Duke Law Journal

VOLUME 1990 JUNE NUMBER 3

SOME REALISM ABOUT PLURALISM: LEGAL REALIST APPROACHES TO THE FIRST AMENDMENT

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I. IDEOLOGICAL DRIPT AND THE CHANGING CONCEPTION OF FREE SPEECH

A few years ago, in my home town of Kansas City, Missouri, I found myself in a very uncomfortable position politically. The local chapter of the Ku Klux Klan asked the local cable company, American Cablevision, if they could show what was essentially a racist propaganda series, "Race and Reason," on the public access channel. They were told that the public access channel was available only for locally produced shows, and they responded by asking if they could air a locally produced show saying basically the same things, called "Klansas City Live." American Cablevision was concerned about the reaction of the neighbors (they're located east of downtown Kansas City in an all black neighborhood), and they complained to the City Council. They asked if they could be let out of their franchise contract in which they were granted a monopoly in the city in exchange for providing a public access channel. After a very public and emotional debate, the City Council finally voted to abolish the public access channel and substitute a "community access" channel. This meant that American Cablevision had editorial discretion concerning whether or not to allow any particular speaker on the channel and what they could or could not say. Needless to say, the Klan was

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not permitted to broadcast under the new regime, and in fact American Cablevision began to exercise its new authority toward other groups who had participated in public access programming before the changeover. And, not too surprisingly, the City's decision led to litigation that was ultimately settled out of court in the Klan's favor.[1]

Just before the City Council vote, the local board of the American Civil Liberties Union of Western Missouri asked me, along with a former colleague, Joan Mahoney, to write a memo to the City Council explaining why their action would violate the first amendment and expose them to liability. We did so, and the memo was a straightforward exposition of first amendment doctrine. What made me uncomfortable was that on the other side of this dispute were not the usual opponents of the ACLU nor was it a question of the Kansas City establishment versus the guardians of freedom and enlightenment. On the other side of this controversy was the Reverend Emmanuel Cleaver, a liberal city councilman who is one of the leaders of the black community in Kansas City.[2]

And this situation got me thinking: The left in the United States used to be solidly united around the overriding importance of protecting speech from governmental interference—proclaiming the necessity of protecting the speech we hate every bit as much as the speech we love.[3] It's not that way anymore. An important realignment of political beliefs and attitudes is occurring in the United States. It is a sea change that may prove to be something rich, but at least for now is certainly something strange. I am an ardent advocate of the freedoms guaranteed by the first amendment, yet all around me I see the American left abandoning its traditionally libertarian positions, often for reasons I sympathize with. This change in the conception of the principle of free speech is one of the subjects of this Article.

Let me offer a set of recent examples of left arguments about free speech. At first glance they all appeared isolated, but I think they share an underlying logic. I present these arguments in what I believe to be their strongest versions, although I do not agree with them in all respects. Nevertheless, I believe that the general form of analysis they offer is very important indeed, even if I would reach different conclusions by

1. Missouri Knights of the Ku Klux Klan v. Kansas City, Mo., 723 F. Supp. 1347 (W.D. Mo. 1989); *see* Farnsworth, *KC Abandons Effort to Keep Klan Off TV,* Kansas City (Mo.) Times, July 14, 1989, at A1, col. 2; Farnsworth, *Council Pays All Legal Fees of ACLU in Klan TV Case,* Kansas City (Mo.) Times, Sept. 29, 1989, at B1, col. 1.

2. Farnsworth, *KC Abandons Effort to Keep Klan Off TV, supra* note 1, at A1, col. 2.

3. The phrase is derived from United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

employing it. That form of analysis is the other major subject of this Article.

The first example of left arguments involves the newly expressed disappointment with the free speech principle when it is used to protect racist speech that promotes racial stereotypes and racial oppression.[4] As Professor MacKinnon tells us, if we view first amendment values as a system, so that a victory for free speech anywhere is a victory for free speech everywhere, then the same view applies to racism—a victory for racism anywhere bolsters racism in society in general.[5] And this is, of course, the argument for abolishing the public access channel in the Kansas City Cablevision case. Since we, the public of Kansas City, subsidize the cable channel, we are actually making it easier for racists to communicate their message. We thus make it easier for them to spread racist dogma, gain converts, and foster racial oppression and racial violence. One might respond that we subsidize strects and parks too, so does that mean we should close off access to public forums for racist speech? Yet I think that if we really wanted to take this line of reasoning all the way, we would say yes, that when the government grants access to racist groups to use streets and parks for racist speech, it is to that extent subsidizing racist speech. In fact, we might add, when the state declines to allow suits for intentional infliction of emotional distress or other forms of racial harassment, it is permitting racists to harm minorities. Indeed a number of legal scholars have begun to argue in precisely this way.[6] In fact, as I shall argue later on, many mainstream scholars have used this type of argument before, and accepted it before, although not in the context of speech.

The second line of arguments involves the radical feminist critique of pornography, and in particular, the work of Catherine MacKinnon and Andrea Dworkin. MacKinnon and Dworkin have argued that the free speech defense of pornography is largely a sham because there is no real free speech for women in a country in which women are relegated to

4. *See, e.g., Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation,* 37 BUFFALO L. REV. 337 (1988-1989) [hereinafter *Language as Violence*]; Lawrence, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus,* 1990 DUKE L.J. 431; Matsuda, *Public Response to Racist Speech: Considering the Victim's Story,* 87 MICH. L. REV. 2300 (1989).

5. *See* MacKinnon, *Pornography, Civil Rights, and Speech,* 20 HARV. C.R.-C.L. L. REV. 1, 4 (1985).

6. *See, e.g.,* Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling,* 17 HARV. C.R.-C.L. L. REV. 133 (1982); *Language as Violence, supra* note 4, at 359-64 (remarks of Professor Mari Matsuda); Matsuda, *supra* note 4.

the particular gender roles that society gives them.[7] Patriarchy is so embedded in the societal conception of free speech that it has become invisible, and what appears to be the speech of women in pornographic films, for example, is actually expression that is forced upon them by males.[8] More generally, patriarchy constructs a world in which pornography looks indistinguishable from speech, and in which women's speech is not their own but is constructed for them. Hence, Dworkin suggests that rather than listening to the speech of women in a male-dominated society, we should listen to their silence. The silence of women is the trace or evidence of their oppression.[9]

The third line of arguments is very familiar nowadays, and I think there is a wider consensus among left thinkers that these arguments represent a genuinely left position, or rather, more people on the left agree with these arguments than with the arguments about racist speech or pornography. This line of arguments critiques the "money as speech" position taken in cases like *Buckley v. Valeo.*[10] It argues that regulation of campaign finance is necessary because what passes for free speech is really more like unregulated economic power that is used to influence (and corrupt) the political process.[11] In fact, this position even can become a liberal argument in the *Carolene Products*/John Hart Ely style[12]—that the political process itself is flawed or defective when large sums of money can be used to influence legislators under the guise of freedom of association, or influence voters under the guise of freedom of speech.

The anti-*Buckley* argument usually stops short at the limited position of reform of campaign finance (especially the liberal version), but

7. C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 127-213 (1987); Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality,* 8 HARV. WOMEN'S L.J. 1 (1985).

8. C. MACKINNON, *supra* note 7, at 180-81.

9. *Id.* at 140-41, 194-95; Dworkin, *supra* note 7, at 17-20.

10. 424 U.S. 1 (1976) (striking down limitations on individual expenditures under the Federal Election Campaign Act of 1974); *see also* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (striking down statute prohibiting corporate contributions or expenditures for the purpose of influencing or affecting voter referenda that do not materially affect the property, business, or assets of the corporation).

11. *See, e.g.,* Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment,* 29 UCLA L. REV. 505 (1982); Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?,* 82 COLUM. L. REV. 609 (1982); Wright, *Politics and the Constitution: Is Money Speech?,* 85 YALE L.J. 1001 (1976). For thoughtful responses, see Levinson, *Regulating Campaign Activity: The New Road to Contradiction?,* 83 MICH. L. REV. 939 (1985); Powe, *Mass Speech and the Newer First Amendment,* 1982 SUP. CT. REV. 243.

12. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105-34 (1980).

one can take it much further. One could argue that free speech in a situation of radically unequal economic power is not free speech at all because it is skewed by the preexisting distribution of property. That is to say, in our country the power of persons to put their messages across loudly and repeatedly because of their economic power and influence effectively silences other, excluded and marginalized voices. The long term effect of the unequal distribution of power and property is an unequal exposure of particular ideas, and the stifling and co-opting of more radical and imaginative ideas about politics and society. Under this analysis, the paradigmatic example of free speech in our society is not the speaker on the soapbox, or the reasoned exchange of views on the television talk show or in the legislative chamber; rather, it is the endless succession of candidates for the two major political parties who sound exactly alike, it is the endless bombardment of our minds with commercials about shampoo and deodorant, telling us how awful our bodies are and how we have to change them or decorate them in some way in order to become worthwhile people, dictating for us what we really want and do not want. It is the repeated urge to cultural conformity as explained to us through the latest fashion statements on "Dallas," "Dynasty," or even MTV. In short, the paradigmatic example of free speech in this country is the parroting of values created for us by those groups and persons who have sufficient money and clout to monopolize our attentions and ultimately our very imaginations.

These different criticisms of first amendment law seem widely separated and distant from each other. I suggest, however, that they all have something in common. They all involve techniques first used by the legal realists in the 1920s and 1930s to deconstruct the ideology of the sacred right of freedom of contract.[13] The only difference is that now the at-

13. The key articles are F. Cohen, *Transcendental Nonsense and the Functional Approach,* 35 COLUM. L. REV. 809 (1935); F. Cohen, *The Ethical Basis of Legal Criticism,* 41 YALE L.J. 201 (1931); M. Cohen, *The Basis of Contract,* 46 HARV. L. REV. 553 (1933); M. Cohen, *Property and Sovereignty,* 13 CORNELL L.Q. 8 (1927); Hale, *Bargaining, Duress, and Economic Liberty,* 43 COLUM. L. REV. 603 (1943) [hereinafter Hale, *Bargaining*]; Hale, *Coercion and Distribution in a Supposedly Non-Coercive State,* 38 POL. SCI. Q. 470 (1923) [hereinafter Hale, *Coercion*]; Hale, *Law Making by Unofficial Minorities,* 20 COLUM. L. REV. 451 (1920). I include Morris Cohen's work although he is perhaps better described not as a realist but as a sympathetic critic of realism, *see* M. Cohen, *Justice Holmes and the Nature of Law,* 31 COLUM. L. REV. 353 (1931) (criticizing overly positivistic and nominalist elements in social science strand of legal realism). However, his critiques of property and contract law have much in common with the realist analyses of Robert Hale and Felix Cohen. An excellent summary of the arguments appears in Singer, *Legal Realism Now,* 76 CALIF. L. REV. 465 (1988) (reviewing L. KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986)). Professor Peller calls this strand of realism "deconstructive realism." He distinguishes it from the more familiar version of legal realism, which emphasized discovering the "actual conditions" of law and social life, and thus placed great faith in social science. Peller calls this strand of realism "scientific realism." Peller, *The Metaphysics of American Law,* 73 CALIF. L. REV. 1151, 1222 (1985). His

tack, the assault on the citadel if you will, is directed at the sacred right of free speech.

The legal realist critique of freedom of contract argued that when the employer and the employee contracted for the employee to work sixty hours a week in a bakery, this was only formally a relationship of free contract. It was actually the very opposite of free exchange because of the preexisting economic status of the parties. In fact—and something like this actually appears in the preamble to the Wagner Act[14]—the legal realists argued that only through the regulation of employment contracts could one approach a truly free exchange of labor. Note the similarity to the MacKinnon/Dworkin approach—among other things, MacKinnon and Dworkin argue that when a woman appears in a pornographic movie, this is not the woman's real speech. Rather, it is speech forced upon her through a system of patriarchy. More generally, the lack of protest by women and the particular gender roles that men and women have in society are not chosen, but rather are imposed through a psychosexual equivalent to a "lack of bargaining power" created by the dominant male ideology. Just as the exchange between employer and employee looks free but is actually coerced, so the speech of women and of other groups is not free but is actually the result of social forces beyond their control.[15] Just as the Wagner Act was necessary to counter economic inequalities, so the dismantling of the social forces of patriarchy through regulation of pornography is appropriate in order to vindicate women's true rights of free expression.

A second legal realist critique argued that to the extent one protected the right of freedom of contract, one actually infringed on some other right that might be equally valuable. One could not justify this result by claiming no infringement was taking place, or by invoking a distinction between public and private infringement or between government action and inaction. The government was ultimately responsible for the distribution of power and wealth in society when actors made use of its rules of contract, property, and tort, which in turn defined the economic system.[16] Thus, no articulation and protection of rights could be

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article is a brilliant synthesis of American Legal Realism and deconstructive theory, which states in more general form many of the arguments presented here.

14. *See* 29 U.S.C. § 151 (1988) (characterizing deleterious effects on interstate commerce of "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract," and employers).

15. *See* Olsen, *Feminist Theory in Grand Style,* 89 COLUM. L. REV. 1147, 1162 (1989) (reviewing C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987)).

16. M. Cohen, *The Basis of Contract, supra* note 13, at 586; Hale, *Bargaining, supra* note 13, at 627-28. These arguments depended heavily on Wesley Hohfeld's analysis of rights, which argued that rights were not things that people possessed, but jural relations of private power, whose bounda-

politically neutral—any definition of rights necessarily defined the rights of others. No regime of contract, property, and tort was unregulated or free of governmental policy or government intervention—there were only different possible regimes and different choices about which persons to benefit at the expense of others. This is also the argument for regulation of racist speech: To the degree that the state protects the free speech rights of racists, the state affirms that the rights of minorities to be free from certain forms of racial oppression do not count. If the government is unwilling to allow common law causes of action for racial insult, that reluctance is in itself an admission that the state is responsible for the balance it strikes between speech rights and the perpetuation of racism—the state has chosen to value the expressive liberty of racists over the feelings of their victims.[17] Put another way, this argument is really the familiar legal realist argument that the public/private distinction between direct state abridgement of rights and private abridgement collapses in particular contexts. This argument has simply been extended from the realm of contract and property rights to the realm of speech rights.[18]

Finally, the legal realists argued that one could not disregard the effect of economic status on the exercise of economic rights, and that neither the existing distribution of economic power nor the effect of that distribution on economic bargains were pre-political.[19] But the same thing might be said of the right of freedom of speech in two senses: First, the right of political participation is no less affected by differences in economic power than is the right of economic participation. There is nothing natural, or (in modern post-*Lochner* terms) nothing fair, about the results of a process in which some have vastly more political clout be-

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ries were fixed by statute or by common law doctrine. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,* 23 YALE L.J. 16 (1913); *see also* Balkin, *The Hohfeldian Approach to Law and Semiotics,* 44 U. MIAMI L. REV. 1119 (1990); Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld,* 1982 WIS. L. REV. 975; Sunstein, *Lochner's Legacy,* 87 COLUM. L. REV. 873 (1987) (recapitulation of legal realist arguments through critique of naturalness of common law baseline).

17. *Cf.* Delgado, *supra* note 6, at 172-79; *Language as Violence, supra* note 4, at 359 (remarks of Professor Matsuda).

18. There is another, less radical, version of this argument that appears in discussions of first amendment rights and state action: It begins with the assumption that the libel laws at issue in New York Times v. Sullivan, 376 U.S. 254 (1964), involved state action because the state's defamation laws allow injured parties to sue and collect damages from persons who engage in expressive conduct. Under the same line of reasoning one might argue that the refusal of the owner of a shopping center to grant access to protesters also involves state action, *see e.g.,* Hudgens v. NLRB, 424 U.S. 507 (1976), because the property rights of the owners are being allowed to trump the speech rights of the protesters.

