is there any reason grounded in evidence—as opposed to market theology—to think that a regulatory solution of this sort would inevitably be inferior to the current system.

The third point is that any regulations would be subject to First Amendment scrutiny. Viewpoint discrimination would be invalid under normal standards. Any content regulation must have a high degree of generality and neutrality. These requirements would be satisfied by a broad requirement that public affairs programming, or free time for candidates, be provided; they would be violated by a requirement that (for example) feminists, pro-lifers, or the Democrats in particular must be heard. And the legislature must generate a factual record to support any regulatory alternative to the existing regime.

How might these points bear on the constitutional question? A law that contained suitable regulatory remedies might promote rather than undermine "the freedom of speech," at least if we understand that phrase in light of the distinctive American theory of sovereignty. The current system does not promote that understanding. Instead, it disserves and even stifles citizenship.

I have not argued that government should be free to regulate broadcasting however it chooses. As noted, regulation designed to excise a particular viewpoint of course would be out of bounds. More draconian controls than those I have described—for example, a requirement of public affairs broadcasting around the clock—would raise more serious questions. But at the very least, legislative "fairness doctrines" would not raise serious doubts.[108] Legislative efforts to restructure the marketplace might even be seen as the discharge of the legislature's constitutional duty, a duty

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[108] Consider Meiklejohn, *Free Speech and Its Relation to Self-Government* at 16-17 (cited in note 1):

> [C]ongress is not debarred from all action upon freedom of speech. Legislation which abridges that freedom is forbidden, but not legislation to enlarge and enrich it. The freedom of mind which befits the members of a self-governing society is not a given and fixed part of human nature. It can be increased and established by learning, by teaching, by the unhindered flow of accurate information, by giving men health and vigor and security, by bringing them together in activities of communication and mutual understanding. And the federal legislature is not forbidden to engage in that positive enterprise of cultivating the general intelligence upon which the success of self-government so obviously depends. On the contrary, in that positive field the Congress of the United States has a heavy and basic responsibility to promote the freedom of speech.

that courts are reluctant, for good institutional reasons, fully to enforce.[109] We might understand the courts' unwillingness to require something like a fairness doctrine to be a result of the judiciary's lack of a democratic pedigree and limited remedial power. A legislature faces no such institutional limits. Its actions might therefore be seen as a response to genuine, though underenforced, constitutional obligations.

2. Campaign finance.

Many people have justified restrictions on campaign expenditures as an effort to promote political deliberation and political equality by reducing the distorting effects of disparities in wealth. On this view, such laws promote the system of free expression by ensuring that less wealthy speakers do not have much weaker voices than wealthy ones. But some have forcefully challenged campaign finance laws as inconsistent with "the marketplace of ideas." Indeed, some say these laws effect a kind of First Amendment taking from rich speakers for the benefit of poor ones. On this rationale, the Supreme Court invalidated certain forms of campaign finance regulation in *Buckley v Valeo*.[110] In the crucial passage, the Court said that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."[111]

*Buckley* reflects pre-New Deal understandings. We should view it as the modern-day analogue of *Lochner v New York*:[112] a decision to take the market status quo as just and prepolitical, and to use that decision to invalidate democratic efforts at reform. Reliance on markets is governmental neutrality. Use of existing distributions for political expenditures marks out government inaction.

From what I have said thus far, it should be clear that elections based on those distributions are actually subject to a regulatory system, made possible and constituted through law. That law consists, first, in legal rules protecting the present distribution of wealth, and more fundamentally, in legal rules allowing candidates to buy speech rights through markets.

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[109] See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv L Rev 1212, 1239-42 (1978).

[110] 424 US 1, 58-59 (1976).

[111] Id at 48-49.

[112] 198 US 45, 53 (1905).

Because it involves speech, *Buckley* is even more striking than *Lochner*. Efforts to redress economic inequalities, or to ensure that they do not translate into political inequalities, should not be seen as impermissible redistribution, or as the introduction of government regulation where it did not exist before. Instead we should evaluate campaign finance laws pragmatically in terms of their consequences for the system of free expression. There are some hard questions here. The case for controls on campaign expenditures is plausible but hardly clearcut.[113] An inquiry into these considerations would raise issues quite different from those invoked by the *Buckley* Court.

3. Private right of access.

If it were necessary to bring about diversity and attention to public matters, a private right of access to the media might even be constitutionally compelled. The notion that access will be a product of the marketplace might be constitutionally troublesome.[114] I have suggested that a democratic polity allowing people to speak in accordance with the amount of resources that other people are willing to pay in order to hear them makes a mockery of democratic ideals. With respect to much important and influential speech, our current system of free expression has just that feature in practice.

Suppose, for example, that a group objecting to a war, or to the practice of abortion, seeks to purchase advertising time to set out its view. Suppose too that the purchase is refused because the networks object to the message. It is plausible that the law that makes the refusal possible violates the First Amendment, at least

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[113] Consider John Rawls, *The Basic Liberties and Their Priority*, in Sterling M. McMurrin, ed, *Liberty, Equality and Law, Selected Tanner Lectures on Moral Philosophy* 76 (Utah, 1987):

> The Court fails to recognize the essential point that the fair-value of the political liberties is required for a just political procedure, and that to insure their fair-value it is necessary to prevent those with greater property and wealth, and the greater skills of organization which accompany them, from controlling the electoral process to their advantage. . . . On this view, democracy is a kind of regulated rivalry between economic classes and interest groups in which the outcome should properly depend on the ability and willingness of each to use its financial resources and skills, admittedly very unequal, to make its desires felt.

But such regulation might be objectionable on other grounds, for example, that it operates in purpose or effect as a kind of incumbent protection measure. This is of course a quite different point from that in *Buckley*.

[114] See the discussion in Meiklejohn, *Free Speech and its Relation to Self-Government* at 104-05 (cited in note 1), of the failure "of the commercial radio."

if other outlets are unavailable or are far less effective. Effectiveness is important because if speech involving public affairs or diverse views is not widely heard, the Madisonian system will be severely undermined.

If the courts ought to deny a right of access, it is largely for institutional reasons. Such a right would strain judicial competence in light of the courts' limited factfinding and policymaking capacities. But it is not clear that these considerations should be decisive.