19. *See* Singer, *supra* note 13, at 487-91.

cause of vastly more economic clout. This is the critique of *Buckley v. Valeo.*

Second, and perhaps more important, the very desires and beliefs of persons in society are no more natural, no less skewed, by the maldistribution of economic and political power. To dissolve the public/private distinction in this particular context is not only to make government responsible for the citizen's ability to speak; it is also to make the government responsible for the values imposed and implanted in each citizen. This argument is implicit in Dworkin's and MacKinnon's attack on pornography as sustaining or giving comfort to male hegemony. Yet this is the point at which the legal realist critique of governmental responsibility begins to devour itself and its liberal premises. For now the problem is how we are to know what set of values should be imposed if our values are themselves infected by preexisting social constructs.[20] This critique attacks not only the old style liberal belief in neutrality as between different perspectives, but also the newer and more sophisticated liberal belief in an essentially non-preferential attitude of fairness towards competing groups, all of whom want to instill their values in the hearts and minds of others. A critique that emphasizes the state's responsibility for the production and reproduction of values is hardly new. It is implicated, for example, in the problems that modern liberal thinkers now face in trying to explain why creationist parents should not be able to prevent secular education of their children when that education conflicts with their religious beliefs.[21]

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20. The best recent legal discussion of these problems is M. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983). Dean Yudof emphasizes the government's role in shaping values and warns of the danger of the manufacturing of consent by means of propaganda and indoctrination. Commentators have pointed out that Yudof's arguments and concerns suggest that powerful private interests can also manipulate society's values. *See* Carter, *Technology, Democracy, and the Manipulation of Consent,* 93 YALE L.J. 581, 587 (1984); Shiffrin, *Government Speech and the Falsification of Consent,* 96 HARV. L. REV. 1745, 1750-51 (1983). For an attempt to view the mass media in terms of a "propaganda model," see E. HERMAN & N. CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA (1988). For an explanation of how business and government interests combine to limit the nature of political and economic reform, see C. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEM (1977).

21. For a sensitive discussion of the issues, see Carter, *Evolution, Creationism, and Teaching Religion as a Hobby,* 1987 DUKE L.J. 977. Professor Fish's commentary on this article argues that liberalism involves its own imposition of liberal values of neutrality in apparent violation of liberal principles. *See* Fish, *Liberalism Doesn't Exist,* 1988 DUKE L.J. 997; *see also* Rawls, *The Priority of Right and Ideas of the Good,* 17 PHIL. AND PUB. AFF. 251, 267 (1988) (defending teaching the values of tolerance through public education even to children whose parents belong to intolerant religious groups). For an argument that the battle over creation science masks a struggle for ideological dominance between the traditional values of poor and lower middle class southerners and the seeular ideology imposed upon them by the burcaucratic and managerial elites of the New South, see Peller, *Creationism, Evolution, and the New South,* TIKKUN, Nov.-Dec. 1987, at 72 (1987).

My argument so far has been that recent left critiques of traditional liberal first amendment doctrine bear a striking similarity to the legal realist critique of the favored right of laissez-faire conservatives, free contract. In one sense, it was inevitable that the skeptical acid of legal realism eventually would leak out and consume sacred rights other than contract. The question is, why did it happen now, and what does the future hold for the heretofore blissful marriage of the left and the first amendment?

To answer these questions, we need to examine a bit of history. It is important to remember that for most of America's history, protecting free speech has helped marginalized or unpopular groups to gain political power and influence. The first amendment normally has been the friend of left wing values, whether it was French èmigrès and Republicans in the 1790s, abolitionists in the 1840s, pacifists in the 1910s, organized labor in the 1920s and 1930s, or civil rights protesters in the 1950s and 1960s.[22] We should remember too that during the ACLU's early years the organization represented mainly draft resisters and labor organizers, whom Roger Baldwin saw as, and intended to be, the main beneficiaries of his work.[23] So the historical connections between left politics and free speech in this country are obvious. However, it is also important to remember that the alliances between particular conceptions of rights and a particular political agenda are always contextual, always situated in history. Everyone is familiar with positions that originally were espoused by radicals and later became mainstream or even conservative positions. The radical ideas of the day often become the orthodoxy of tomorrow, and, in the process, take on a quite different political valance. I refer to this phenomenon as "ideological drift." Although this drift can move either from right to left or left to right, the most common examples are comparatively liberal principles that later serve to buttress comparatively conservative interests.

For example, laissez-faire was a liberal argument before the Civil War, as liberals like Jefferson, Jackson, and Van Buren tried to avoid the granting of corporate charters and other special governmental benefits to monied interests in the Northeast.[24] By the 1890s, as we all know, lais-

22. For recent histories of free speech, especially in the pre-World War I period, see M. Graber, Transforming Free Speech (in press); Kairys, *Free Speech: An Introduction, reprinted in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 140 (D. Kairys ed. 1982); Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

23. *See* S. WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 21-57 (1990); Kairys, *supra* note 22, at 158-59; Rabban, The Free Speech League and the First Amendment Tradition (unpublished manuscript) (available from author).

24. *See* Balkin, *Federalism and the Conservative Ideology*, 19 URB. LAW. 459, 469-70 (1987); Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire*

sez-faire had become a conservative argument because by that time American business was developed sufficiently that it needed government assistance less than it needed to avoid governmental regulation. The primary interest of American business was not gaining special benefits, but rather avoiding redistributive regulation at the hands of voting majorities of the middle and lower classes—majorities created by the Jacksonian movement for universal manhood suffrage.[25] Thus, ironically, the conservatives of the 1890s adopted the liberal laissez-faire argument of the previous era, and generally the left has been committed to various forms of redistributive social and economic regulation ever since.

A similar transformation, I suspect, is overtaking the principle of free speech today. Business interests and other conservative groups are finding that arguments for property rights and the social status quo can more and more easily be rephrased in the language of the first amendment by using the very same absolutist forms of argument offered by the left in previous generations. Here's a quick quiz: What do the Klan, conservative PACs, R.J. Reynolds Tobacco, and the conglomerate that owns the holding company that owns the manufacturer of your favorite brand of toothpaste all have in common? They can all justify their activities in the name of the first amendment. What was sauce for the liberal goose increasingly has become sauce for the more conservative gander.[26]

This social transformation is not yet complete, and indeed, I suspect, it probably never will be as complete as the transformation of political views regarding laissez-faire between 1830 and 1890. For example, I can't imagine a social context that would change so radically that the left would find it in its best interests to abandon completely its commitment to protecting the speech of unpopular groups. What I do expect will happen, however, is that gradually the left no longer will find the first amendment its most effective tool for promoting a progressive agenda. That job will fall to other fundamental rights and interests, which occasionally will conflict with the absolutist interpretation of the first amendment that the left traditionally has favored.

These developments are quite serious, and they signal a profound upheaval in legal theory, which will at first be felt most strongly on the left, but, if previous history is any guide, will gradually affect the main-

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Constitutionalism, 3 LAW & HIST. 293, 318-26 (1985); *see also* Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation,* 70 VA. L. REV. 187, 189-92 (1984).

25. *See* R. MCCLOSLEY, AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE 21-30 (1951).

26. For arguments that the tenor of modern first amendment law increasingly serves corporate and propertied interests, see Tushnet, *An Essay on Rights,* 62 TEX. L. REV. 1363, 1386-92 (1984); Tushnet, *Corporations and Free Speech,* in THE POLITICS OF LAW 253 (D. Kairys ed. 1982).

stream view of free expression in American law. The skeptical and deconstructive aspects of the legal realist critique of property and contract rights were quite disruptive in previous generations and took a great deal of time to be accepted. If, as Professors Peller and Singer tell us, we are all legal realists now,[27] we have only recently become so with respect to the first amendment.[28]

The rest of this Article discusses some of the theoretical issues that face us as the legal realist critique of rights is assimilated into first amendment law. I raise these issues not because I have clear-cut solutions in every case, but rather to make the reader think about first amendment problems in different ways. It is important to understand that this project has both a conservative and a transformative purpose. When one offers a new perspective, one should always remember that some objects remain unchanged even when viewed from widely different angles. So it is with free speech. The application of legal realist methods to the first amendment may confirm that the balance of expressive liberties and other social interests should remain unchanged in many situations. On the other hand, a different perspective may reveal previously unrecognized unities in seemingly conflicting legal doctrines or goals. Conversely, new perspectives may show us that two situations we thought were indistinguishable in principle are, in fact, quite different. In any event, in our efforts to reconceptualize the problems of modern first amendment law, we should always keep in mind why the principle of free speech is important to us—because it protects dissent, egalitarian participation in public and private forms of social power, individual conscience, and individual autonomy. As the legal realists would no doubt remind us, these concepts themselves are fuzzy, and their exact contours cannot be determined in the abstract. Thus, ironically, fleshing out a theory of

27. Peller, *supra* note 13, at 1152; Singer, *supra* note 13, at 467.

28. As early as 1942, the sociologist David Riesman, then still a law professor, saw some of the implications of legal realism for the first amendment. *See* Riesman, *Civil Liberties in a Period of Transition,* 3 PUB. POL'Y 33, 66-67 (1942). Concerned about the power of big business and the strength of anti-union propaganda, Riesman pointed out the unreality of the marketplace of ideas metaphor in a world of vastly disparate economic power. His analysis appears to have been influenced by the work of "deconstructive" realists like the economist Robert Hale. *See* Rosenberg, *Another History of Free Speech: The 1920's and 1940's,* 7 J.L. & EQUALITY 333, 348-54 (1989). Riesman's apprehensions about the power of private parties to limit politieal liberty also inform his better known work on defamation and group libel. *See* Riesman, *Democracy and Defamation: Control of Group Libel,* 42 COLUM. L. REV. 727 (1942); Riesman, *Democracy and Defamation: Fair Game and Fair Comment I,* 42 COLUM. L. REV. 1085 (1942); Riesman, *Democracy and Defamation: Fair Game and Fair Comment II,* 42 COLUM. L. REV. 1282 (1942). Nevertheless, as Professor Rosenberg points out, the legal realist inspired analysis of "Civil Liberties in a Period of Transition" did not take root in the intellectual soil of the 1940s. Not only did the article "quickly disappear from free speech discourse," but by the 1950s Riesman himself had modified his views. Rosenberg, *supra,* at 362-63.

the first amendment is the only way we can truly come to understand what the first amendment means to us.

The goal of this Article, then is not to call for a total transformation of first amendment jurisprudence. Rather, it seeks to shake up the analytic picture a bit in order to stimulate more creative arguments and reconceptualizations. Indeed, the actual modifications to doctrine that this Article suggests—higher scrutiny of content-neutral regulations, greater guarantees of access to the mass media, greater judicial restraint in challenges to campaign finance reform, and a reinterpretation of the captive audience doctrine to permit regulation of face-to-face racial and sexual harassment and harassment in the workplace—do not depart greatly from arguments often made about the first amendment. My suggestions do not, however, fit easily within the libertarian theory of the first amendment traditionally offered by left-liberals. That is why I have moved to a different approach—to preserve what I believe is good about current first amendment protections, while justifying reforms I feel are equally important.

This approach, too, is in the spirit of legal realism. For the legal realists, although arguing that demarcations of property and contract rights were in no sense natural or required by the concepts of property and contract themselves, were not arguing for wholesale restructuring of the American economy. They were laying the theoretical groundwork to justify the reforms of the New Deal and the emergence of the regulatory and welfare state. Although their conservative opponents viewed them as communists, anarchists, or worse, they were nothing of the sort. From our perspective, we see them as preserving economic freedom by readjusting its contours and boundaries. Yet in order to do this, they had to foresake a libertarian conception of economic freedom that had been adopted by liberals of a century before and to which conservatives now fiercely clung.

Thus, I offer a legal realist approach not only as someone interested in theory, but also as someone who identifies and sympathizes with the goals of progressive politics. From what I have said above, it seems clear to me that more conservative forces soon will overtake and appropriate the libertarian approach to first amendment law that progressives have used so effectively in the past. Of course, this would not be the first time such an appropriation has occurred. The most recent example is the appropriation of the anti-discrimination principle by the right as a means of combating affirmative action.[29] Just as an easy-to-apply principle of neu-

29. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring in the judgment) ("The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the

trality in racial distinctions at first served, and later thwarted, the forces of change, so the libertarian conception of the first amendment will soon become co-opted.

Events are rapidly overtaking us. The paradigmatic first amendment cases of the 1930s, 40s, and 50s concerned attempts by state and federal governments to punish seditious speech and unpopular dissent. These are situations for which the libertarian conception of free speech was well-designed. Yet the paradigmatic free speech issues of the 1970s, 80s, and 90s are quite different. They are questions of how to provide effective media access for unpopular groups, how to check the spread of corruption and manipulation of the political process, and how to balance the interests of free expression against a national commitment to eradicating racial and sexual discrimination. Finally, they raise questions of how to protect the expressive rights of unpopular groups from abridgement through manipulation of government taxing and spending programs—products of the very regnlatory and welfare state that New Deal liberals fought to establish.

If progressive scholars cling to libertarianism because we cannot think of any other way to conceptualize first amendment problems, because we have no other voice in which to speak, we shall meet the same fate as progressives of the late 19th century, victims of what Clinton Rossiter called the "Great Train Robbery of Intellectual History,"[30] in which laissez-faire conservatives appropriated the words and symbols of Jeffersonian liberalism—liberty, opportunity, progress, and individualism—and gave them an economic and decidedly reactionary reinterpretation.[31] As one who believes that language structures and determines thought, I think it is imperative that progressive scholars begin to experiment with new ways of talking about the problems of free expression. We must find our own voice, we must find a new voice, before it is too late. Otherwise we shall find the progressive tools of an earlier era turned against progress, and the goals of a more humane and egalitarian society thwarted in the name of the first amendment.

II. THE VICTORY OF DEMOCRATIC PLURALISM

I want to begin by placing modern debates about the first amendment in a particular historical context. I apologize in advance for painting with a fairly broad brush, and for simplifying historical movements that are considerably more complicated than I present them here. I want

illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected.").

30. C. ROSSITER, CONSERVATISM IN AMERICA 128 (1962).

31. *Id.* at 128-62.

to return to two constitutional moments—two supposedly great constitutional victories for liberals in the United States. The first is the jurisprudential revolution of 1937, and the second is 1969, the year in which *Brandenburg v. Ohio*[32] was decided.

The revolution of 1937 marks the end of classical constitutional jurisprudence and ushers in the modern era. It was the moment at which constitutional law caught up with developments that had been occurring in common law and statutory law for some time as a result of the influence of progressive jurisprudence and its successor in interest, legal realism.

We normally think of 1937 as a year in which the Supreme Court's institutional role changed radically and decisively—that henceforth courts would not interfere with social and economic legislation—and I do not wish to dispute that orthodox interpretation, which I shall in fact depend upon a bit later. Nevertheless, 1937 also involved a change in the substantive conception of liberty, which is every bit as important as, and in fact goes hand in hand with, the change in the Court's institutional role. This linkage is why we can say that 1937 is the year that constitutional law caught up with progressive jurisprudence and legal realism.

Put very briefly, legal realist critiques of common law doctrine argued that abstract concepts like "will," "liberty," "contract," or "property" could not, in and of themselves, produce determinative answers to questions of economic rights and duties. Economic rights and duties were always in conflict. Moreover, the legal realists argued, the goal of the law was to allocate rights and duties equitably, not simply on the basis of abstract or formal equality, but with sensitivity to the factual context in which rights and duties were exercised. Hence the notion of unequal bargaining power arising from differences in property and social status was of immense importance to the legal realists, whereas under the classical (late 19th century) conception of law this issue was largely irrelevant as long as the formal equality of the parties to a transaction was preserved. Similarly, for the legal realists, individual economic transactions had to be judged in their larger context, not only in terms of their effects on the power of the parties, but also in terms of their cumulative effects on third parties and, indeed, upon the nation as a whole.[33]

32. 395 U.S. 444 (1969) (holding that first amendment protects advocacy even of unlawful conduct, except where advocacy is directed to inciting imminent lawless action and is likely to incite or produce such action).

33. In contrast, the classical vision viewed economic transactions as involving exercises of individual rights and only local relations. This vision underlies the *Lochner* Court's commerce clause decisions as well as its due process decisions.

It is not difficult to see how these views of private law are related to a transformation in constitutional jurisprudence. After all, the *Lochner* Court's jurisprudence was based upon the idea that there was a relatively coherent and determinate right of liberty of contract. To be sure, this liberty was subject to reasonable restrictions within the police power of the state, but such restrictions had to be related to a public interest in aid of common law rights, rather than simply a transfer of power from one group to another. The Court saw itself as the guardian of individual rights, standing ready to prevent an overweening state from sacrificing private rights to satisfy majoritarian desires.

However, once judges accepted the arguments of legal realism, it was clear that there were property and contract rights on both sides of any issue of state regulation of economic liberty. To vindicate one group's rights was to diminish another's, and vice-versa. Having lost faith in common law categories as the benchmark for determining whether one person's liberty was infringed or another's was justifiably protected, it became difficult to argue that strict judicial scrutiny of social and economic legislation was warranted. Rather, it was thought that issues of economic freedom should be left to legislatures and administrative agencies, who could study these matters in their larger social context and determine the allocation of rights and duties that best served the public interest.

Under this new way of thinking, social and economic liberty takes on a new meaning. It comes increasingly to be viewed as an instrumental value to be parceled out for the public good. This result was no doubt easy to accept for persons with a utilitarian cast of mind. It was less acceptable for deontological theorists, but they could comfort themselves with the notions that these rights were not in fact fundamental, or that to the extent that they were fundamental, it was the substantive right rather than the formal right to economic liberty that counted; protection of formal liberty at the expense of substantive liberty was hardly a better state of affairs.

An interesting transformation of the rhetoric of economic rights occurs as well. As the concept of economic liberty ceases to encompass a clearly defined private sphere of activity, the kind of arguments one hears in its defense change. Slippery slope arguments against regulation (i.e., that there is no principled way to justify a particular alteration of contractual or property rights) lose much of their force, since issues of economic liberty increasingly are seen as contextual and dependent on relatively specific factual situations rather than on grand principles of economic right. Of course, people would still make slippery slope arguments against the regulatory and welfare state, but these arguments carry

less and less weight. Rather, the major arguments for old-fashioned economic liberty are increasingly phrased in terms of good or bad consequences. One no longer rests content to argue that sacred rights of liberty are being violated. Rather, one tends to argue that deregulation is more efficient, that government handouts sap individual initiative and skew incentives, and so forth.[34]

I believe that this sort of rhetoric generally accompanies a loss of faith in the fundamental nature and coherence of an abstract liberty. When one knows in one's heart that liberty of contract is essential, fundamental, and an inalienable right of humanity, it becomes easier to say with a straight face that the introduction of the minimum wage or child labor laws surely will lead us down the road to totalitarianism. I do not mean to suggest that the United States no longer sees itself as a capitalist country, or that we no longer think it important to protect economic liberty and private property. It is rather that the dominant ideology in this country sees economic rights as much more a matter of give and take than did the ideology of a hundred years ago. We (and by "we" I mean persons ascribing to that dominant ideology) recognize, or rather we accept, in a way in which previous generations did not, that we can shift the boundaries of our economic rights a great deal and still say that we respect private property and economic freedom in this country. We have abandoned, to a considerable degree, the belief that economic liberty must take *this* form rather than that or else it is not truly economic liberty.

At the same time that this change is occurring, issues of freedom and coercion are being reconceptualized through an increased concern with process and democratic legitimacy. It is no accident, I believe, that a loss of faith in classical legal thought's ability to describe the essential components of economic liberty corresponds to a renewed emphasis on democratic decisionmaking as a means of legitimating state allocation of rights—that is to say, state allocation of power. And, of course, this provides the connection between the legal realist critique of economic rights

34. Although not generally considered a political liberal, Robert Bork, whose theories of constitutional law were in many ways influenced by the majoritarian constitutional rhetoric of 1937, best summed up the new attitude towards economic liberty:

> The distinction between rights that are inherent and rights that are derived from some other value is one that our society worked out long ago with respect to the economic marketplace . . . . We now regard it as throughly old hat, passe and in fact downright tiresome to hear rhetoric about an inherent right to economic freedom or to economic property. . . . The modern intellectual argues the proper location and definition of property rights according to judgments of utility—the capacity of rights to forward some other value.

Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 18 (1971). Of course, in this passage Bork meant to make the same claims about the right of free speech. *Id.* What is interesting about recent history is that more and more people on the left seem willing to agree.

and the orthodox interpretation of the revolution of 1937, which is phrased in terms of institutional responsibility and authority. The great questions of economic liberty are henceforth to be decided by legislatures and not by courts. If their answers change from year to year and from jurisdiction to jurisdiction, that change is not a loss of liberty but rather a net increase—for now the public, through its elected representatives, shall determine what is in the public interest.

What results from the shift in legal and political thought occurring in the first half of the 20th century, and which, for convenience, I identify as having "occurred" for constitutional law in 1937, is the construction of a vision of politics that we might call democratic pluralism. Its basic contours are familiar—democratically elected legislatures determine the scope of our economic liberties, while the courts protect the integrity of the democratic process through the development of constitutional law. This should remind you of the division of institutional authority in *United States v. Carolene Products,*[35] and indeed, I would call this case an icon of democratic pluralism. While under classical legal theory one could know whether legislative enactments served the public interest by reference to the concept of the police power (which in turn was derived from traditional common law rights), in the pluralist model the public interest miraculously springs forth from the struggle of various private interest groups.

There is a wonderful irony here. The rise of democratic pluralism accompanies a loss of faith in the ideals of laissez-faire capitalism—that self-interest pursued in economic transactions would inure to the common good. Yet this faith is now replicated by the victorious advocates of democratic pluralism in their assumptions about the structure of political bargains. The public interest is believed most likely to result from the unregulated pursuit of private interests in the legislatures. Whereas previously the courts were concerned with policing the formal equality of the parties in economic bargains, but not with the fairness or wisdom of particular bargains struck, their role now is to enforce formal equality in political bargains and the representative quality of the process that produces them, but not to concern themselves with the fairness or wisdom of legislative enactments.

The contours of democratic pluralism are so familiar that we are likely to think that they were always instantiated in American democracy, and in one sense this is so: Democratic decisionmaking is an essential postulate of American constitutionalism. Nevertheless, democratic pluralism—at least the 20th century version of it—is simply one in a

35. 304 U.S. 144 (1938).

succession of solutions to a recurring problem in constitutional democracy: how to tell whether legislation is enacted in the public interest, or whether it is simply the illegitimate harnessing of public power for private ends. Constitutional theorists throughout American history have proposed a number of different ways of answering this question—by reference to the inherent limitations of government,[36] the protection of vested rights,[37] or the demarcations of the police power (as in the classical period).[38] The theory of democratic pluralism is simply another solution to this age old problem of how to limit the powers of limited government, how to prevent democracy from meaning what it means literally—that is, rule by the mob. The characteristic feature of the solution I call democratic pluralism is its relative agnosticism as to any substantive conception of the public interest. If one thinks of liberalism as requiring neutrality with respect to competing visions of the good, then democratic pluralism is the furthest historical realization of this conception of liberalism; earlier dependence on the notion of the police power is, in contrast, insufficiently fair to competing conceptions of economic justice. In the pluralist vision, the proper scope of economic liberty itself is up for grabs within the framework of the democratic process.

Once one grasps the contours of democratic pluralism, it is not difficult to see why the first amendment comes to occupy a special position in the pantheon of constitutionally protected liberties.[39] Just as freedom of contract was the paradigmatic liberty through which one participated in the marketplace in the classical conception of law, freedom of speech is the paradigmatic liberty through which one participates in democracy in the pluralist conception. Its constitutional instantiation, the first amendment, becomes identified with democratic pluralism itself. Thus, as liberals in the 1930s and 1940s gained power, they focused increasing attention on the protection of speech even as they gave increasingly scant attention to economic rights. They replaced the previous era's faith in an abstract concept of economic freedom with a pluralist faith in an abstract concept of expressive freedom. To be sure, more conservative thinkers fought them every step of the way, and the left-libertarian conception of the first amendment was in partial eclipse in the courts in the 1950s.[40] Eventually, however, a very pro-speech conception of the first

36. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

37. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch.) 87 (1810).

38. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

39. *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); Jones v. Opelika, 316 U.S. 584, 608 (1942) (Stone, J., dissenting), *adopted as opinion of the court on reh'g*, 319 U.S. 103 (1943) (per curiam); Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464 (1956); McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182 (1959).

40. *See, e.g.*, United States v. Dennis, 341 U.S. 494 (1951).

amendment achieved intellectual hegemony. Symbolically, we can say that its coronation occurred in 1969 in *Brandenburg v. Ohio,*[41] but the basic principles had been assimilated into the mainstream of American law even before this. *Brandenburg* establishes the dominance of the Holmes-Brandeis vision of first amendment law—that speech cannot be banned simply because it may be politically dangerous or politically convincing—and, more generally, the principle of content neutrality in governmental regulation of speech.[42] These principles were, in turn, necessitated by the pluralist conception of politics that rose to intellectual prominence in the middle of the 20th century.

I have told this story in the way it is usually told, as a great progressive history, in which liberal ideas and values eventually convince and win over the opponents of enlightenment and fairness. Within this portrait of constitutional history, *Carolene Products* is a great vindication and affirmation of liberal principles, as is *Brandenburg v. Ohio* for another era. Yet it is an ironic commentary on American liberalism that its basic ideas are accepted in the mainstream—and indeed, even become the orthodoxy of later generations—at the very moment when they have begun to lose their progressive force. The story of how the theory of *Carolene Products* produced eventual doctrinal stagnation has been told elsewhere.[43] I shall now make a similar argument here—that the success of democratic pluralism and acceptance of the special position of the first amendment occurred just as these intellectual constructs were rapidly becoming obstructions to progressive change. The incorporation and, I would suggest, subtle alteration of the left-libertarian position on the first amendment produced a doctrinal framework that would hinder development of first amendment theory for the 1980s and beyond.

In arguing that democratic pluralism has come to obstruct progressive reform, I do not mean that there is something inherently wrong with "democracy" or "pluralism" as abstract concepts. I mean that their concrete instantiations—how they have actually turned out in practice—have gone astray. This phenomenon is part of what I mean by "ideological drift." Just as the concepts of "liberty" and "equality" were co-opted by laissez-faire conservatism in the 1870s, so too "pluralism" and "free speech" are slowly being co-opted by the right today. To be sure, there is a progressive and transformative side to pluralism; that is part of the reason it was so attractive to liberals in the 1930s and 1940s. In theory, that aspect of pluralism could be recovered and used to revivify the abstract concept. One could use the concepts of "democracy" and "plural-

41. 395 U.S. 444 (1969).

42. *Id.* at 447-49; *see also* Chicago Police Dep't v. Mosley, 408 U.S. 92, 97-98 (1972).

43. *See* Balkin, *The Footnote,* 83 NW. U.L. REV. 275 (1989).

ism," in other words, to critique the very institutions we claim are democratic and pluralist. One could argue that the real problem is that these institutions are not democratic *enough,* not pluralist *enough.* But this strategy would require a much more egalitarian approach to the first amendment than current doctrine allows; and it would surely conflict with the understandings now coalescing around the word "pluralism"—that is, a guarantee of formal equality of access to the political process under conditions of radically unequal economic and social power. In the last analysis, it does not much matter whether we call the more egalitarian vision the "true" form of pluralism or an alteruative to pluralism (as it presently exists). I am concerned here to criticize what democratic pluralism has become, not to deny what it could be.

III. CONTENT NEUTRALITY AND THE PROBLEM OF ACCESS

One of the legacies of the success of New Deal liberals in establishing the preferred position of the first amendment is the present-day distinction between content regulation and time, place, and manner regulation. The former was subjected to the highest level of scrutiny, while the latter was subject only to the requirement of reasonableness, provided always that the regulation was content neutral. The content/form distinction in speech was not the only possible solution to the problems of first amendment law. However, in light of the progressive purpose of protecting political dissent and unpopular types of speech, the distinction made a good deal of sense. By conceding the state's power to balance interests in social order against speech rights where only time, place, and manner regulation was concerued, left-libertarians made more plausible a rigid prohibition against government censorship of content.

The distinction between time, place, and manner regulation and content regulation bears a striking resemblance to the process/substance distinction that figures so prominently in 20th century American law. It also mirrors, at the level of first amendment doctrine, the agnosticism about the public interest that is so characteristic of democratic pluralism. Since no one can know in advance what is in the public interest (at least before the legislature votes), people must be free to speak their minds on any subject and advocate any position, no matter how ridiculous or wicked it may appear to others. Regulation of speech henceforth must be confined to issues of procedure—that is, where and when one may speak—to ensure that debate on the great issues of the day takes place in an orderly manner. Indeed, one even might go so far as to say that the distinction between form and content regulation mimics at a lower level an even grander distinction in liberal political theory—the priority of the Right over individual ideas of the Good. The state is not permitted to

elevate any particular theory of the Good over any other, but it is entitled to demarcate the basic structure of rights within which private parties pursue (or, as here, advocate) their own visions of the Good.

Nevertheless, formal guarantees of liberty and neutrality, whatever their original progressive meaning, can serve quite different functions as time passes. If history has demonstrated that a formal guarantee of contractual liberty—with no inquiry into questions of bargaining power and the adequacy of consideration—proved ultimately unsatisfactory (because unjust) and even incoherent (because not truly substantively neutral), repeating the same moves in the area of expressive liberty is unlikely to fare any better. And indeed, what was true for economic liberty has turned out to be no less true for speech several generations later. In the process, the progressive vision of democratic pluralism increasingly has come to serve nonprogressive purposes.[44]

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44. For a useful summary of the dilemmas produced by interest group pluralism, see Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the* Noerr-Pennington *Doctrine,* 41 HASTINGS L.J. 905, 937-59 (1990). Dissatisfaction with pluralism has spawned two important schools of thought in contemporary legal scholarship—public choice theory and republicanism. Because pluralism is relatively agnostic as to what legislation is in the public interest, one cannot easily tell special interest legislation from legislation that serves or is mistakenly but sincerely believed to serve the public interest. Every enactment may be viewed as having both a naughty and a nice purpose. Indeed, if one thoroughly accepts the agnosticism of what I have called democratic pluralism, there is, quite simply, nothing from which "the public interest" could differ. Conversely, all forms of legislation become special interest legislation. Every civil rights bill, every offer of relief to widows and orphans, can be reconceptualized as self-centered rent seeking with respect to some interest group. Once pluralism becomes the orthodoxy of the day, public choice theory is not far behind.