4. Conventional constitutional claims.

What I have said so far suggests that we need to reassess the constitutional claims of television and radio broadcasters quite generally.[115] In general, the production of most television shows is not a contribution to democratic deliberation, or even a means of self-expression, but instead a fairly ordinary business decision. The broadcast of such shows bears faint resemblance to the production of works for which the First Amendment was designed to provide protection. From the standpoint of liberty, regulatory intrusions on these business decisions do not always abridge the freedom of speech. Indeed, the broadcast media in many respects set out a new orthodoxy on social and political questions—making serious criticisms, from the left and the right, invisible or seem too silly or invidious to deserve consideration.[116]

I do not mean to suggest that broadcasters should be regulable under the same standards applied to, say, employers. Broadcasters are engaged in speech, and this fundamentally alters the inquiry. But we should not disable a constitutional democracy from responding to the current situation. A constitutional amendment en-

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[115] Compare John Dewey, *The Public and its Problems* 184 (Gateway, 1946):

> We have but touched lightly and in passing upon the conditions which must be fulfilled if the Great Society is to become a Great Community; a society in which the ever-expanding and intricately ramifying consequences of associated activities shall be known in the full sense of that word, so that an organized, articulate Public comes into being. The highest and most difficult kind of inquiry and a subtle, delicate, vivid and responsive art of communication must take possession of the physical machinery of transmission and circulation and breathe life into it. When the machine age has thus perfected its machinery it will be a means of life and not its despotic master. Democracy will come into its own, for democracy is a name for a life of free and enriching communion. . . . It will have its consummation when free social inquiry is indissolubly wedded to the art of full and moving communication.

[116] It is interesting to compare this phenomenon with the recent attention given to the phenomenon of "political correctness." In any culture there are ideas about what is politically correct, and in our culture these ideas reflect the conventional political morality of television and radio. Serious criticism of that political morality, from any point of view, sometimes counts as beyond the pale.

acted in order to ensure democratic self-determination need not bar a democratic corrective.

5. Exclusive property rights.

The creation of rights of exclusive use of property raises constitutional problems when people are thereby deprived of a chance to present their views to significant parts of the public. Courts should review the creation of such rights under the standards applied to content-neutral classifications. That is, courts should apply some form of balancing to the use of property law to exclude people from places plausibly indispensable for free and open discussion. Government should have to show that the adverse consequences on the exercise of rights of free speech were justified by important governmental interests.

This would entail a new look at the "shopping center" cases.[117] In these cases, people sought to use the shopping center to engage in political protest. They claimed that access to those grounds was necessary if the public was to hear a certain point of view. Their claim is the same as that which underlies the notion, accepted by the Court, that the state may not ban leafletting or door-to-door solicitation.[118] In view of the role of the shopping center in many areas of the country, a right of access seems fully justified.

It follows that insofar as newspapers invoke the civil and criminal law to prevent people from reaching the public, we might be able to regulate them, in a viewpoint-neutral way, without abridging the freedom of speech.[119] If the government seeks to promote quality and diversity in the newspapers, courts should uphold mild regulatory efforts, especially in view of the fact that many newspapers operate as de facto monopolies.

6. The public forum doctrine.

We would also have to rethink the public forum doctrine.[120] Current law appears to take roughly the following form. The state may not close off streets, parks, and other areas held open to the

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[117] *Food Employees Union v Logan Valley Plaza*, 391 US 308, 324-25 (1968); *Lloyd Corp. v Tanner*, 407 US 551, 567-70 (1972); *Hudgens v NLRB*, 424 US 507, 521-23 (1976).

[118] See, for example, *Schneider v State*, 308 US 147, 165 (1939) (leafletting); *Martin v Struthers*, 319 US 141, 145-49 (1943) (door-to-door solicitation).

[119] This claim casts doubt on the outcome, or at least the rationale, in *Miami Herald Publishing Co. v Tornillo*, 418 US 241, 254-58 (1974).

[120] See *Hague v CIO*, 307 US 496, 514-18 (1939) (Roberts writing for a plurality); *Clark v Community for Creative Non-Violence*, 468 US 288, 293-99 (1984).

public "from time immemorial"; here the public has earned a kind of First Amendment easement. Courts will uphold reasonable regulations, but government cannot eliminate the basic right of access. The same rules apply to other areas if they have been "dedicated" to the public, that is, if the state has generally opened them for expressive activities. But still other areas—and this is a very large category—need not be open at all. Courts will uphold any restrictions so long as they are minimally rational.

This system turns on common law rules. It gives access if the area has been "dedicated," by tradition or practice, for public access, and this determination is based on whether, at common law, the area in question was held open.[121] In a period in which streets and parks were principal places for communicative activity, this historical test was sensible functionally. It well served the goal of the public forum doctrine, which was the creation of access rights to places where such rights were most effective and crucial.

The streets and parks no longer carry out their common law roles. Other areas—mailboxes, airports, train stations, broadcasting stations—are the modern equivalents of streets and parks. It is here that current doctrine is ill-suited to current needs. To keep the streets and parks open is surely important, but it is not enough to allow broadly diverse views to reach the public. For this reason the Court should abandon the common law test and look instead to whether the government has sufficiently strong and neutral reasons for foreclosing access to the property.[122] Certainly airports and train stations should be open to communicative efforts.

7. Content-based versus content-neutral restrictions.

We would also need to reassess the distinction between content-based and content-neutral restrictions on speech—the most central distinction in contemporary free speech law.

Under current law, the Court views with considerable skepticism any law that makes the content of speech relevant to restriction. If, for example, Congress tries to prevent speech dealing with a war from appearing on billboards, it is probably acting unconstitutionally. By contrast, if Congress bars all speech on billboards, courts will subject the measure to a balancing test, because this type of restriction on speech is content-neutral. It does not skew

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[121] See *Davis v Massachusetts*, 167 US 43, 47-48 (1897), where this idea is explicit.
[122] *Grayned v Rockford*, 408 US 104, 115-18 (1972).

the thinking process of the community, and it is unlikely to reflect an impermissible governmental motivation.[123]

There is a great deal to be said in favor of this conception of neutrality.[124] In certain respects, however, it reproduces the framework of the *Lochner* era. It takes the market status quo as natural and just insofar as it bears on speech. It sees partisanship in government decisions to alter that status quo, and neutrality in decisions that basically respect it. But there may be no neutrality in use of the market status quo when the available opportunities are heavily dependent on wealth, on the common law framework of entitlements, and on the sorts of outlets for speech that are made available, and to whom. In other words, the very notions "content-neutral" and "content-based" seem to depend on taking the status quo as if it were preregulatory and unobjectionable.

At least two things follow. The first is that many content-neutral laws have content-differential effects.[125] They do so because they operate against a backdrop that is not prepolitical or just. In light of an unjust status quo, rules that are content-neutral can have severe adverse effects on some forms of speech. Greater scrutiny of content-neutral restrictions is therefore appropriate.[126] Above all, courts should attend to the possibility that seemingly neutral restrictions will have content-based effects. The government's refusal to allow Lafayette Park (across the street from the White House) to be used as a place for dramatizing the plight of the homeless[127] is a prominent example.