Conservative thinkers in the law and economics tradition, who retain faith in the relatively neutral value of economic efficiency (which is considered by these thinkers as always in the public interest), can use public choice theory to criticize legislative enactments to the extent that they result in economic inefficiency (which they often do). Miraculously, then, one can reestablish the wisdom of *Lochner*-era restraints on majoritarian interference with property rights through the very framework of pluralist assumptions that were believed to call this jurisprudence into disrepute.

Not surprisingly, the American left has recoiled from these conclusions. The left, as concerned as the right with the dominance of "special interests," is nevertheless convinced that protection of welfare and civil rights is different in kind from the unabashed pursuit of lucre through the democratic process. Therefore, it has become necessary for the left to establish a vantage point from which the public interest can be defined and asserted. Hence the attraction of left-liberals to republicanism and other forms of communitarianism, which focus on the need for social solidarity and the potentialities of altruism and assert a public interest separate and apart from the interests of particular individuals or social groups. Although much celebrated by political theorists and historians for some twenty years previously, civic republicanism arrived as a force in legal scholarship coincident with the bicentennial of the Constitution. It appeared to offer yet another way of justifying judicial protection of rights and interests that had so far rested uneasily within the confines of demoeratic pluralist theory. The movement on the left to recover and transform republicanism—a theory of politics that was, even in its own day, based upon the existence and preservation of rigid forms of social hierarchy—demonstrates how serious the problems of democratic pluralism have become for the left.

One might begin the analysis of the problems of formal equality in democratic pluralism by pointing out that the ideal of eliminating content based regulation was never realized in practice. This is true even if one views the McCarthy Era cases as deviations from "true" first amendment doctrine. The illusion of content neutrality could only be achieved by viewing certain types of speech as not "speech"—for example, obscenity, commercial speech, and "fighting words."[45] The very act of carving out these classes was akin to content regulation. Moreover, despite the constitutionalization of defamation and privacy law begun with *New York Times Co. v. Sullivan,*[46] many common law rules of libel and slander, which were quite directly concerned with content, remained intact. Indeed, even with respect to public figures, inquiry into content by juries was considered completely appropriate once actual malice had been proven, and the falsity of the communication was not only relevant but was essential to the plaintiff's case. And this is to say nothing of the well-known examples of fraud, perjury, and professional malpractice, which have never been considered "speech" for purposes of the first amendment.

Thus, the division of the doctrinal world into regulations of form (with relaxed scrutiny) and those of content (with heightened scrutiny) required a necessary ideological blindness. To the credit of left-libertarians, it was a blindness with which they were never fully comfortable. Justice Douglas was obviously bothered by what he viewed as the artificial exclusion of obscenity,[47] just as later judges and scholars came to be dissatisfied with the exclusion of commercial speech or an expansive definition of fighting words.[48] For this reason, many of the battles that left-libertarians fought (and won) were battles that sought to break down these categories, and give increased protection to "symbolic" speech, pornography, defamation, or commercial speech.

45. And indeed, this is what the Supreme Court did in effect in Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (describing libel, obscenity, and fighting words as "no essential part of any exposition of ideas"). Putting aside the particular categories actually carved out, I suspect that the basic strategy of *Chaplinsky*—defining away particular types of speech—was intellectually necessary to the success of democratic pluralism. A theory of formal equality of all speech—including these categories—otherwise could never have gotten off the ground.

46. 376 U.S. 254 (1964).

47. *See, e.g.,* Paris Adult Theatre v. Slaton, 413 U.S. 49, 70 (1973) (Douglas, J., dissenting); Miller v. California, 413 U.S. 15, 37 (1973) (Douglas, J., dissenting); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 424 (1966) (Douglas, J., concurring in the judgment).

48. *See, e.g.,* Redish, *The Value of Free Speech,* 130 U. PA. L. REV. 591 (1982) (justifying expanded protection for obscenity, fighting words, and commercial speech under theory that first amendment protects "individual self-realization").

Even if one forgot for the moment that the firm rule of "no content-based regulation" had been purchased at the cost of clearly content-based distinctions, there was a still more troublesome problem that arose as soon as cases involving time, place, and manner regulation became a regular portion of the dockets of the federal courts. Although the form/content distinction allowed "dangerous" speech to be protected, this guarantee of liberty promised only a formal liberty of speech and only a formal equality of opportunity for its exercise. Yet as is often the case, guarantees of formal liberty and formal equality generally favor those groups in society that are already the most powerfnl. Guarantees of formal liberty and formal equality generally do not guarantee, and indeed may sometimes even thwart, substantive liberty and substantive equality.

This has proved to be the case in first amendment law. Even as the formal liberty of speech—freedom from content-based censorship—was enshrined in *Brandenburg v. Ohio,* the federal courts found themselves faced with increasing difficulties concerning the question of substantive liberty. At its inception, this problem was conceptualized as the issue of access to government property or, still more technically, the question of what constituted a "public forum." And this question, seen as the paradigmatic issue in time, place, and manner regulation, has led to less and less protection of speech.

The public forum cases of the past twenty years have produced exactly what one would expect from a guarantee of formal equality in conditions of substantive economic inequality. They have demonstrated that a low level of scrutiny in cases involving time, place, and manner regulation will produce not only less speech overall, but less speech from the least powerful groups in society.[49] As Justice Marshall pointed out in *Clark v. Committee for Creative Non-Violence,* most regulators, although not opposed to free speech as an abstract principle, nevertheless like a quiet life.[50] For this reason, they have no incentives to increase access any more than is constitutionally required. And if the Constitution requires less and less, then access will diminish accordingly. The result is that the groups who most need inexpensive or free access (usually the groups most on the outs) are the ones who end up bearing the brunt of content-neutral regulations.[51] The notion that protection of formal

49. *See infra* note 51 and accompanying text.

50. 468 U.S. 288 (1984) (Marshall, J., dissenting).

51. *Id.* at 313-16. For further discussion of the problem, see Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations,* 78 NW. U.L. REV. 937 (1983); Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication,* 70 VA. L. REV. 1219 (1984); Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials,* 32 BUFFALO L. REV. 175 (1983); Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas,* 74 GEO.

equality of economic liberty can lead to unacceptable degrees of substantive inequality has been understood for many years; it should hardly be surprising, then, that a similar analysis applies to the liberty of expression.[52]

As I have noted above, the problem of access traditionally has been viewed in terms of access to government property; this has become the paradigmatic situation in which the problem arises. Nevertheless, another group of cases that have reached the federal courts have been conceptualized as involving the question whether a speaker should have access to what was nominally private property.[53] Interestingly, the pro-access strategy has been to assimilate these cases into the public forum cases. The goal has been to show that there was "state action" after all—that the private property in question was effectively equivalent to the sort of government property that was in turn thought to constitute a public forum.

I believe that this general approach to the issue of access needs to be rethought. I do not mean to suggest that it is not useful in some cases, or that considerable good has not come from it. The public forum/state action debate correctly captures an important idea that the legal realists

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L.J. 257 (1985); Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987); Redish, *The Content Distinction in First Amendment Law*, 34 STAN. L. REV. 113 (1981); Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987). Note that the traditional reasons given against licensing schemes in the area of content regulation are also perfectly good arguments against content-neutral, regulatory schemes. Licensing schemes make it easier for regulators to deny access; they lack formality and procedural safeguards; they shift the burden of access to the person seeking a license; regulators have institutional incentives to avoid controversy and social disruption; and regulators also have institutional incentives to find reasons to regulate in order to justify their existence. *See* Emerson, *The Doctrine of Prior Restraint*, LAW & CONTEMP. PROBS., Autumn 1955, at 648, 656-60. The fact that courts do not take these arguments as seriously in content-neutral schemes of regulation is simply another consequence of the distinction between form and substance in modern first amendment law.

52. Of course, there is a further connection between the strategy of content neutrality and the resulting substantive inequality that public forum doctrine has generated. In speech, no less than in contract, guarantees of substantive equality require one to treat particular persons differently because of their preexisting status and power. Yet often one of the best ways to identify the stronger or weaker parties is in terms of who they are and what they stand for. This sits uneasily with the requirement of content neutrality.

53. *E.g.*, Marsh v. Alabama, 326 U.S. 501 (1946) (access to streets of company town for distribution of handbills could not constitutionally be denied); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (peaceful labor picketing of business enterprise located within shopping center constitutionally protected); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (upholding privately owned shopping center's ban on distribution of handbills when handbilling was unrelated to shopping center's operations); Hudgens v. NLRB, 424 U.S. 507 (1976) (overruling *Logan Valley*); PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (holding that state constitutional right to enter shopping centers for speech and petitioning did not violate free speech or just compensation rights of shopping center owner). *See generally* Schauer, Hudgens v. NLRB *and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433 (1977).

bequeathed to us in the area of economic liberty—that the distinction between public and private law, and between public and private abridgements of liberty, is both tenuous and socially constructed, and that it can be made to disappear in certain contexts when pressed sufficiently. Nevertheless, I believe that the strategy of showing that private forums are really analogous to public forums is unhelpful in many cases because it simply reasserts the distinction between public and private abridgement of rights in a different way.

The public forum/state action debate assumes that the right of access in the ordinary case is something that one has to *government* property, and that, absent a showing of "government-like" behavior, private parties do not need to give access to speech to other private parties. The assumption that the public forum and state action cases shared was that one had to show state interference (or its equivalent) with speech in order to demonstrate a restraint on liberty. What this approach neglects is that private restraints on liberty may have been the most serious obstacles to the exercise of free speech rights all along, even in cases that appear at first glance to involve only governmental restraints on liberty. Thus, the problem with the argument that private actors are really state actors is not that it fails to note the similarity of public and private, but that the form of analogical reasoning goes in the wrong direction.

To understand this point, let us go back to the seminal case on public forum law, *Hague v. CIO.*[54] *Hague,* like many other public forum cases, involved a group of protesters (here the CIO and the ACLU) who wished to protest particular conditions they disagreed with and sought to gain members and public support through organizing public meetings and distributing literature.[55] Groups such as these have a message to deliver, but where are they to deliver it? If they owned real property, the answer would be simple. They could use their own property as the site of their demonstrations: They could march around their own houses and distribute literature in their own front yards.[56]

54. 307 U.S. 496 (1939) (plurality opinion).

55. The actual facts of *Hague v. CIO* are considerably more complicated. They involve the efforts of the Mayor of Jersey City, Frank Hague, to break up the CIO's organizing efforts by means of an ordinance that prohibited all public meetings in public places without a permit. In essence, Mayor Hague's strategy was to make it impossible for the CIO to engage in expressive activities anywhere within the city limits. *See* Hague v. CIO, 101 F.2d 774, 778-80 (3d Cir. 1939), *modified,* 307 U.S. 496 (1939). The district court's opinion, Hague v. CIO, 25 F. Supp. 127 (D.N.J. 1938), makes interesting reading if only for its unusual practice of juxtaposing literally pages and pages of short quotations on the subjects of democracy and the rights of free speech.

56. Assuming, of course, that such use of their own property did not create a nuisance. But this is simply another way of stating the point that one's freedom of expression is limited by private rights created and enforced by the state.

However, what is crucial to situations in which protesters seek access to a public forum is that most of the protesters in such situations do not, in fact, own much property. Moreover, one of the most effective places for them to get their message across might be on the largest or most centrally located plots of land in the city, where, we may assume, they own no property at all.[57]

Of course, the possibility exists that the strikers could purchase the right to form a picket line on the land of a centrally located landowner, or one whose property was across the street from a particular employer or government official whose practices they wished to protest. That is to say, they could go into the market and buy rights to the use of another's property for purposes of expression. However, the central problem in this case is, once again, that the strikers might not have a great deal of property (real or otherwise), and their budget constraints might well prevent this solution to the problem of access.[58]

If there were no guarantee of public forums like streets and parks, and we left the strikers to the vicissitudes of the marketplace, I suspect many would think that their free speech rights had been denied, even though they were formally guaranteed the right to speak. To be sure, a *Lochner*-era formalist might argue that if one lacks sufficient economic

57. Again, the situation in *Hague* itself was more complex. In *Hague,* the CIO and the ACLU planned open air meetings and demonstrations in several different places in Jersey City. Many of the organizers came from outside of the state of New Jersey and the city of Jersey City. Fear of outside labor agitators descending upon Jersey City was precisely why Mayor Hague was so determined to use bullying tactics to keep them away. For example, protesters were routinely rounded up by police and deposited outside the city limits. Moreover, in *Hague,* the Jersey City police even tried to prevent gatherings on *private* property owned by the CIO by arresting persons found at the CIO headquarters, searching the premises and confiscating circulars and handbills. *See* 101 F.2d at 778. Finally, I should note that today labor picketing is treated quite differently from other forms of protest, and the actual fact situation in *Hague v. CIO* itself might be conceptualized differently under present-day doctrines of federal labor law. In my discussion of first amendment issues, therefore, I assume that the nature of the protest does not place it under the more stringent rules regarding labor picketing. For example, imagine that the strikers in our *Hague*-like hypothetical are protesting in support of the general principles of free speech and political association.

58. There are further problems, of course. The owner of the choicest parcels might be unwilling to bargain at all, perhaps for ideological reasons. It is also possible that there would be problems of monopoly. A landowner might realize that no other landowner had anywhere near as effective a location in which to protest, and seek to extract monopoly profits. Even if there were more than one landowner, or more than one location in which effeetive picketing could take place, the landowners in the most desirable locations would probably charge more, all things being equal, and thus the strikers might not be able to afford a protest at a level of effectiveness that would make the picketing worthwhile. These possibilities, however, simply reinforce my fundamental point: The effective exercise of speech rights in this ease depends upon economic power to purchase property rights. The effectiveness of the protest varies according to the property rights of others because these rights determine the price of access. If market imperfections or high transaction costs make such exchanges even more difficult, this simply enhances the nature of the diffieulty and the importance of already owning property suitable for expressive purposes.

power to purchase a place to protest, this fact alone does not constitute a direct infringement of liberty by the state. Yet just as a legal realist might argue that economic liberty is more than the right to sign contracts of adhesion, we understand that expressive liberty is not simply the right to make noises in the air directed to no one in particular. Nor, we might add, is the freedom of the press simply the right to place particular marks on pieces of paper, which are then never seen or read again. Effective communication, or rather its substantive possibility, is an unavoidable component of the liberty of speech, just as effective bargaining, or its substantive possibility, is an essential component of economic liberty. How effective an exercise of liberty must be guaranteed, of course, is a difficult problem. It is a problem that cannot be solved in the abstract. The legal realists were quite aware of this fact about economic liberty, a recognition that was intimately related to their distrust of conceptualism and formalism. For them, whether one had real liberty of contract was always a matter of degree.

From the foregoing discussion, you can see that the reason why public forums are essential to liberty of expression is that otherwise one's right to speak would depend upon one's ability to purchase property rights from private parties. If one had little property, then one would have no liberty in fact, even if a formal right to speak were guaranteed. Thus what appears to be a question of the individual's rights against the government actually is related to the private power of property owners—a power that in turu results from legal protections afforded to the economic system through the rules of private property and criminal trespass.

The existence of access thus depends upon the state in two senses—first, as the controller of its own property, and second, as the creator and sustainer of property rights that allow private parties to deny access unless they receive compensation. When Justice Black defended the goverument's right to deny access in *Adderley v. Florida* on grounds that "[t]he government, no less than a private owner of property, has the right to preserve the property under its control for the use to which it is lawfully dedicated,"[59] he said more than he knew. One can analogize the government's "rights" to those of the property owner only because the state has already decided that the owner's property rights trump any contrary interest of third parties in free expression.[60]

59. 385 U.S. 39, 47 (1966) (holding that the state could deny access to entrance of jail and jail driveway for demonstration by students protesting arrest and incarceration of fellow students).