Second, we should draw into question a familiar justification for skepticism about content-based regulation of speech. That justification is that such regulation "skews" the marketplace of ideas.[128] This idea has two infirmities. First, we do not know what a well-functioning marketplace of ideas would look like. The preconditions of an economic marketplace can be specified by neoclassical economics; the same is not true for the preconditions of a system of free expression.[129] Second, the idea depends on taking the "marketplace" as unobjectionable in its current form. If it is already skewed, content-based regulation may be a corrective. It

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[123] Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189, 202, 208-09, 217-18, 227-28 (1983).

[124] Id.

[125] Id at 217-27.

[126] See Stone, 54 U Chi L Rev at 82 (cited in note 18).

[127] *Clark*, 468 US at 289, 295-99.

[128] See Stone, 54 U Chi L Rev at 55 (cited in note 18).

[129] See Strauss, 91 Colum L Rev at 349 (cited in note 42).

would be exceptionally surprising if there were no such skewing. The point bears especially on the debate over pornography, where critics often say that the "preregulatory" status quo is in fact a regulatory system—one that is skewed in favor of sexual inequality.[130]

In general, the existence of an unjust status quo is not a good reason to allow content regulation. For one thing, any inquiry into the speech status quo is probably beyond governmental capacity. There is a serious risk that judicial or legislative decisions about the relative power of various groups, and about to whom redistribution is owed, will be biased or unreliable. Judgments about who is powerful and who is not must refer to some highly controversial baseline. The resulting judgments are not easily subject to governmental administration. Indeed, government will inevitably be operating with its own biases, and those biases will affect any regulatory strategy. This risk seems unacceptable when speech is at stake.

What is distinctive about regulation of speech is that such regulation forecloses the channels of change; it prevents other views from being presented at all. Instead of allowing restrictions, we should encourage efforts to promote a better status quo.[131] I have discussed some of these in connection with the broadcasting market.

8. "Unconstitutional conditions"?

Finally, it would be necessary to reemphasize that there are limits on government's power to affect deliberative processes through the use of government funds. On this point, it is exceptionally hard to unpack the Court's cases. Some of these decisions suggest that when allocating funds, government cannot discriminate on the basis of point of view. It would follow that government could not allocate funds only to people who will speak in favor of a certain cause. Other cases draw a distinction between a "subsidy" and a "penalty," permitting government to refuse to subsidize speech, but prohibiting government from penalizing it.

The Court's most recent decision suggests that so long as the government is using its own money and is not affecting "private"

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[130] See Catharine A. MacKinnon, *Francis Biddle's Sister: Pornography, Civil Rights and Speech*, in MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 163-97 (Harvard, 1987).

[131] Of course it is necessary to defend the characterization of any change as a "restriction." See Section II.B.

expression, it can channel its funds however it wishes. The problem in *Rust v Sullivan*[132] arose when the Department of Health and Human Services issued regulations banning federally funded family planning services from engaging in (a) counseling concerning, (b) referrals for, and (c) activities advocating abortion as a method of family planning. The plaintiffs claimed that these regulations violated the First Amendment, arguing that the regulations discriminated on the basis of point of view.

The Court disagreed. In the key passage, it said,

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.[133]

In response to the claim that the regulations conditioned the receipt of a benefit on the relinquishment of a right, the Court said that "here the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized."[134]

*Rust* seems to establish the important principle that government can allocate funds to private people to establish "a program" that accords with the government's preferred point of view. In fact the Court seems to make a sharp distinction between government coercion—entry into the private realm of markets and private interactions—and funding decisions. So made, this distinction replicates pre-New Deal understandings. But there is no fundamental distinction among the law that underlies markets, the law that represents disruption of markets, and the law that calls for funding

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[132] 111 S Ct 1759 (1991).

[133] Id at 1772. The Court added:

> To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advancing certain permissible goals, because the program in advancing those goals necessarily discourages alternate goals, would render numerous government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism and Fascism.

Id at 1773.

[134] Id at 1774.

decisions. Courts must assess all of them in terms of their purposes and effects for free speech.[135]

Notwithstanding the apparent implications of *Rust*, it would be intolerable to say that government can target funds, or jobs, or licenses, or anything else that it owns only for speech with which it agrees. Suppose, for example, that the government decides to fund only those projects that speak favorably of Democrats. However government is acting, the First Amendment constrains the purposes for which government may act, and the effects of its actions. The notion that the First Amendment is directed only at criminal punishment or civil fines depends on an outmoded notion of what government does, and on a pre-New Deal understanding of "interference" with constitutional rights. A government decision to sponsor speech favorable to one or another party platform would run afoul of a central commitment of the First Amendment.

For this reason funding decisions that discriminate on the basis of viewpoint are at least ordinarily impermissible.[136] The proposition that government may allocate funds however it chooses is rooted in anachronistic ideas about the relationship between the citizen and the state. It poses a genuine threat to free speech under modern conditions.

### D. Conclusion: A New Deal For Speech

A reformulation of First Amendment doctrine of this general sort has much to be said in its favor. Above all, such a reformulation would reinvigorate processes of democratic deliberation, by

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[135] This is not to say that we should treat funding decisions the same as other decisions. From first principles, the development of constitutional limits on funding that affects speech raises exceedingly complex issues, and I restrict myself to a few observations here. A key feature of funding is that government must be selective in dispensing money, and the inevitability of selection means that certain judgments will be acceptable here that would not be acceptable elsewhere. With respect to the arts, for example, judgments involving esthetics and subject matter seem unavoidable. A more detailed discussion of government funding of speech and the arts can be found in Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is An Anachronism*, 70 B U L Rev 593, 610-15 (1990).

[136] *Rust v Sullivan* is an unusual case, on its facts. (1) It plausibly involves "private speech"—counseling—rather than public or political speech. Private speech is subject to more deferential scrutiny. See *Connick v Myers*, 461 US 138 (1983). (2) It involves the abortion context, where the government has a legitimate interest in protecting fetal life. See *Maher v Roe*, 432 US 464 (1977). (3) The speech restriction in *Rust* might be seen as ancillary to the prohibition on government funding of abortion. For these reasons we may doubt whether *Rust* will extend to viewpoint discrimination with respect to public, political speech; instead, it involved a limitation on a governmentally funded private counseling program.

ensuring greater attention to public issues and greater diversity of treatment of those issues.

Some qualifications are necessary here. A system of markets in speech—surrounded by the law of property, contract, and tort—has major advantages over other forms of regulation. Such systems are content-neutral, at least on their face. This is an important point, above all because in markets, no government official is authorized to decide, in particular cases, who will be allowed to speak. There is no need to emphasize the risk of bias when government decides that issue.

In addition, markets are highly decentralized. With respect to both the print and electronic media, there are numerous outlets. Someone unable to find space in the New York Times or on CBS may well be able to find space elsewhere. A great advantage of a market system is that other outlets generally remain available. At least some other forms of regulation do not have this salutary characteristic. In any case it is important to ensure that any regulation does not foreclose certain points of view.

But our current system of free expression does not serve the Madisonian ideal. Free markets in expression are sometimes ill-adapted to the American revision of the principle of sovereignty. If we are to realize that principle, a New Deal for speech, of the sort outlined above, would be highly desirable.[137]

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[137] There is no argument here that government may silence "the powerful" to protect "the powerless." Such a position would create a legitimate risk that judicial or legislative decisions about the relative power of various groups, and about who should receive redistribution, will be biased or unreliable. Judgments about who is powerful and who is not must refer to some baseline. That baseline will of course be politically contested. When the powerful are free to redistribute speech, it is likely they will distribute it in ways that advantage them. The resulting judgments are not easily subject to governmental administration. This risk seems unacceptable.

Moreover, we should regard a decision to silence the views of the powerful as an objectionable interference with freedom, even if it might promote the goal of equality. Well-off people might not have any strong claim of right to distributions of wealth and property that the common law grants them; but surely they have a right to complain if they are silenced. It is obvious that what they have to say may turn out to be correct, may spur better approaches to current problems, or may add a great deal to the debate simply by virtue of the reasons offered by those who respond.

These are the most conventional Millian arguments for the distinctiveness of speech. See Mill, *On Liberty* at 20-21 (cited in note 28). They do not apply to the recommendations set out here. These recommendations turn not on "power" or on "silencing the powerful," but on the application of First Amendment scrutiny to all legal rules.

## III. An Alternative Proposal: The Primacy of Politics

Instead of or in addition to renovating the free speech tradition in this way, we might offer a more cautious proposal. The most fundamental step would involve an insistence on the original idea that the First Amendment is principally about political deliberation.[138] The fact that words or pictures are involved is not, standing by itself, a sufficient reason for full constitutional protection. Bribery, criminal solicitation, threats, conspiracies, perjury—all these are words, but they are not by virtue of that fact entitled to the highest level of constitutional protection. They may be regulated on the basis of a lesser showing of harm than is required for political speech.[139] They are not entirely without constitutional protection—they count as "speech"—but they do not lie within the core of the free speech guarantee.[140]

### A. Theory

#### 1. The two-tier First Amendment; and a note on autonomy.

In order to defend this proposal, we must explore whether there should be a two-tier First Amendment. The view that some forms of speech are less protected than others is frequently met with alarm. Notwithstanding its controversial character, this view derives strong support from existing law. Indeed every Justice has expressed some such view within the last generation.

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[138] See Meiklejohn, *Free Speech and Its Relation to Self-Government* at 94 (cited in note 1):

> The guarantee given by the First Amendment is not . . . assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the considerations of matters of public interest. Private speech, or private interest in speech, on the other hand, has no claim whatever to the protection of the First Amendment.

[139] Alexander Meiklejohn, the greatest philosopher of the First Amendment, was emphatic on the point, distinguishing between "a private right of speech which may on occasion be denied or limited, though such limitations may not be imposed unnecessarily or unequally" and "the unlimited guarantee of the freedom of public discussion." Id at 39. "There are, then, in the theory of the Constitution, two radically different kinds of utterances. The constitutional status of a merchant advertising his wares, of a paid lobbyist fighting for the advantage of his client, is utterly different from that of a citizen who is planning for the general welfare." Id.

[140] Here I depart from Meiklejohn, who believed that nonpolitical speech was not covered by the First Amendment at all. Much of the analysis in this section is devoted to an exploration of how to protect nonpolitical speech in a two-tier First Amendment.

For example, the Supreme Court accords less than complete protection to commercial speech.[141] It excludes obscenity from First Amendment protection altogether.[142] It treats libel of private persons quite differently from libel of people who are public figures.[143] The fact that the First Amendment does not protect conspiracies, purely verbal workplace harassment of individuals on the basis of race and sex, bribery, and threats appears to owe something to a distinction between political and nonpolitical speech.

The Court has yet to offer a clear principle to unify the categories of speech that it treats as "low value." Indeed the apparent absence of a unifying principle is a source of continuing frustration to scholars of free speech law. But at least it seems clear that all the categories of low-value speech are nonpolitical.[144]

Thus far, then, we see that the Supreme Court understands the First Amendment to have two tiers. But is a two-tier First Amendment inevitable, or desirable? It does indeed seem that any well-functioning system of free expression must ultimately distinguish between different kinds of speech by reference to their centrality to the First Amendment guarantee.[145]

For example, courts should not test regulation of campaign speeches under the same standards applied to misleading commercial speech, child pornography, conspiracies, libel of private persons, and threats.[146] If the same standards were applied, one of two results would follow, and both are unacceptable.[147]

The first possible result would be to lower the burden of justification for governmental regulation as a whole, so as to allow for restrictions on misleading commercial speech, private libel, and so forth. If this were the consequence, there would be an unaccept-

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[141] *Central Hudson Gas v Public Service Commission of New York*, 447 US 557, 562-63 (1980); *Posadas de Puerto Rico Associates v Tourism Co.*, 478 US 328, 340 (1986).

[142] *Miller v California*, 413 US 15, 23 (1973) ("categorically settled").

[143] *Gertz v Robert Welch, Inc.*, 418 US 323, 342-48 (1974); see also *Milkovich v Lorain Journal Co.*, 110 S Ct 2695, 2703-04 (1990).

[144] This is so at least in the sense that I understand the term "political" here.

[145] See Thomas M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U Pitt L Rev 519 (1979).

[146] Id at 537-39.

[147] It is tempting, and possible, to classify some speech as unprotected because it is "really" action. But this is unhelpful. Conspiracies and bribes are speech, not action. If they are to be treated as action—that is, if they are not to be protected—it is because of their distinctive features. This is what must be discussed. The word "action" is simply a placeholder for that unprovided discussion.

ably high threat to political expression. A generally lowered burden of justification would therefore be intolerable.

The second possible result is that courts would apply the properly stringent standards for regulation of political speech to commercial speech, private libel, and child pornography. The central problem with this approach is that it would mean that government could not control speech that should be regulated. A system in which the most stringent standards were applied across the board would mean that government could not regulate criminal solicitation, child pornography, private libel, and false or misleading commercial speech, among others. The harms that justify such regulation are real, but they are insufficient to permit government controls under the extremely high standards applied to regulation of political speech. If courts are to be honest about the matter, an insistence that "all speech is speech" would mean that they must eliminate many currently unobjectionable and even necessary controls—or more likely that judgments about value, because unavoidable, would continue to be made, but covertly.