60. As the Supreme Court explicitly held in Lloyd Corp. v. Tanner, 407 U.S. 551, 567-68 (1972).

Once we understand that the problem of access is a problem of both private and public power, several alternative solutions present themselves. First, the government could provide a voucher system to subsidize expressive activity. People could use their vouchers to purchase access to private property for communicative purposes. Second, the government could tax all private landowners (and by analogy, other owners of communication-producing properties), unless they agreed to make their property a forum available for expression at certain times. Third, the government could simply alter existing property rights to create an easement that would require private landowners (and other owners of communicative property) to allow protests without compensation.

The fourth alternative is what Justice Roberts actually did in *Hague v. CIO.* He created "a kind of First Amendment easement" against the government for the use of streets and parks.[61] One might think that this is better than the other solutions, especially a tax or a system of easements on private property. When the government grants access to a public forum, the argument goes, it is not thereby diminishing the property rights of individuals. Moreover, the public forum solution, unlike the voucher system, does not appear to turn the first amendment into a "positive" liberty—a right to wealth or government subsidy akin to welfare rights or education. It preserves the idea that civil rights are essentially negative rights—the right to have government not do something to you.

Nevertheless, this analysis is flawed. Even when a public forum is created, the government is still engaging in a form of redistribution. It is transferring the power of the state to certain citizens who want to use the forum for expressive activity and away from other citizens who want the streets and parks kept clear of demonstrations and protests. Grants of access limit some private interests as much as they empower others. There is no better example of this than *Schneider v. State,* in which the Supreme Court held that the interest in free speech was so great that a municipal ban on leafletting violated the Constitution.[62] The effect, as Professor Tribe points out, was that the state was forced to subsidize such expressive activity by absorbing the costs of extra litter prevention.[63] Interestingly, Professor Tribe conceptualizes the problem of gov-

61. The phrase is Professor Kalven's. *See* Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 13; Stone, *Fora Americana: Speech in Public Places,* 1974 SUP. CT. REV. 233, 238. The analogy between first amendment access and traditional property easements, however, already appears in Judge Clark's district court opinion in *Hague* in which the court speaks of "an easement of assemblage [in] . . . parks." Hague v. CIO, 25 F. Supp. 127, 145 (D.N.J. 1938), *modified,* 307 U.S. 496 (1939); *see also id.* at 146, 151.

62. 308 U.S. 147 (1939).

63. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 964, 998 (2d. ed. 1988).

ernmental access as a governmental subsidy for speech. His analysis is quite correct, and we could take it one step further by noting that the governmental subsidy is also a transfer of power away from private individuals as well—for now there are higher taxes, and now one's cheerful walks through the park will be disturbed by handbills thrust in one's face and lying beneath one's feet.

One might insist nevertheless that there is an important difference between the creation of first amendment easements in government property and redistribution from private individuals. If the government grants an easement against a particular piece of private property, then the burden of redistribution falls on a specific individual or a relative handful of individuals. In contrast, the redistribution involved in the creation and maintenance of a public forum is spread in theory over a larger group of individuals, all of whom (for example) use the streets and parks. But this argument does not prove that government does not or should not redistribute for the purpose of guaranteeing expressive liberty. It merely demonstrates that it is in some eases better and fairer to spread the redistributive burden over as large a group as possible. Assigning general tax revenues for a voucher system or creating a uniform system of easements on everyone's property would satisfy this demand for generality equally well.

The point of this exercise in reconceptualization is simply to note that modern first amendment doctrine has seen the issue of access primarily in terms of access to public property and only in the exceptional case as an issue of access to private property. Moreover, even these exceptional cases must be explained in terms of their similarities to public forums. I suggest that it might be more fruitful in some cases to think of it the other way around. Perhaps we should reconceptualize access to public forums as a special case of access to private forums, in which the government transfers power from one group of private citizens to another by means of control of governmental property, just as it does so through the use of property and trespass laws.

What is the advantage of this reconceptualization? The more orthodox view of access tends to discomfit people who think of the first amendment as a negative right—a right to be free from governmental interference. Requests for access look too much like what in one sense they are—requests for affirmative assistance from the goverument. On the other hand, if one sees the problem of access as essentially a division of power between speech rights of individuals and property rights of other individuals, then the issue of affirmative versus negative rights vanishes, just as it does in the case of defamation. No one thinks of *New York Times Co. v. Sullivan* as establishing an affirmative right to exploit

the reputational "property" of public officials. Rather, it is seen as a balancing of competing private interests in speech and reputation.

Viewed in this way, we should stop trying to show that cases such as *Hudgens v. NLRB*[64] or *CBS v. Democratic National Committee*[65] raise the same issues as the public forum cases. For that way of thinking simply reinforces the exclusively public nature of first amendment law by trying to assimilate all of our problems of speech regulation to that model. Rather, we should try exploring why the public forum cases raise the same issues as *Hudgens* and *CBS v. Democratic National Committee*—that public expansion or contraction of rights is really an issue of relations of power between private individuals.[66] I thus believe that a legal realist approach to the first amendment involves collapsing the distinction between public and private power in specific contexts, but I suggest we do so in the opposite direction. When we do so we can begin to reinterpret first amendment law in terms not of governmental control, but rather in terms of private power and subordination.[67]

IV. TECHNOLOGY AND THE MEANS OF COMMUNICATION

The above analysis of public forum law argues that our freedom to speak depends upon access to particular forms of property. More generally, access is determined by control of what we might call the "means of communication,"[68] which include access to various places to speak (pub-

64. 424 U.S. 507 (1976) (upholding right of private shopping mall owner to exclude labor picketers).

65. 412 U.S. 94 (1973) (first amendment does not require broadcast licensees to sell advertising time to all private groups for expressive purposes).

66. A good example of the interrelation between the scope of public access and the balance of private power is Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). In *Perry*, a school district permitted an incumbent teacher's union to use the employees' interschool mailboxes while denying access to a rival union. The Court held that the denial of access did not violate the Constitution because the mailbox system was not a public forum. However, the school board's access policy was actually the result of a collective bargaining agreement with the incumbent union when it defeated the rival union in a representation election. The access policy in the collective bargaining agreement was obviously designed to help perpetuate the incumbent union's status by making it more difficult for the rival union to communicate quickly and easily with all of the teachers. The Court's decision, phrased in terms only of the private citizen's right of access to public property, nevertheless clearly had ramifications for the relative economic and political power of two private parties, namely, the unions.

67. For this reason, I believe that Professor MacKinnon's work on pornography (although it is not specifically about issues of access to communicative technology) is of great importance to other areas of first amendment law. For MacKinnon has emphasized over and over again that rights to speak involve relations of power between private individuals. *Cf.* C. MACKINNON, *supra* note 7, at 155-56 (separation of public and private conceptions of right in first amendment law supports and facilitates domination of women by men and permits men to silence women).

68. My pun on the familiar Marxist term "means of production" is both deliberate and ironic. It is deliberate because communication is like production in that it requires investment in certain

lic and private real property) and access to various ways of speaking (for example, publishing houses, television stations, and other communication media). One can have control over the means of communication because one owns them outright, or because one has purchased access from those who do own them, or because the law requires the owner to give access.

As noted above, Justice Roberts' solution to the problem of access to the means of communication—the creation of a first amendment easement in streets and parks—proceeded from the fiction that expressive activity was a traditional use of streets and parks. Yet this form of justification had several unfortunate consequences. By this fiction, Justice Roberts seemed to establish that the government, like an owner of private property, had the right to exclude persons from the expressive use of its property, except where it traditionally had suffered their presence. Moreover, by emphasizing that access to streets and parks was *traditional* (an unjustified assumption in any case—most municipalities up to that time wanted nothing less than protests in the streets),[69] Roberts did two things. First, he tied the question of access to the question whether a particular form of access was of the type that the state had previously allowed. Second, he tied the question of access to *traditional technologies of communication*—that is, protesting in streets and parks, handing out leaflets, and so forth. However, Roberts wrote his opinion as technologies of communication were rapidly changing. It soon would become clear that these traditional technologies of communication were as efficacious in a world flooded by the communications of mass media as a blacksmith's forge in an era of mass industrialization.

I have just spoken of "technologies of communication," and I believe that this concept is crucial to a realist analysis of first amendment law.[70] Although we normally think of liberty as freedom from restraint and therefore as wholly unrelated to the existing state of technological achievement, in fact many human liberties are dependent on forms of

forms of property. It is ironic because belief in the power of the means of communication ultimately rests upon a rejection of a materialist conception of history. Control of the means of communication matters because ideas matter, and ideas matter because they influence people to do things they would otherwise not do, regardless of the present ownership of the means of production.

69. Roberts has justly been accused of conveniently overlooking the previous history of regulation of public protest. *See, e.g.*, Kairys, *supra* note 22, at 144. For an example of the earlier treatment of so-called "traditional" public forums, see Massachusetts v. Davis, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895) (Holmes, J.), *aff'd*, 167 U.S. 43 (1897) ("For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.").

70. For an important recent analysis of communicative technology, see I. DE SOLA POOL, TECHNOLOGIES OF FREEDOM (1983) (arguing against government regulation of the broadcast media).

technology for their exercise. Where the exercise of a liberty depends upon technology, access to that technology largely determines the substantive liberty of the actor. Sometimes this is because the liberty in question cannot be enjoyed in any form without a given level of technology. More commonly, however, it is because liberties are always in conflict. Access to widely different levels of technology by persons who seek to exercise competing liberties may place some actors at a very significant disadvantage with respect to others, and thus result in an effective denial of their liberty.

In the paradigmatic situation of the speaker on the soapbox, technology appears to play no part in the exercise of expressive liberty. One simply speaks, and one's voice is heard by others. These others are either convinced or not convinced, and further speech acts ensue, all using the "natural" tools of the human voice. In contrast, we recognize the pervasive role that technology plays in the production of wealth and economic value, at least once civilization has progressed past the point where wealth is created through brute labor alone. Indeed, as soon as tools are invented, the production of wealth depends upon technology. In present day America, reliance on technology and capital investment in the production of wealth is taken for granted. Wealth is not created simply through individual effort—rather we need technology to transform our labor into goods and services. Moreover, the type of labor that must be input is determined in large part by the requirements of available technology. Strength is required for some jobs, finesse for others. Physical stamina may be essential to the manual laborer, whereas a different sort of stamina may be needed by the bond trader or arbitrageur.

Yet many of the things that can be said of production of goods and services are true of communication and the production of information. Just as the power to create wealth relies to a large extent upon the existing technologies of the time, so does the power to communicate with and influence people. Of course some people are influential or good at communicating because they are better orators, painters, musicians, or writers than others. But the same is true of wealth creation. Some people are more skillful at using the existing technologies that produce wealth. Talents for effective communication do not simply preexist society, but also depend upon and adjust to, the nature of the technologies of the time. A great orator in Periclean Athens may have needed only a loud voice and a fluid style; in the era of Ronald Reagan, he must look natural in makeup and have some degree of facility with a Teleprompter.

The dependence of effective exercise of rights upon technology is a major source of the divergence between formal and substantive liberty, and this is as true of liberty of speech as it is for the liberty of contract. If

ownership, control, or other access to the means of production are essential to wealth creation, then ownership, control, or access to the means of communication are essential to effective communication. To put it bluntly, the more property one has, the greater one's ability to compete in the marketplace of ideas, just as in the ordinary marketplace. Similarly, to the extent that one does not own the means of communication, one must bargain with others to obtain access. We still retain a romantic vision of the great thinker who changes history through the strength of her ideas and the power of her charisma. But increasingly, technology swamps such "native ability." The president of a large corporation may not be as fluent a speaker as William Jennings Bryant or Jesse Jackson. But what does she care if she can hire the best advertising agency to formulate her message and the most attractive actor to recite it?[71]

This brings me back to Justice Roberts and the doctrine of the public forum. In his solution to the problem of access, Roberts chose a method that in the short run appeared not much less protective of access than a tax on or easement to private property. After all, protests on a neighbor's land next to a public park are probably no more effective than protests in the park itself. Thus, there was no compelling reason to create easements to private property when access to public property would do just as well. Nevertheless, as new technologies of communication outstripped older forms in terms of effectiveness, there was greater and greater significance to the difference between access to traditional forms of communication (available under public forum law) and access to newer forms that could only be purchased from private sources. There may well have been as many streets and parks as there were parcels of private land when Roberts wrote. But it soon would become clear that this parity was not preserved for other technologies. For each private newspaper, or television or radio station, there was not a corresponding government-owned forum open to all on a first come, first served basis.

Professor Fiss captures the essence of the problem when he argues that speech, like other resources, exists under conditions of scarcity.[72]

71. What we think of as individual effort "unaided" by economic power is often most effective at the beginning of a new technology. For example, everyone is familiar with stories of the computer hacker whose software program catapulted him or her to millionaire status in a matter of months. But as the computer industry matures, these sorts of success stories occur less and less frequently. The latest versions of the standard commercial software products now require armies of programmers, substantial expenditures on advertising promotions, and all of the other requirements of modern corporate marketing and production. Moreover, it may even make economic sense for existing market participants to engage in behavior that increases barriers to entry by new competitors, at least after an industry has reached a given level of maturity.

72. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987); Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986). Both of these essays are highly recommended for their fresh

This scarcity is of at least two types. First, effective communication (and that is, on the whole, the only sort of communication most people are interested in) costs money. Like all other desirable things, technologies of communication are scarce, and this has been true even when those technologies were primitive. If one person has a pleasant voice, it costs money to hire that voice as an advocate. If another person has a plot of land useful for organizing, the right to use that land costs money. If still another is the only literate person in a small village and therefore can transfer thoughts to paper and decipher them, this is also a technology of communication that costs money.[73]

Improved technology does not change this feature of scarcity. Even after printing presses are invented, some own them, while others do not. Paper costs money, as do typefaces, ink, and newspaper buildings. Educating people to read and write (which we tend to forget is necessary to much effective communication) involves an enormous investment of resources, so great in fact that it is often treated as a public good and delegated to the government. I suspect that if we opened up the air waves to competitive bidding—as some have suggested[74]—at the end of the bidding there would be no more space left, given a particular level of technological development. Where the technology that constitutes the dominant means of communication is inexpensive, we can expect that the problem of scarcity, and hence the distribution of property rights, will have somewhat less effect on speech. Yet as society changes and effective means of communication become increasingly expensive, the right to effective speech becomes increasingly linked to the distribution of property.

Effective communication is scarce not only in the sense that technologies of communication are limited. Communication is scarce also in the sense that there is only so much available audience time to go around.

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approach to the problems of first amendment law. For a spirited rejoinder, see Powe, *Scholarship and Markets*, 56 GEO. WASH. L. REV. 172 (1987).

73. Note that this argument about scarcity should be distinguished from the claim of "scarcity" made in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)—that regulation of broadcasting could be justified by natural limits to the number of persons who could broadcast simultaneously over the airwaves. As Professor Powe notes, the justification of content based regulation on the basis of a factual claim of comparative scarcity is spurious, given the much larger number of television and radio stations than newspapers. Powe, *"Or of the [Broadcast] Press,"* 55 TEX. L. REV. 39, 55-56 (1976). One might also note that despite fears of comparative scarcity, many cable, VHF, and UHF channels remain unused or underutilized in most communities. *See* I. DE SOLA POOL, *supra* note 70, at 138-54. My point is that *all* forms of communication are scarce to the extent they involve the expenditure of resources and control of communicative technology. It is the general scarcity of things of value, and not the particular scarcity of the medium of broadcasting, which is my concern here.