If courts must draw a distinction between low- and high-value expression, the many efforts to understand the First Amendment as a protection of "autonomy" may be doomed to failure.[148] Some have suggested, for example, that the free speech principle guards the autonomy of speakers or of listeners.[149] I must be tentative here, but it seems likely that any autonomy-based approach would make it difficult or impossible to distinguish between different categories of speech.[150] Autonomy, taken in the abstract, seems to argue in favor of similar protection of all, or most, forms of speech.[151]

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[148] See Thomas Scanlon, *A Theory of Freedom of Expression*, 1 Phil & Pub Aff 204, 214-15 (1972); Strauss, 91 Colum L Rev at 353-60 (cited in note 42); Martin H. Redish, *The Value of Free Speech*, 130 U Pa L Rev 591, 625 (1982). Especially notable, it is for this reason that Scanlon revised his own earlier position, see Scanlon, 40 U Pitt L Rev at 533-34 (cited in note 145); See also Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U Chi L Rev 225, 233 (1992).

[149] Strauss, 91 Colum L Rev at 335-36 (cited in note 42).

[150] It might be tempting to ask whether the speech in question is cognitive or affective, and to accord protection only to the former. Some of the Court's opinions can be so read. See, for example, *Chaplinsky v New Hampshire*, 315 US 568, 573-74 (1942). But such an approach would be unacceptable. It would disregard the fragility of the distinction between the affective and the cognitive; see Martha C. Nussbaum, *Love's Knowledge, Essays on Philosophy and Literature* 291-97 (Oxford, 1990). There are important affective components of much political speech, or speech that is high-value by any measure; and many forms of speech accorded a lower-level of protection—like commercial speech and private libel—are surely cognitive.

[151] But see note 153.

Moreover, an approach rooted in a norm of autonomy makes it difficult to understand what is special about speech.[152] Many acts, like most speech, serve the goal of autonomy as it is usually understood by advocates of an autonomy-based conception of the First Amendment.[153] If autonomy in the abstract is the principle, there appears to be nothing distinctive about speech to explain why it has been singled out for constitutional protection. An approach to the First Amendment that does not account for the distinctiveness of speech would be untrue to constitutional text and structure.

2. The case for the primacy of politics.

We must still decide by what standard courts might accomplish the task of distinguishing between low-value and high-value speech. To support an emphasis on politics, we need to define the category of political speech. For present purposes I will treat speech as political *when it is both intended and received as a contribution to public deliberation about some issue.* It seems implausible to think that words warrant the highest form of protection if the speaker does not even intend to communicate a message; the First Amendment does not put gibberish at the core even if it is taken, by some in the audience, to mean something.[154] By requiring intent, I do not mean to require a trial on the question of subjective motivation. Generally this issue can be resolved simply on the basis of the nature of the speech at issue. By requiring that the speech be received as a contribution to public deliberation, I do not mean that all listeners or readers must see the substantive content. It is sufficient if some do. Many people miss the political message in some forms of political speech, especially art or literature. But if no one sees the political content, it is hard to understand why the speech should so qualify.

Finally, the requirements are in the conjunctive, though in almost all cases speech that is intended as a contribution to public deliberation will be seen by some as such. The fact that speech is

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[152] Bork, 47 Ind L J at 25 (cited in note 17).

[153] It would be possible, however, to have a more refined conception of autonomy. Under such a conception, autonomy is not a right to say and do what you "want," but instead, to have the social preconditions for autonomy, understood as a form of self-mastery. This notion may well allow distinctions among different forms of speech. See C. Edwin Baker, *Human Liberty and Freedom of Speech* 37-46 (Oxford, 1989); Cass R. Sunstein, *Preferences and Politics*, 20 Phil & Pub Aff 3, 11-14 (1991). But it will be very hard to make this a principle for speech.

[154] See R. George Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 S Ct Rev 149.

so seen by some is insufficient if it is not so intended; consider, for example, commercial speech, obscenity, or private libel. If some people understand the speech in question to be a contribution to public deliberation, it cannot follow that the speech qualifies as such for constitutional purposes, without treating almost all speech as political and therefore destroying the whole point of the two-tier model. Of course the definition I have offered leaves many questions unanswered, and there will be hard intermediate cases. I offer it simply as a starting point for analysis.

An approach that affords special protection to political speech, thus defined, is justified on numerous grounds. Such an approach receives firm support from history—not only from the Framers' theory of free expression, but also from the development of that principle through the history of American law. There can be little doubt that suppression by the government of political ideas that it disapproved, or found threatening, was the central motivation for the clause. The worst examples of unacceptable censorship involve efforts by government to insulate itself from criticism. Judicial interpretations over the course of time also support a political conception of the First Amendment.[155]

This approach seems likely as well to accord with our initial or considered judgments about particular free speech problems. Any approach to the First Amendment will have to take substantial account of those judgments, and adjust itself accordingly.[156] It seems clear that such forms of speech as perjury, bribery, threats, misleading or false commercial advertising, criminal solicitation, and libel of private persons—or at least most of these—are not entitled to the highest degree of constitutional protection. No other approach unifies initial or preliminary judgments about these matters as well as a political conception of the First Amendment.

In addition, an insistence that government's burden is greatest when political speech is at issue responds well to the fact that here government is most likely to be biased. The presumption of dis-

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[155] See Levy, *Emergence of a Free Press* at 266-70 (cited in note 3). Original understanding and the tradition of legal interpretation, however, are not decisive. The same support could be found for an unacceptably narrow view of the Equal Protection Clause, the history of which suggests validation of much discrimination on the basis of sex and even race. But a position is surely strengthened if it can draw on a good historical pedigree.

[156] Thus it is not unprincipled or merely convenient to adjust a theory when it proves to deal inadequately with particular cases. Sometimes the adequacy of the theory is itself tested by how well it conforms to initial or considered judgments about particular outcomes. See John Rawls, *A Theory of Justice* 48-51 (Harvard, 1971) (discussing reflective equilibrium).

trust of government is strongest when politics are at issue.[157] It is far weaker when government is regulating (say) commercial speech, bribery, private libel, or obscenity. In such cases there is less reason to suppose that it is insulating itself from criticism.[158]

Finally, this approach protects speech when regulation is most likely to be harmful. Restrictions on political speech have the distinctive feature of impairing the ordinary channels for political change; such restrictions are especially dangerous.[159] If there are controls on commercial advertising, it always remains possible to argue that such controls should be lifted. If the government bans violent pornography, citizens can continue to argue against the ban. But if the government forecloses political argument, the democratic corrective is unavailable. Controls on nonpolitical speech do not have this uniquely damaging feature.

Taken in concert, these considerations suggest that government should be under a special burden of justification when it seeks to control speech intended and received as a contribution to public deliberation. To be sure, there are some powerful alternative approaches. Perhaps we should conclude that speech is entitled to protection if it involves rational thought. This would extend beyond the political to include not merely literary and artistic work, but commercial and scientific expression as well. But there would be serious problems with any such approach. For example, we should probably not give technological data with potential military applications the same degree of protection as political speech; nor should we give misleading commercial speech the same protection as misleading political speech.

Alternatively, one might think that the free speech principle includes any representation that reflects deliberation or imagination in a way that is relevant to the development of individual capacities.[160] No one has fully elaborated an approach of this sort. It

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[157] See Frederick Schauer, *Free Speech: a Philosophical Enquiry* 35, 39, 45 (Cambridge, 1982).

[158] As work in public choice theory has shown, there are possible bad incentives elsewhere too. For example, restrictions on commercial advertising might be an effort by a well-organized group to eliminate competition. But this does not distinguish regulation of speech from regulation of anything else, and so it provides no special reason to be suspicious of government regulation of speech. Regulation of political speech, by contrast, raises the specter of governmental efforts to suppress criticism of its own conduct and is therefore more likely to be biased.

[159] See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 75-77 (Harvard, 1980).

[160] This idea could reflect Aristotelian ideas involving the development of individual capacities. See Amartya Sen, *Commodities and Capabilities* (Elsevier Science, 1985);

would carry considerable promise. But such an approach would make it hard to distinguish between scientific and political speech. It also might protect such things as child pornography.

Much work must be done to elaborate and evaluate alternatives of this sort. But a conception of free speech that centers on democratic governance appears to be the best way to organize our considered judgments about cases likely to raise hard First Amendment questions.

If the First Amendment offers special protection to political speech, we must of course reject the proposition that all forms of speech stand on the same ground. It would be necessary to draw distinctions between obscenity and political protest, or misleading commercial speech and misleading campaign statements, or proxy statements and party platforms. We must resort far less readily to the view that a restriction on one form of speech necessarily will lead to restriction on another.

3. Counterarguments.

The difficulties with a political conception of the First Amendment are not unfamiliar; they raise all of the questions that produced the current First Amendment preoccupation with line-drawing. How, for example, are we to treat the work of Robert Mapplethorpe, the music of a rock group, or nude dancing? Both commercial speech and pornography are political in the crucial sense that they reflect and promote a point of view, broadly speaking ideological in character, about how to structure important things in the world. The recent attack on pornography has drawn close attention to its political character, and thus ironically might be thought to invalidate efforts to regulate it.[161]

Is it so clear that speech that has nothing to do with politics is not entitled to First Amendment protection? Must we exclude music or art or science?[162] Surely it is philistine[163] or worse to say that

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Martha Nussbaum, *Aristotelian Social Democracy*, in R. Bruce Douglass, Gerald M. Mara, and Henry S. Richardson, eds, *Liberalism and the Good* 203 (Routledge, 1990). The idea has no clear defenders in current legal writing.

[161] See *American Booksellers Association, Inc. v Hudnut*, 771 F2d 323, 325 (7th Cir 1985).

[162] See Meiklejohn, *Free Speech and Its Relation to Self-Government* at 99-100 (cited in note 1):

> We have assumed that the studies of the "scholar" must have, in all respects, the absolute protection of the First Amendment. But with the devising of "atomic" and "bacteriological" knowledge for the use of, and under the direction of, military forces, we can now see how loose and inaccurate, at this point, our thinking has been. . . . It may be,

the First Amendment protects only political platforms. Often the deepest political challenges to the existing order can be found in art, literature, music, or sexual expression.[164] Sometimes government attempts to regulate these things for precisely this reason.

These are hard questions without simple solutions. I will venture only some brief remarks in response. The first is that we should not take the existence of hard line-drawing problems to foreclose an attempt to distinguish between political and nonpolitical speech. If the distinction is otherwise plausible, and if systems that fail to make it have severe problems, the difficulty of drawing lines is acceptable.

Even more fundamental, there is no way to operate a system of free expression without drawing lines. Not everything that counts as words or pictures is entitled to full constitutional protection. The question is not whether to draw lines, but how to draw the right ones.

Second, we should understand broadly the category of the political. The definition I have offered would encompass not simply political tracts, but all art and literature that has the characteristics of social commentary—which is to say, much art and literature.[165] Much speech is a contribution to public deliberation despite initial appearances. In addition, it is important to create a large breathing space for political speech by protecting expression even if it does not fall unambiguously within that category. Both *Ulysses* and *Bleak House* are unquestionably political for First Amendment purposes. The same is true of Robert Mapplethorpe's work, which attempts to draw into question current sexual norms and practices, and which bears on such issues as the right of privacy and the antidiscrimination principle.

To say this is emphatically not to say that speech that has political consequences is by virtue of that fact "political" in the constitutional sense. Obscenity is political in that it has political well-springs and effects; the same is true of commercial speech and

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therefore, that the time has come when the guarding of human welfare requires that we shall abridge the private desire of the scholar—or of those who subsidize him—to study whatever he may please. . . . As I write these words, I am not taking a final stand on the issue which is here suggested. But I am sure that the issue is coming upon us and cannot be evaded. In a rapidly changing world, another of our ancient sanctities—the holiness of research—has been brought under question.

[163] See Richard A. Posner, *Sex and Reason* (Harvard, 1992).

[164] Sex is familiarly a metaphor for social rebellion. See, for example, George Orwell, *Nineteen Eighty-Four* 126-27 (Harcourt, 1949).

[165] See generally Nussbaum, *Love's Knowledge* (cited in note 150).

even bribery—certainly bribery of public officials. An employer's purely verbal sexual or racial harassment of an employee surely has political consequences, including the creation of a disincentive for women and blacks to go to that workplace at all. But these forms of speech are not by virtue of their effects entitled to the highest form of constitutional protection. To say that speech is political for First Amendment purposes because it has political causes and effects is to say that nearly all words or pictures are immunized from legal regulation without the gravest showing of clear and immediate harm. For reasons suggested above, that cannot be right.

For purposes of the Constitution, the question is whether the speech is a contribution to social deliberation, not whether it has political effects or sources. Thus, for example, there is a distinction between a misogynist tract, which is entitled to full protection, and pornographic movies, some of which are in essence masturbatory aids and not entitled to such protection. Personal, face-to-face racial harassment by an employer of an employee is not entitled to full protection,[166] while a racist speech to a crowd is. There is a distinction between a racial epithet and a tract in favor of white supremacy. An essay about the value of unregulated markets in oil production should be treated quite differently from an advertisement for Texaco—even if an oil company writes and publishes both.

The definition I have offered would exclude a wide variety of speech from the category of high-value expression, and for this reason might be thought to pose an unacceptable danger of censorship. A more general response to the suggestion that the core of the First Amendment involves politics and democracy is that this theory would provide fragile safeguards for art, music, literature, and perhaps much of commercial entertainment. A First Amendment that offers so little protection to so much might be embarrassingly weak and thin. If the exclusion of such materials results from a theory of free speech that the Constitution's text does not compel, perhaps the Court should repudiate that theory.