74. *See* Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 36 (1959); Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 256-57 (1982).

Although newer technologies like the mass media can reach more people more quickly, they still do not eliminate this second type of scarcity. Indeed, mass communication only increases the competition for audience attention. Simply put, if thirty percent of the American public is watching "Roseanne" on Tuesday nights, we can rest assured that they will not be listening to a speaker in the park criticizing U.S. foreign policy or reading a book on the history of American religion. In an earlier age in which one could reach only a limited audience with one's voice, it may have seemed that there was a plenitude of listeners, and audience scarcity was not a real phenomenon.[75] With the advent of mass media, however, we see all the more urgently that speech rights can come into conflict not only with the property rights of others, but also with the speech rights of others.

Of course this problem as well always existed in the abstract. To have a liberty interest (or "privilege" in the Hohfeldian sense[76]) meant that one could not be prevented by the state from engaging in certain behavior. It did not mean, however, that one could not be prevented from exercising that liberty because other private parties had soaked up all of the available resources for its effective exercise. One might have the freedom to park one's car in any space in a municipal parking lot, but that freedom is meaningless if all of the spaces are occupied by other private parties.

Thus my speech and your speech are always potentially in competition with each other. This is due partly to audience scarcity and technological scarcity. It is due also to the fact that one of the ways we exercise our liberty of speech is by not speaking, or rather by not having certain ideas or beliefs associated with us. For example, if we give protesters access to shopping malls, then the owner of the mall's freedom not to speak is endangered. Some people like to think that this is not a true abridgement of the freedom to speak because the shopping center owner can simply post a sign saying that she does not agree with the speech being made. I think this explanation simply defines the problem out of existence. You should try explaining this theory to a black entrepreneur who has to let the Klan march through her shiny new food court and see how receptive she is to the idea.

In like fashion, if we give Vietnam war opponents access to CBS's technology, we are diminishing CBS's right to speak, not to mention imposing an opportunity cost on it for the air time it could have sold for other purposes. In short, we cannot guarantee freedom of speech for

75. A different form of scarcity of access always existed because of the limited number of persons one could communicate with in a particular amount of time.

76. *See* Hohfeld, *supra* note 16, at 32-33.

everyone anymore than we could have vindicated everyone's conflicting freedom of association rights in *Brown v. Board of Education.*[77]

Let me summarize the argument so far. Modern public forum doctrine has obscured a fact about the right of free speech: Speech rights depend upon access to communicative technologies, which are forms of private property. The effective exercise of speech rights thus both depends upon one's own property rights, and is potentially in conflict with the property rights of others. Moreover, because of the relationship between speech rights and technology, speech rights are potentially in conflict with other speech rights.

It is not difficult to see the relevance of legal realism here. The legal realists taught us to look beyond the division of the world into public and private and recognize that the state is largely responsible for forms of private power that interfere with the effective exercise of private rights. Thus, for example, Robert Hale argued that a certain degree of coercion inheres in all economic transactions, and this coercion is due to the constellation of property and contract rights provided by the state. One has to contract with others to purchase food because they have property rights in food that the state will enforce.[78]

Nothing, however, has changed when we move from bread to broadcasting. One can have control over the means of communication because of ownership, purchase of access, or access enforced by law. Yet following the legal realists, we might note that the third situation actually includes the first two. Ownership of the means of communication and the right to sell or to refuse to sell access are state-enforced guarantees and denials of access. Whenever the state enforces an advertising contract, allows a person to own and run a newspaper, or grants a broadcast license, it is sanctioning a grant of access to the means of communication. Whenever the state ejects a protester from private property, or enforces the right of CBS to refuse to broadcast the views of Vietnam War opponents, it is sanctioning a denial of access to the means of communication. If freedom of contract is a state enforced monopoly in the use and disposition of the means of production, then freedom of speech can be reinterpreted as a state enforced monopoly in the use and disposition of the means of communication.

77. 347 U.S. 483 (1954); *see* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 34 (1959).

78. Hale, *Coercion, supra* note 13, at 470-76. Peller's treatment of Hale's arguments, Peller, *supra* note 13, at 1232-40, is especially good. *See also* Samuels, *The Economy as a System of Power and Its Legal Bases: The Legal Economics of Robert Lee Hale,* 27 U. MIAMI L. REV. 261 (1973) (summary and exposition of Hale's work).

This type of analysis holds true even in the simple case of individual speech. The right to speak is the state's sanction to use one's voice to convince others (without fear of direct state punishment), as well as the right not to be made a mouthpiece to shout the slogans of others. Note, however, that the state simultaneously guarantees the right of private parties to harm a speaker's interests because of the content of one's speech—for example, to refuse to associate with the speaker, to refuse to sell air time or newspaper space to the speaker, or to boycott the speaker's business. Private forms of speech control thus owe their efficacy in part to the existing private rights of social and economic power guaranteed by the state. The right to boycott a business owned by a racist would mean nothing if one did not have the right to purchase one's goods elsewhere. And, as we have already seen, the right to deny access to broadcast and print media exists only because of the state's rules of property and contract.[79]

If freedom of speech is a state-granted monopoly in the use and disposition of the means of communication, it becomes increasingly difficult to see the liberty of speech as merely a grant of formal equal liberty to speak, unrelated to issues of substantive equality. It becomes problematic to claim that the state has not exercised a substantive choice when a William Loeb or Ruppert Murdoch can reach a large number of people, and persons with opposite but equally extreme views can reach very few.[80]

Of course, one might respond that the state is involved in these cases—that it does intervene and that its intervention is not value-free—but that the value that it imposes is one of neutrality. However, if the

79. Thus, even state laws regarding theft and destruction of property affect access to the means of communication. One can communicate by commandeering a television station and holding the station managers hostage until they deliver one's message. Indeed, one can also communicate a message by killing someone, or by blowing up a building. That is one reason why acts of political terrorism are performed. (Another is that antisocial behavior gains media attention—it is the poor person's way to gain access to the mass media.) Of course, we do not allow people to engage in acts of political terrorism, and we are quite right to forbid them, even if such prohibitions have an incidental impact on the communicative power of private parties. We also do not allow newspapers to cut down trees to make paper unless they purchase the appropriate property rights. Nor, I suspect, would we allow even President Bush to seize a flag factory during a Presidential campaign in order to convey a patriotic message. My point is simply that we need not look very far for restraints on our communicative powers. They are all around us, in the social and economic structures the law sustains and enforces. The state is always granting and denying access to the means of communication through its distribution of economic power to private parties, power that in turn can be used by private parties to grant or deny such access.

80. More commonly, marketplace forces require the mass media to cater to the great mass of public tastes. Thus the mass media tend to reinforce mainstream ideas—the path of least audience resistance. To this end, they generally offer radical ideas on the left and right only as the intellectual equivalent of a freak show, thereby strengthening our faith in mainstream thought by displaying unusual ideas and opinions as things to ogle and marvel at.

state is always implicated in access to speech, if the state's contract and property laws always help determine one's freedom of speech because they determine access to the means of communication, then it is difficult to argue that the state is neutral when some persons have vastly greater access to the means of communication than others because of vastly more economic power. The state is no more neutral in these decisions than it is when it enforces or chooses not to enforce contracts of adhesion or contracts with unconscionable terms.

One might object that whatever one's feelings about the assumption that formal equality does not involve state interference with liberty, this theory is written into our Constitution because the first amendment says that Congress shall make no law abridging the freedom of speech. However, this argument proves too much. Under a theory of formal equality, the government would have no obligation to provide any public forums at all. Moreover, if one accepts the force of the legal realist critique as applied to contract, the rules of property themselves affect and therefore may potentially "abridge" the freedom of speech. It all depends upon what you mean by an "abridgement," and we are back once again to the issue of substantive liberty.

I realize that these conclusions seem to discount the value of intellectually safe harbors like formal equality and content neutrality. But my point is that once the legal realist critique of economic liberty is applied to the first amendment, these safe harbors can no longer seem quite as safe as they did before. Certainly I do not pretend to have complete solutions to the problem of access. I am simply asking that we abandon belief in a rigid division of public and private spheres in the realm of communication and information that we jettisoned long ago in the areas of property and economic exchange. A libertarian conception of free speech has served us well in the past, but like all conceptions, it can and eventually must run out of steam and degenerate into a sterile conception that will hinder progressive reform rather than aid it.

What I have said suggests that redistributive legislation might be a good means of enhancing the substantive liberty of speech (and many other liberties as well, one might add). It also suggests that governmental investment in the modern technological equivalents of traditional public forums—for example, radio and television—would help ameliorate the situation. Whether such expenditures are required constitutionally by the first amendment is a more complicated question. Yet if (as I believe to be the case) the first amendment requires the government to create at least some public forums that provide effective means of communication, I believe the answer to that question must be yes.

The key word in the last paragraph, it seems to me, is "effective." Just as I accept the legal realist argument that questions of economic duress and substantive unconscionability are matters of degree in the determination of economic liberty, I also believe that the question of effective access to the means of communication is always a matter of degree. This does not mean that once having weighed the relevant factors, we should not adopt rules that approximate our concerns but have the virtue of being relatively easy to apply. The point I am making is true of every affirmative liberty (such as education), and it is especially true of every negative liberty that turns out to be an affirmative liberty (like speech). Where affirmative liberties are at stake, the most that courts can do is define a range of alternatives for the political branches to pick from, or direct the political branches to propose their own alternatives and then accept them if they appear reasonably calculated to succeed. In other words, the effective protection of affirmative liberties requires considerably more judicial restraint than the protection of negative liberties.

At this point a few words about campaign finance are in order. The arguments I have just given, which tie the liberty of free speech to communicative technology and thus to property rights, may seem to concede too much to the "money is speech" position used in the past to thwart campaign finance reform. But I think this concession (if it is a concession) is intellectually necessary for a legal realist analysis to proceed. If control of the means of communication is necessary for effective speech, and if such control requires property, then speech rights and property rights are intimately related—property is what gives one access to the means of communication. The entire argument has been based upon the assumption that one of the best ways to shut someone up is to impoverish them. If property and speech rights are intimately related, that is all the more reason to regulate property used to influence the outcome of political campaigns.

I suspect that the slogan "money is not speech" is attractive because it appeals to a certain humanistic vision—that there is something quite different between the situation of a lone individual expressing her views and the purchase of hired mouths using hired expressions created by hired minds to saturate the airwaves with ideological drivel. Yet in one sense, this humanistic vision really turns upon a set of unstated egalitarian assumptions about economic and social power. Certainly we would have no objection to a person with a speech impediment hiring someone to do her talking for her; that is because we think that, under these circumstances, it is fair for such a person to boost her communicative powers. Modern political campaigns seem a far cry from this example because of the massive amounts of economic power expended to get the

message across. I think we should isolate the egalitarian assumptions implicit in the "money is not speech" position and put them to their best use—the justification of campaign finance reforms on the grounds that gross inequalities of economic power destroy the integrity of the political process.

My conclusion, then, is that campaign finance reforms may be constitutional not because money is not speech, but because in a very important sense it is. The government is responsible for inequalities in access to the means of communication because it has created the system of property rights that makes such inequalities possible. Therefore, it is not only wrong but also incoherent for opponents of campaign finance reform to contend that the government should not regulate access to the political process. Government already regulates access to the political process—the first amendment simply demands that it do so fairly. At the very least the first amendment should not act as a barrier to attempts to ensure that the process works equitably. Thus, the advantage of a legal realist analysis over more traditional approaches is that it allows one to hoist the opponents of campaign finance reform by their own petards.

V. HARASSMENT AND THE PROBLEM OF THE CAPTIVE AUDIENCE

We can generalize our previous discussion of public forum law in the following way: The right of free speech does not consist merely in protecting citizens from being harmed by the government. It also includes the government's grant of power to private citizens to harm others through the exercise of their right to speak. It is a statement by the government that a particular exercise of power is permissible, and that the other party has no right to prevent the exercise of that power. Moreover, protecting freedom of speech also involves protecting the freedom not to speak, that is, protecting a person's right not to be associated with a particular type of speech, or the person's right to deny access to a particular means of communication that she controls. Rights to speak and not to speak, to grant access and to deny access, are thus delegations of public power; public rights against the government are also private rights against others.

Whenever the government grants private parties the right to withhold benefits to others, issues of coercion arise. We have already seen that a system of property rights "coerces" persons to bargain for access to the means of communication. But speakers are not the only persons who suffer coercion—the recipient of the message also can be coerced into listening. In the usual libertarian discussion of free speech, the problem of audience coercion does not exist or is relatively insignificant. The listening party is free to listen, avert her ears, or engage in counter-

speech of her own. To be sure, there are exceptions. Some regulation of speech is permitted where there is a captive audience, because in that case the listening party is forced to listen against her will.[81] The libertarian vision thus rests upon an important distinction between exceptional situations in which there is a captive audience and the usual or normal case of speech in which these problems do not exist to any significant degree. Put even more generally, the libertarian vision rests upon a distinction between communication in conditions of free will and communication under duress.

Once we recharacterize the situation in this way, however, it is clear that the problem of the captive audience is much like the problem of access. There is simply no bright line test to tell us whether a situation of speech involves coercion or not.[82] Although we might wish for a world divided into audiences who had the free choice to avoid the speaker and those who were forced to listen under duress, the world is not so constructed. It is all a matter of degree. Indeed, we can go further and note that just as all contractual situations can be reconceptualized as involving a form of economic coercion, all speech situations involve different degrees of coercion as well.

This claim must surely seem odd at first. Yet it is a simple application of an argument made by the legal realists long ago in the context of economic liberty. Here we must turn again to the work of Robert Hale. Hale pointed out that the reason why we contract with other people is because they have property rights. The coercion inherent in market transactions consists precisely in the fact that others can refuse to deal with us or give us things we want unless we pay them for the privilege. Indeed, if we try to take something from them without contracting, they can invoke the power of the state to punish us.[83] Hale's point was simply that you can coerce someone to do something when you have rights and can threaten to exercise them. Sometimes this coercion is not at all unpleasant, and we hardly notice it as such. In other cases, such as con-

81. FCC v. Pacifica Found., 438 U.S. 726 (1978) (FCC could prohibit certain types of offensive speech on the airwaves because persons receiving such broadcasts in their homes are in position of captive audience); Lehman v. City of Shaker Heights, 418 U.S. 298, 305 (1974) (Douglas, J., concurring) (city may ban political advertising on its buses because commuters are captive audience); Rowan v. Post Office Dep't, 397 U.S. 728 (1970) (first amendment does not protect right to send unwanted material into home of another).

82. A point that Justice Harlan explicitly recognized in his opinion in Cohen v. California, 403 U.S. 15, 21 (1971): "The ability of government . . . to shut off discourse solely to protect others from hearing it is . . . dependent upon showing that substantial privacy interests are being invaded in an essentially intolerable manner." The very words used—"substantial" and "essentially intolerable"—indicate that this question does not admit of precise answers.