In fact, however, there would remain room for powerful First Amendment challenges to most regulatory efforts. No speech can be regulated on the basis of whim or whimsy. Something stronger than rationality review, though weaker than "strict scrutiny," is

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[166] This is a harder question if it is not personal. It could, however, still count as harassment under current law. See Balkin, 1990 Duke L J at 414-28 (cited in note 21), on "captive audience" ideas in this setting.

and should be applied to low-value expression. Thus, for example, commercial speech occupies an intermediate category, regulable when government can show a good reason and a solid connection between the means of regulation and the reason in question. The same should be true for scientific speech and private libel.

In addition, the government may not regulate speech—or anything else—on the basis of constitutionally disfavored justifications. Frequently, the reason for regulating speech will be disfavored even if the speech is low-value. Courts could not permit the regulation of pornography if the purpose of the regulation is to repress a message rather than to redress genuine harms.[167] The First Amendment makes certain reasons for regulation illegitimate, and this is so even if those reasons are invoked against low-value speech.

Government may not regulate speech of any kind if the reason is that it disapproves of the message or disagrees with the idea that the speech expresses. Regulation can be justified only by reference to genuine harms. An effort to regulate music because it is "offensive," or because it stirs up passionate feeling, would run afoul of the Free Speech Clause. Of course there will be hard cases in which courts have to decide whether a legitimate justification is at work. The resolution of these cases cannot be purely mechanical. But even if we understand the First Amendment as centrally concerned with political speech, there is little reason to fear that this understanding would permit a large increase in official censorship.

## B. Practice

This approach would not entail substantial change in existing law. It would help us deal with the new controversies, but generally would not unsettle resolution of the old ones. The Court has already created categories of speech that are less protected or unprotected. But the Court has not given a sense of the unifying factors that justify the creation of these categories. It is highly revealing that political speech never falls within them, and that all speech that does so is usually not political in the sense that I understand the term. The principal difference between the approach I suggest

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[167] It is sometimes said that the goal of anti-pornography laws is to suppress pornography's message about women. If this were the reason for such laws, they would indeed be unconstitutional. I do not enter that debate here. See Cass Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 Colum L Rev 1, 18-29 (1992) (discussing harm-based arguments for pornography regulations).

and current law is the explicit statement that nonpolitical speech occupies a lower tier—a statement that the Court has yet to make. For reasons suggested below, it is unclear that even this would make much of a difference.

There are several areas of controversy, however, where this approach would likely lead to different results than those reached under current law. The suggested approach would mean that libel of public figures not involved in governmental affairs—famous actors, for example—would not be subject to special constitutional disabilities. Current law sharply constrains celebrities from bringing libel actions.[168] But there is no special interest in protecting the "breathing space" of the press in discussing athletes or movie stars. On what principle must a legal system provide special "breathing space" to untruths about famous people?[169] The test for special protection should be whether the matter bears on democratic governance, not whether the plaintiff is famous.

Treatment of sexually explicit speech also would diverge from current doctrine. Under current law, such speech usually receives protection[170] if it has significant social value, even if scientific or literary rather than political. An emphasis on the political foundations of the First Amendment appears to threaten this basic protection. But under the approach I suggest, courts should invalidate regulation of sexually explicit speech in most cases. As discussed in more detail below, such regulation usually would be unsupportable by reference to a legitimate justification.[171]

The securities laws would raise no serious question. Indeed, many of the controversies with which I began would be resolved fairly automatically. The only real exception is hate speech, which plausibly has political content in that it is a self-conscious statement about how to resolve current political controversies. The analysis would depend on the extent to which something labelled as "hate speech" is actually intended or received as a contribution

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[168] *Gertz v Robert Welch, Inc.*, 418 US 323, 342 (1974).

[169] A possible response would be that many famous people have governmental associations of some sort, and the notion of "public figures" is designed to overcome the difficulties of case-by-case inquiries. Also, many people not involved in government are involved in activities in which the public is legitimately concerned on democratic grounds. Consider attempted bribery of public officials by corporate executives. Probably the best approach, suggested by Justice Marshall, would involve an inquiry into whether the issue is one of legitimate public interest or concern. See *Rosenbloom v Metromedia, Inc.*, 403 US 29, 43-44 (1971) (Marshall concurring).

[170] *Miller v California*, 413 US 15, 26 (1973).

[171] Literature is generally protected, see text accompanying note 165. With the regulation of sexually explicit speech, illegitimate motives are likely to be at work.

to thought about a public matter. This approach might deprive speech of protection if it amounts to simple epithets, showing visceral contempt. On an analogy to the obscene telephone call, a public university can prevent students and teachers from using words in a way that is not plausibly part of social deliberation about an issue. But racist, homophobic, or sexist speech, even if offensive and harmful, would not be regulable so long as it is plausibly part of the exchange of ideas. It follows that the speech codes of public universities are generally unconstitutional, except insofar as they apply to the narrow category of epithets.[172]

This approach would also suggest that government may regulate some forms of scientific speech. For example, the government could regulate the export of technology with military applications. This is so even though the showing of harm is in such cases insufficient under the standards properly applied to political speech.[173]

What of art and literature? The fact that they are frequently political—combined with the severe difficulty of evaluating their political quality on an ad hoc basis—argues powerfully in favor of the view that generally art and literature should be taken as "core" speech. When government seeks to censor art or literature, it is almost always because of the political content, making the censorship impermissible. Even when art or literature stands outside the core, government cannot attempt to regulate speech because it disagrees with the message. The First Amendment requires a legitimate justification. A legitimate justification is almost always lacking.

This approach would solve most of the current First Amendment problems without making it necessary to enter into complex debates about power and powerlessness, or about neutrality in constitutional law. It would also draw on history, on the best theories about the function of the free speech guarantee, and on a sensible understanding about when government is least likely to be trustworthy.

## IV. . NOTES ON FOUNDATIONS: DELIBERATIVE DEMOCRACY

Thus far I have not said anything general about the functions of the free speech guarantee or about the conception of democracy

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[172] See Cass R. Sunstein, *Ideas, Yes; Assaults, No*, The American Prospect 35, 37-38 (Summer 1991).

[173] See Cass R. Sunstein, *Government Control of Information*, 74 Cal L Rev 889, 905-12 (1986).

that we should take it to embody. A few remarks are therefore in order.

We might understand the American constitutional system to create a deliberative democracy.[174] This is a system that combines a degree of popular accountability with a belief in deliberation among representatives and the citizenry at large. The system is not designed solely to allow the protection of private interests and private rights. Even more emphatically, its purpose is not to furnish the basis for struggle among self-interested private groups. That notion is anathema to American constitutionalism.

Instead, the system is intended to ensure discussion and debate among people who are differently situated, in a process through which reflection will encourage the emergence of general truths.[175] A distinctive feature of American republicanism is hospitality toward heterogeneity, rather than fear of it. Indeed, it was along this axis that the antifederalists and federalists most sharply divided. Thus the antifederalist Brutus insisted: "In a republic, the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be continually striving against those of the other."[176] Alexander Hamilton responded that in a heterogeneous republic, discussion will be improved; "the jarring of parties" will "often promote deliberation."[177] The Federalists did not believe that heterogeneity would be an obstacle to political discussion and debate. On the contrary, they thought that it was indispensable to it.