83. Hale, *Bargaining, supra* note 13, at 625-28; Hale, *Coercion, supra* note 13, at 473-77; Samuels, *supra* note 78, at 302-09.

tracts of adhesion and cases of economic duress, our subjective experience is quite different. Nevertheless, Hale argued, coercion is simply the flip side of a guarantee of free choice to deny benefits to others. Coercion has no necessarily pejorative connotations; it is merely the by-product of a system in which private rights are protected by government sanction.[84]

For this reason, Hale argued, one should not assume that the existing regime of contract rights enforces only bargains entered into without coercion. The background allocation of property and contract rights sets the ground rules for how parties will be legally permitted to coerce each other. The appropriate question to ask is how much coercion the law will allow. If we have a classical theory of consideration and no doctrine of substantive unconscionability, then the coercive power produced by the exercise of private rights will run in one direction. If we substitute doctrines of detrimental reliance and strong notions of unconscionability, then the balance of coercive power will shift to other parties. In neither case, however, will we produce a system that respects only the free will of the parties and does not involve forms of coercion.

Indeed, one can make an even more general argument about free will and coercion. Free choice is an intellectual construct that occupies the semantic space that has not been assigned to the concept of coercion.[85] Nevertheless, because guarantees of private choice also produce opportunities for coercion, these two concepts exist in a relation of mutual dependence and differentiation. What we call freely chosen action is always circumscribed within a set of limitations on action. These limitations *construct* the contours and boundaries of what we call a person's free choice. In most cases, it is perfectly reasonable to speak of a person who is limited by circumstances as nevertheless acting or choosing freely. The problem comes when we move to issues of justification. To *justify* existing limitations on action or choice based on the fact that one is not acting under duress but instead has free choice—which means only that

84. One might try to avoid these conclusions by defining coercion as an attempt to force a person to do what she is not legally required to do by means one is not legally entitled to use. In that case, the problem of coercion disappears because one never coerces by definition when one is acting within one's rights and never fails to coerce when one is acting outside of them. However, Hale pointed out, this approach creates a problem of circularity. For what concerns us in assessing the justness of the law is whether rules of law unfairly allow parties to coerce each other. But the above definition of coercion would indicate that no matter what system of rules we had, the law never sanctions coercion. *See* Hale, *Coercion, supra* note 13, at 476; *see also* Peller, *supra* note 13, at 1235-36. Thus, Hale's point is that a purely positivistic definition of coercion (defined in terms of *legal* rights) is either empty or circular.

85. *See* Peller, *supra* note 13, at 1237-39.

one is choosing within the context of those limitations—is ultimately a circular argument.

This general point applies to limitations produced by rules of law. We say that actors within a system of law have the freedom to choose how they will act. But this freedom is circumscribed and defined by the set of limitations that the law imposes on the actor, as well as the powers of coercion granted to other private parties by the law. Thus, what we call free choice is not something that preexists the legal regime, and which the legal regime merely attempts to vindicate. Rather, free choice (and its opposite, coercion or duress) are constructed by the existing regime of legal rules. This leads to a problem of circularity like that described above. It will do no good, for example, to say that a contract with grossly unfair terms is just because the parties agreed to it through an exercise of their free will. The problem is that the free will of the weaker party is defined and constructed by what types of actions are available, given the existing system of rules of contract and property. It may be true that the weaker party chooses the unconscionable terms, but that is because the rules of property and contract do not allow her to force the other party to offer better terms. Thus a system of rules circumscribing the scope of one's choices in economic bargains cannot be justified on the grounds that people acting within the system of rules freely choose what they think best for themselves given the legally available alternatives. For virtually any system of legal rules could be justified in this way.[86]

The same arguments about free will and coercion in the economic marketplace apply to the problem of coercion in the marketplace of

86. Note the difference between the circumscription produced by physical conditions and that produced by legal rules. For example, if a person desires to be the world's greatest sprinter but has only one leg, we do not say that she lacks free will or frcedom to choosc. It is nevertheless true that what we call "exercises of her will" are circumscribed by her physical condition. The difference between this case and the critique of formal freedom of contract is that we are concerned with defending legal rules as just or unjust, but not physical conditions. The argument about free will exercised in the context of physical limitations would be circular only if it were within our power to alter those conditions.

Thus, if technology existed miraculously to endow the would-be sprinter with a perfeetly functioning leg and the talents necessary to become a world class athlete, ownership of that teehnology would be determined by the existing legal rules of property and contract. At that point an issue of justice would arise as to whether the sprinter should be entitled to that technology, and under what conditions. We can see this better by choosing a less fanciful example. Suppose a cure for a previously incurable disease (say AIDS) has been discovered, but the right to distribute the drug is held privately. If the regime of contract and property rules results in some AIDS victims not purchasing the drug because they cannot not afford it, it would be circular to argue that this result was morally just merely because the failure to contract was a result of those AIDS victims' free will—that they freely chose from among the best of the legally available alternatives. This is not to say, however, that the justness of a particular distribution of medical technologies might not be established on grounds other than the concept of free will exercised in the marketplace.

ideas—that is, the problem of the captive audience. We feel sorry for the captive audience because we believe that persons who listen in such circumstances are listening against their will, lacking any real alternatives. In contrast, we note that the person who is offended by speech in other settings can, by an act of will, avert her eyes, escape the speaker, or stay and argue back.[87] If she stays and is offended or injured by the experience, her injury is a product of her own willed choice, and her offense, in some sense, is her own fault.

My point is not to deny the value of this common sense way of looking at things. Rather, I want to emphasize that no less than in the case of contractual relations, what we call an exercise of "choice" and what we label a "captive audience" or the product of "duress" is the result of a background set of rights, which include not only property rights but also the right of free speech itself. In other words, Hale's analysis of freedom and coercion, so admired by left scholars in discussions about labor legislation and welfare rights, must also be reckoned with in first amendment law, which also relies upon similar concepts of "choice" and "duress."

Let us take, for example, the case of the communication you are presently reading. This poses few problems of unjust coercion between author and reader. You have chosen to read this Article. You can pick it up or put it down, scrawl nasty comments on the margins of the paper, and so on. If you are offended by what I am saying, nothing forces you to read further. You are exercising free choice. My point, however, is that even if you see your choice as free, it is also a choice made within a preexisting set of property and speech rights. The relatively non-coercive nature of this communicative transaction derives from the assumption that nothing substantial in your life (whether it be retaining your job, advancing your career, or impressing someone else) turns upon your reading or not reading this Article. On the other hand, if you wished to become a lawyer, and if everyone who graduated from law school was required to recite the contents of this Article by heart or produce a detailed analysis of its arguments (here I indulge in a law professor's dream), you undoubtedly would think your freedom to refuse to read this Article was significantly diminished. You might retreat to the position that your will was unencumbered because you still had the choice, after all, to become something other than a lawyer. But this argument is

87. *See, e.g.*, Erznoznick v. City of Jacksonville, 422 U.S. 205 (1975) (limited privacy interest of persons on the streets places burden on them to avoid offensive expression); Cohen v. California, 403 U.S. 15, 21 (1971) ("Those in the Los Angeles Courthouse [who objected to message on defendant's jacket] could effectively avoid further bombardment of their sensibilities simply by averting their eyes.").

strangely reminiscent of the *Lochner*-era argument that bakers are not in any sense forced to work more than sixty hours a week by their employers because they are in no sense forced to become bakers.

Indeed, once we understand that what we call "will" or "choice" is actually the product of personal predilections exercised within a constellation of governmental regulations and private expectations (which in turn are enforced or curtailed by other governmental regulations), it does not seem so odd to say that most law students are coerced into reading large volumes of material every day as a part of their training as lawyers, including specific documents such as the Constitution of the United States and the Uniform Commercial Code. The fact that substitutions are readily available in the marketplace of ideas (in the form of *Gilbert's* and *Emanuel's*) does not change the basic nature of the argument, other than to allow us to achieve a more precise definition of the boundaries of coercion and duress that inhere in our educational system.[88]

I want to leave these academic examples and turn to a slightly different set of problems. Suppose that we do not have a situation of an author and a reader, but rather a young black woman pursued across the quadrangle of a college campus by a group of young white males who

88. Although it would take me too far afield to discuss the matter at length, I should point out that the problem of coercion in education is part of a larger issue—namely the use of the right of free speech as a means of ideological control. In my use of the analytical framework developed by the legal realists I have assumed that one is partly free and partly coerced when one chooses what one thinks best given the limitations created by legal rules. But this argument assumes that one also determines "what one thinks best"—that is, that one determines one's own values. Yet control of the means of communication is also an important method of shaping and altering the values of listeners. This is especially true in mass communication, where the audience listens but has no opportunity to talk back. The unanswered messages conveyed may have the effect of normalizing and naturalizing particular attitudes and beliefs. M. POSTER, FOUCAULT, MARXISM AND HISTORY: MODE OF PRODUCTION VERSUS MODE OF INFORMATION 115 (1984).

A normalizing process, of course, always has existed in education of the young. We want our children to accept the values we teach them in schools. Indeed, the right to instill values may be even more effective than rights to coercion through the use of legal rules, since values internalize restraints upon behavior. Thus, although we believe that "brainwashing" is bad and inimical to notions of individual self determination, we nevertheless simultaneously believe that some forms of ideological control may be justified "for our own good," or for the good of society. The difficulty is heightened when there is the danger that ideological control may be used to perpetuate relations of power that are thought undesirable. *See generally* C. MACKINNON, *supra* note 7 (perpetuation of private power); M. YUDOF, *supra* note 20 (public power).

Thus, the right of free speech soon runs headlong into another right that the left seeks to foster—the right to education. The right to education is the right to particular forms of training and cultural indoctrination, but such training and such cultural indoctrination may raise difficult first amendment issues of ideological coercion and control. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853 (1982) (first amendment restricted ability of school library to remove books thought offensive); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (school had right to regulate offensive speech given at student assembly); Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (school principal had right to edit student newspaper as part of school's educational mission of instilling respect for appropriate values).

hurl racial and sexual insults at her. In one sense, she is not a captive audience because she has (and is presently exercising) the free choice to avoid these men, dash into the nearest building, lock the door if a lock is available, and wait for them to grow tired of their sport and leave her in peace. Perhaps this exercise of will is all the first amendment demands to avoid the conclusion that she is a member of a captive audience. Perhaps, however, you will think that something more is required. In any case, we should note that her choice of how to respond to their speech is affected not only by numerical and physical disadvantages, but also by the fact that it is illegal for her to pull out a pistol and threaten her persecutors, or, what is equally important, to have the campus authorities discipline the students for engaging in these acts of speech. Put another way, the existing system of rights and obligations, including the free speech rights of her pursuers, affect her will, inhibit her will, indeed *construct* her will just as surely as the liberty of contract affected, inhibited, and constructed the will of the bakers in *Lochner v. New York* [89] or the employees in *Coppage v. Kansas.* [90]

If free speech doctrine is justified through concepts of will and free choice, and if will and free choice are constructed by the system of legal rights and obligations, including the rights of free speech, then there is an inherent problem of circularity. It is true that one always has the free choice to avert one's eyes when one sees a naked buttock on the screen,[91] in the same sense that it is always true that the weaker party to an unconscionable bargain always has the free choice to walk away or to accept the unconscionable terms. But this "choice" tells us no more about the justness of the duress and coercion involved in the law of free speech than it does for the doctrines of laissez-faire capitalism.

I believe that if we assimilate the legal realist critique of contract into first amendment law, we will recognize that the concepts of coerced and non-coerced exposure to speech also exist in a relation of mutual dependence and differentiation. We will recognize that these terms do not preexist the system of first amendment law but rather are constructed by it, and that defenses of first amendment liberties in terms of freedom and coercion will prove ultimately as circular as those for freedom of contract did. This does not mean that most of current first amendment doctrine is wrong, or that we should start rounding up offensive speakers and throwing them in jail. I do suggest we recognize that our protection of free speech rights is protection of a certain type of coercion, of induced harm, and that we should be more sensitive to the existence of this coer-

89. 198 U.S. 45 (1905).

90. 236 U.S. 1 (1915).

91. *See Erznoznick,* 422 U.S. at 206-07.

cion and this harm in specific and limited contexts—for example, direct face-to-face racial and sexual harassment.

To some extent, we already do recognize the problem of coercion through the fiction of "fighting words"—that is, words that by their nature are likely to incite an immediate breach of the peace. Nevertheless, the use of the "fighting words" doctrine to deal with face-to-face racial or sexual harassment is a very bad idea. It merely disguises and misrepresents what I believe is the real issue in these cases—that is, the harm forced upon an audience in an extreme and unfairly coercive situation. The problem with group harassment of the student in my previous example is not that as a result of their speech she is likely to fight back. The problem is that she is *not* going to fight back—that she will be intimidated and silenced by their heckling.[92] Both the rationale of the original "fighting words" decision, *Chaplinsky v. New Hampshire,*[93] and the later gloss provided by *Brandenburg v. Ohio*—that unprotected speech must be directed to produce imminent lawless action[94]—are ill-equipped to deal with cases of harassment for precisely this reason. The paradigmatic situation these cases are concerned with is the speaker who so angers her audience that they attack her, or so inspires them that they arise and revolt. These cases do not concern speakers who browbeat their opponents into silence. If in the first two cases we understand that no counter-speech will occur because of the imminence of violence, we also should understand that in the third case no counter-speech will occur because of the directness of the intimidation. Moreover, we should recognize that in the case of the inciting, as well as the harassing, speaker, judgments cannot be clear-cut but are always matters of degree. If there are problems of administrability in the latter case, there are also problems in the former case, which is already comprehended by current first amendment doctrine.

The most obvious place in which the *Chaplinsky/Brandenburg* doctrines of non-protected speech fail us is the case of sexual or racial harassment in the workplace. And here the conflict between the left-libertarian conception of free speech and the progressive agenda of guaranteeing racial and sexual equality is especially pronounced. The most rudimentary Hohfeldian analysis[95] demonstrates that to the extent we allow verbal conduct creating a hostile working atmosphere, we thereby refuse to protect persons from certain forms of private racial and sexual discrimination. Conversely, to the extent that mere words can give rise

92. *See* Lawrence, *supra* note 4.
93. 315 U.S. 568 (1942).
94. 395 U.S. 444, 447 (1969).
95. *See supra* note 16 and accompanying text.

to liability for employment discrimination, intentional infliction of emotional distress, or other causes of action, we acknowledge that an employer or co-worker can be punished for making such statements.

This problem has not yet been squarely addressed in the courts.[96] I suspect that this is partly due to the limited nature of remedies for sexual harassment under Title VII. Under present law, Title VII[97] does not allow traditional legal damage remedies for sexual harassment. It permits injunctive relief to eliminate offending practices in "hostile environment" cases. Monetary relief is available only when there has been an actual or constructive discharge as a result of harassment, and even then Title VII only allows for the equitable remedies of reinstatement and back pay.[98] Nevertheless, awarding any sum of money for harms caused by speech surely raises first amendment concerns. Moreover, injunctive relief ordered against an employer to cease all harassing behavior in the future—including harassing speech—has many of the trappings of a prior restraint. Causes of action for intentional infliction of emotional distress, which allow for the whole panoply of traditional tort remedies, raise the conflict between first amendment values and egalitarian concerns in starker terms.[99] So too would the enactment of group libel laws, which presumably would operate outside the workplace.[100]

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96. *See* Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 3 n.12 (1990).

97. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

98. *See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 77 (1986) (Marshall, J., concurring); Note, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers*, 99 YALE L.J. 1611, 1613-19 (1990). Although one could obtain legal remedies under 42 U.S.C. § 1981 (1988), it does not reach sex discrimination, and the Supreme Court has now decided that it does not encompass claims of racial harassment. Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). The proposed Civil Rights Act of 1990, H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess. (1990), vetoed by President Bush, *see* 136 CONG. REC. S16562 (daily ed. Oct. 24, 1990), would have reversed the Supreme Court's holding in *Patterson* by allowing causes of action for racial harassment under § 1981. The Act would also have authorized traditional legal remedies, including compensatory and punitive damages, for violations of Title VII.