In the American tradition, politics is not a process in which desires and interests remain frozen, before or during politics. Indeed, some suggested early on that national representatives should take instructions from their constituents and vote accordingly. The First Congress rejected the proposal on the ground that it would destroy the purpose of the meeting.[178] That purpose was to ensure an exchange of views, one that would actually change opinions. We should understand the protection accorded to free speech in this

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[174] Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in Robert A. Goldwin and William A. Schambra, eds, *How Democratic is the Constitution?* 102, 112-16 (American Enterprise Institute, 1980); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan L Rev 29, 45-48 (1985).

[175] This is a pragmatic conception of truth. See, for example, William James, *Pragmatism and the Meaning of Truth* 78-79 (Harvard, 1935).

[176] Brutus in Herbert J. Storing, ed, *The Complete Antifederalist* 369 (Chicago, 1980).

[177] Federalist 70 (Hamilton) in *The Federalist Papers* 471, 475 (Wesleyan, 1961).

[178] Joseph Gales, ed, 1 *Annals of Congress* 733-45 (Gales and Seaton, 1834).

view. Its overriding goal is to allow judgments to emerge through general discussion and debate.

This view does not depend on a sharp distinction between public interest and private interest, or on an insistence that private interest should not be a motivation for political action. We need only to claim that the provision of new information, or alternative perspectives, can lead to new understandings of what interests are and where they lie.

In this sense, conceptions of politics as an aggregation of interests, or as a kind of "marketplace," inadequately capture the American system of free expression. Aggregative or marketplace notions disregard the extent to which political outcomes are supposed to depend on discussion and debate, and on the reasons offered for or against the various alternatives. The First Amendment is the central constitutional reflection of the commitment to these ideas. It is part and parcel of the constitutional commitment to citizenship. This commitment must be understood in light of the American conception of sovereignty, placing governing authority in the people themselves.

The proposals set out above flow directly from this conception of the First Amendment. The belief that politics lies at the core of the amendment is an outgrowth of the more general structural commitment to deliberative democracy. The concern for ensuring the preconditions for deliberation among the citizenry is closely associated with this commitment. The proposals suggested here thus fit with the highest aspirations of the constitutional commitments of which the First Amendment is the most tangible expression.

Through this route, we have come far from the basic ideas that characterize current thinking about free speech. The aversion to line-drawing with respect to speech seems to lead to insoluble conundrums. It is better to be candid about the matter and to insist that as far as the First Amendment is concerned, all speech is not the same. Threats to free speech do come from government, but the general understanding of what this means is far off the mark. Such threats do take the form of conventional, highly visible censorship. But they also take the form of what is in some respects the same thing—the allocation by government of rights of property, ownership, and exclusion that determine who can speak and who cannot, and that involve the use of civil and criminal law to protect the rights of exclusion. Government neutrality is the right aspiration, but properly understood, neutrality does not mean respect for rights of speech as these can be vindicated in light of the existing distribution of rights and entitlements. It is thus necessary

to reform all of the commitments that, with respect to speech, have come to represent the conventional wisdom in many circles.

## Conclusion

Over the last forty years, the American law of freedom of speech has experienced a revolution. The revolution has accomplished enormous good. A return to the pre-1950 law of free speech certainly would not provide a better understanding of the free speech principle, or sufficiently serve other valuable social goals to justify abandonment of the current approach. In the bicentennial year of the Bill of Rights—a period in which appreciation for freedom of speech is exploding throughout the world—it is more than appropriate to celebrate our tradition of liberty, and to recognize the extent to which it is an extraordinary and precious achievement.

At the same time, a crucial part of that achievement involves the dynamic and self-revising character of the free speech tradition. Our existing liberty of expression owes much of its content to the capacity of each generation to rethink and to revise the understandings that were left to it. To the economists' plea that "the perfect is the enemy of the good," we might oppose Dewey's suggestion that "the better is too often the enemy of the still better."[179] The conception of free speech in any decade of American history is often quite different from the conception twenty years before or after.

An adherence to current understandings is inadequate to resolve current controversies, and it threatens to protect both more and less free speech than it should. It is inadequate for current controversies, because it is poorly adapted to the problems raised by campaign finance regulation, scientific speech, regulation of broadcasting, government funding, content-neutral restrictions on speech, hate speech, commercial advertising, and pornography. It protects more than it should, because it includes, within the category of protected expression, speech that serves few or none of the goals for which speech is protected, and that causes serious social harms. It protects less than it should, because current doctrine does not sufficiently serve the central goal of producing a deliberative democracy among political equals. Ironically, the existing system owes many of its failures to the supposed mandates of contemporary conceptions of the First Amendment.

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[179] See John J. McDermott, ed, *The Philosophy of John Dewey* 652 (Chicago, 1973).

In this Article I have suggested two changes in existing understandings; both of them derive from the American contribution to the theory of sovereignty. First, some forms of apparent government intervention into free speech processes can actually improve those processes. We should not understand these as an objectionable intrusion into an otherwise law-free social sphere. In these ways, such intervention should not always be taken as an impermissible "abridgement" of the free speech right. Efforts of this sort do not represent "positive" government action intruding on constitutionally protected "negative" liberty.[180]

Instead these proposals entail a democratic recognition of the dangers to free speech posed by content-neutral restrictions that limit access to arenas in which expression should occur. Current doctrine generally recognizes the risks posed by content-neutral restrictions. The gap lies in the unwillingness to see that the speech "market" is a product of law subject to legislative improvements and to First Amendment constraints. A salutary recognition that decentralized markets generally are indispensable to promote liberty—for products and for speech—is not inconsistent with the basic claim. Nor is that recognition inconsistent with the view that the creation of markets might, on some occasions and in some settings, itself be an abridgement of free speech.

Second, we should understand the free speech principle to be centered above all on political thought. In this way the free speech principle should always be seen through the lens of democracy. Government may regulate other forms of speech not on a whim, and not for illegitimate reasons, but on the basis of a lesser showing of harm.

Taken together, these principles would bring about significant changes in the legal treatment currently accorded to electoral campaigns, electronic broadcasting, and the assertion of ownership rights in order to exclude political speech. In their most modest form, the principles would provide a major step toward resolving current free speech controversies without requiring serious revisions in existing law. Rightly understood, these principles might counteract the novel, sometimes invisible, and often serious obstacles that now lie in the path of free speech in America, and that promise to do so in an increasingly threatening way in the twenty-first century.

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[180] Here the analysis in Fiss, 71 Iowa L Rev at 1423-24 (cited in note 21), seems to be off the mark.