99. *See* Delgado, *supra* note 6. For a discussion of the interaction of the tort of intentional infliction of emotional distress with the first amendment, see Anderson, *Tortious Speech*, 47 WM. & MARY L. REV. 71 (1990); Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988); LeBel, *Emotional Distress, the First Amendment, and "This Kind of Speech": A Heretical Perspective on* Hustler Magazine v. Falwell, 60 U. COLO. L. REV. 315 (1989); Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WM. & MARY L. REV. 123 (1990); Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603 (1990); Smolla, *Emotional Distress and the First Amendment: An Analysis of* Hustler Magazine v. Falwell, 20 ARIZ. ST. L.J. 423 (1988); Smolla, *Rethinking First Amendment Assumptions about Racist and Sexist Speech*, 47 WM. & MARY L. REV. 171 (1990); Wolman, *Verbal Sexual Harrassment on the Job as Intentional Infliction of Emotional Distress*, 17 CAP. U.L. REV. 245 (1988).

100. *See* Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682 (1988).

It is surprising that defense counsel have not regularly raised first amendment challenges to allegations of employer misconduct in the developing law of workplace harrassment. Aside from the limited remedies available under Title VII, I suspect that one reason for the strange paucity of first amendment defenses in sexual harassment cases is due to an unconscious form of categorization—that speech in the workplace is not considered speech in the same sense as political or expressive speech generally, but is thought to be utilitarian, pedestrian, and incidental to the performance of work. Of course, as soon as these categories are constructed, it is not difficult to break them down. And indeed, it is likely that very soon defense counsel will connect the first amendment attacks on campus regulation of racist speech with analogous situations in the workplace. We are likely to see increasing numbers of first amendment defenses raised in the years ahead. When and if litigants catch on to such possibilities, the clash between the left goal of egalitarianism and the libertarian theory of the first amendment will be felt with particular poignancy. One or the other has to give way, and I suspect that for many on the left it will be libertarian theory. This is yet another example of the phenomenon of ideological drift—the means by which the libertarian theory of the first amendment increasingly is turned to serve conservative social interests. In the not too distant future, then, we may well see defenders of racist and sexist employment practices join the Klan, cigarette manufacturers, and conservative PACs as the staunchest advocates of the principle of free speech.

The conflict identified here—between egalitarianism and the principle of content neutrality in the regulation of speech—is likely to manifest itself more and more frequently as time passes. It is important that we recognize these problems now and work towards understanding how to reconcile these competing interests before first amendment defenses of sexual harassment become routine.[101] The principle of remedying racial and sexual harassment in the workplace must have stronger protection than the present limits of innovation by defense counsel.

I think, in fact, that there are perfectly good ways to defend laws against racial and sexual harassment in the workplace from first amendment challenges. The question of sexual and racial harassment in the workplace ties in quite well with the analysis of captive audience doctrine presented above. Few audiences are more captive than the average worker. It is true, in theory, that one does not have to be subjected to racist or sexist speech on the job—one can simply shield one's eyes or ears, or failing that, one can decide not to show up for work anymore.

101. For a thoughtful attempt, see Strauss, *supra* note 96.

But this will mean that one's employment also will end. Because the will of employees is circumscribed by their need for employment and because employment is yoked together with the hostile work environment, traditional first amendment claims that more speech is better, and that one need not submit to distasteful speech, lose much of their force. Certainly, if employer-employee relations involve sufficient coercion that we can justify regulation in other contexts, then this coercion does not suddenly vanish when the issue is submission to racist or sexist speech.

If the workplace involves sufficient coercion to invoke the doctrine of the captive audience, then perhaps the first amendment problems I have identified above will not prove insurmountable. Indeed, I suggest that we might do well to shift the paradigmatic case of the captive audience from the passengers on the public buses or the child running through stations on the radio dial,[102] to the employee working for low wages in a tight job market who is sexually harassed by her employer or co-worker. This shift in paradigmatic understandings, inspired by the legal realist analysis of will and duress, might do much to set first amendment law on the right path.[103]

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102. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

103. I have so far emphasized the problem of coercion in speech situations, and one of my previous examples involved racist speech on a college campus. The subject deserves a much fuller treatment than I can offer here; however, I should note that the problems of racist speech in university settings involve somewhat different considerations than the workplace. First, the university setting raises distinct issues of privacy as well as coercion, especially because students live on college campuses as well as work there. Second, educational systems do have a necessarily inculcative purpose, which means that universities may have a legitimate interest in fostering certain types of values—for example, they may have a legitimate interest in instilling values of respect and tolerance for different persous and for ideas different from one's own.

These additional interests do not justify blanket prohibitions on racist and sexist speech. For example, the inculcative interest cuts both ways—it may require some deterrence of intolerant expression, or it may require enforced toleration of the intolerant. *Cf.* L. BOLLINGER, THE TOLERANT SOCIETY 237-48 (1986) (first amendment protection of unpopular speech necessary to instill virtues of tolerance in society as a whole). Rather, the students' interest in privacy and freedom from coercion, and the university's inculcative interests counsel that universities must be all the more sensitive to the specific contexts in which speech occurs, and to the competing interests involved. What would be too great an invasion of privacy in the dormitory (a racist poster slipped under a student's door, for example), may have to be treated differently from offhand remarks in the cafeteria, comments made in the classroom, or arguments in the public streets outside the campus. In addition, the coercive nature of speech may differ in each of these places.

Note that if coerciveness were our only concern, racist and sexist statements would gain no additional protection from being expressed in the classroom. Because students must attend classes, the classroom can easily present as coercive a situation as the workplace, even if the students' privacy interests are minimal in comparison to the college dormitory. However, the university's legitimate inculcative interest in tolerance and respect for dissenting views is important in the classroom in a way that it is not in the workplace. This suggests that the classroom and the workplace cannot be treated alike in all respects, nor can the classroom and the dormitory.

Finally, integrating issues of sexual and racial harassment into first amendment law will require us to rethink the doctrines of vagueness and overbreadth, which for so long have served libertarian interests. For example, the Equal Employment Opportunity Commission's definition of sexual harassment includes "verbal . . . conduct of a sexual nature . . . when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[104] If a statute involving loitering or breach of the peace used language of such generality, I suspect that most left-libertarians immediately would pronounce it overbroad and vague. My argument is not that regulations conforming to the EEOC's guidelines are necessarily unconstitutional (or that no limiting constructions are available). Rather, I suggest that this is yet another example in which the tools of analysis that have served the left-libertarian position on free speech so well in the past are ill-adapted to the problems of the present era. Sexual harassment statutes are not the same as loitering statutes and breach of the peace statutes. The type of analysis required must differ because the subject matter differs.[105]

Offhand, I can think of two ways in which the analysis of overbreadth and vagueness in the context of a loitering statute might differ from that involved in regulations against racial or sexual harassment. First, the remedies offered for violation of the statue or regulation are quite different. We should be more concerned about imposing criminal sanctions on the unwary than ordering back pay and reinstatement against an employer in a close case. Second, and more importantly, the issues of power in the paradigmatic situations in which the two regulations are enforced are quite different. The danger in the loitering case is that a more powerful entity (the state) will take advantage of vagueness or overbreadth to punish persons who are unpopular or unorthodox in their appearance, manner, dress, or behavior. In the case of the harassment regulation, the danger is that a vague or overly broad statute will chill conduct by the more powerful party (the employer or the co-worker

104. 29 C.F.R. § 1604.11(a) (1989). The full text of the EEOC guidelines is as follows:

> (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id. (footnote omitted).

105. For an excellent discussion of the context-sensitive nature of overbreadth analysis, see Redish, *The Warren Court, the Burger Court, and the First Amendment Overbreadth Doctrine,* 78 NW. U.L. REV. 1031 (1983).

who harasses). To be sure, too great a chilling effect will be deleterious to employer-employee relations. Certainly it would be unfortunate if superiors were continually worrying whether the last thing they said to their subordinates will be misconstrued and precipitate a lawsuit. But these possibilities for abuse of power are less troublesome than an abuse of power by police officials who have a monopoly on the use of force against, for example, homeless citizens who have no effective recourse against arbitrary law enforcement.

One might object that whatever the force of these arguments, traditional first amendment doctrine at least has the advantage of content neutrality in applying the doctrines of overbreadth and vagueness. Yet I suggest that this form of neutrality, like so many others in first amendment law, was always illusory. For example, the Supreme Court has recognized that substantial overbreadth is required for facial invalidity.[106] Left-libertarians have understood this doctrinal move by the Burger Court as a serious threat to first amendment rights, for "substantiality" is a sufficiently loose concept that courts will be given considerable leeway in determining what constitutes substantial overbreadth. Yet even Justice Brennan's dissent in *Broadrick v. Oklahoma* recognized that the Court "ha[s] never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine."[107] What separates Justice Brennan's insight from Justice White's majority opinion is the degree of substantiality required for invalidity. And this is not a question that can be determined simply by counting up possible hypothetical applications, even if that task were possible. The question of substantial overbreadth is one of quality as well as quantity. This places the courts in the unenviable position of making judgments of value and context, but this task is no less necessary if one subscribes to Justice Brennan's position. In order to accept Justice Brennan's arguments, one must agree that the examples he gives of protected conduct reached by the statute in question are substantial,[108] and that the type and degree of expression chilled by the statute are also substantial. There are ways of deciding these questions, but they are not indisputable or mechanical, and they are certainly not neutral or value-free.[109]

106. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

107. *Id.* at 630 (Brennan, J., dissenting).

108. *See id.* at 628.

109. What I have said about overbreadth can be applied, in similar fashion, to the problem of vagueness. If there is no specific doctrine of "substantial vagueness" in first amendment law, it is because the requirement of substantiality has always been understood. Whether words are sufficiently unclear that persons of common understanding must guess at their meaning is a matter of

You will note that in my earlier analysis relations of economic and social power figured prominently. In assessing what constitutes substantial overbreadth or vagueness, I do not think it inappropriate to employ common sense judgments about the way the world works. Although the distinction between public power and private power is significant, even more significant for me are what power relations (public or private) exist in the standard case in which the statute operates. I do not claim that this sort of analysis is formally neutral or value-free. Indeed, eschewing claims to this sort of "neutrality" is the only way one can acknowledge that being a homeless indigent rounded up by police in routine sweeps and being an affluent, white, male employer accused of making passes at an underpaid and overworked female secretary are two very different sorts of experiences. I simply am making overt the sort of matters of judgment that courts must make in any case when determining if a statute is substantially overbroad or vague—the degree to which protected conduct will be chilled and the nature and significance of the conduct likely to be chilled. Certainly, the above judgments I have offered about power relations are fallible. One might debate them. But that, of course, is really the point—one should be permitted to debate these issues openly in order to decide what is or is not substantially overbroad and vague.[110]

Moreover, when I say that issues of vagueness and overbreadth are matters of degree and context, I am not making an argument against having any general rules of construction in first amendment cases. Rather, I suggest that we ask ourselves what types of paradigmatic situations call for more and less tolerance in assessing overbreadth and vagueness. Once we have identified contexts in which vagueness and overbreadth concerns are more important—say loitering statutes—and less important—say the workplace—then we can use rules to give judges some direction about how to apply these concepts. Indeed, we do this already. We are much more concerned with vagueness in criminal statutes affecting expressive activity than we are with vagueness in statutes that do not touch upon speech. This same form of reasoning should also hold true within the class of statutes touching upon expressive activity. The legal realists taught us to be suspicious of overly broad abstractions in our legal concepts and sensitive to alterations of social context. They did not, however, suggest we abandon the policy of using rules to give direction to decisionmakers and to ease administrative burdens.

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degree, of practical judgment. All language is clear and all language is vague, depending upon the circumstances and the degree of precision required by those circumstances. Courts have no more value-free methods of determining vagueness than they do of determining overbreadth.

110. *Cf.* Redish, *supra* note 105, at 1069-70 (properly performed, overbreadth analysis requires sensitivity to context that cannot be provided by broad categorical rules).

I thus conclude that precedents like *Broadrick,* as well as the Burger and Rehnquist Courts' increasing predilection to decide first amendment cases on an as-applied basis rather than through facial challenges,[111] may be of increasing importance to litigators who seek to protect harassment-in-the-workplace statutes from constitutional invalidity. It is undoubtedly strange and ironic that liberals who decried cases like *Broadrick* in the 1970s should now employ similar rationales in the 1990s. This, however, is simply another example of ideological drift. A doctrine of law takes its meaning from the contexts in which it is applied repeatedly. Thus the political meanings of the doctrines of overbreadth and vagueness shift in political valence as they are used repeatedly in new historical contexts.

VI. CONCLUSION

This brings me, at last, back to the first amendment problem with which I began this Article—the constitutionality of Kansas City's abolition of a public access channel to keep the Ku Klux Klan off the air. When I first wrote my memo to the City Council, I saw this problem solely as an issue of content neutrality—the City may abolish the public access channel for many reasons, but it may not do so to keep a particular speaker from speaking or a particular viewpoint from being heard. I now see the issues differently. For me, this case poses in striking fashion two conflicting interests for the left in contemporary first amendment law. The first is the need to ensure effective access to the means of communication for all points of view, including unpopular ones; the second is the important state interest in eliminating racial discrimination and protecting racial minorities from harassment and abuse.

My present view is that the City's action is still probably unconstitutional. My reasons for thinking so, however, are somewhat different than before. First, if the City signs a monopoly agreement with a particular cable television company, I think that the City probably is obligated to ensure that there is a public access channel available to all on a first come, first served basis.[112] Even if I am wrong in this conclusion, I be-

111. *E.g.,* Massachusetts v. Oakes, 109 S. Ct. 2633, 2638 (1989); Brockett v. Spokane Arcades, 472 U.S. 491, 504 (1984); United States v. Grace, 461 U.S. 171, 175 (1983).

112. This is now required by statute in some cases. *See* 47 U.S.C. § 532(b)(1) (1988) (commercial (non-governmental) access must be granted for a given number of cable channels depending upon number of total channels available as specified in franchise agreement; franchise owner may exert no editorial control over content of programming on such channels). I would argue a grant of access is also a constitutional requirement. For an argument that monopoly grants to cable franchises are themselves unconstitutional, see L. POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT 239-47 (1987). The statutory requirement of provision of a public access channel apparently did not apply in the Kansas City case, either because the number of channels was too

lieve that once having provided such a public forum, the City may not withdraw it unless it can provide very strong justifications; withdrawal because of distaste for the messages conveyed on the channel is not a sufficiently good reason.

One such sufficiently good reason for limiting access might be harassing behavior against a captive audience. If the City's grant of access assisted the Klan in assaultive behavior, akin to direct face-to-face racial harassment, there might be a justification for a limitation on access *used for this purpose.* On the other hand, there is no reason to think that the showing of the series "Race and Reason" was equivalent to such a face-to-face verbal harassment. Moreover, being the sort of person who is not inclined to assume that movies I have not seen or books I have not read contain materials in need of censorship, I would not be willing to restrain a showing of "Klansas City Live" before the fact, unless it were proved that it would be used as a forum for assanltive and harassing behavior. I think this would be very difficult to prove. It may be that the medium of television, by its very nature, is rarely as assaultive as a face-to-face encounter, but I do not think it necessary to decide that issue as a matter of law. Even if it could be proved that the Klan's behavior on live television rose to that level, I think the appropriate remedy would be to restrain them from that type of behavior alone and not from other racist but non-assaultive or harassing speech they might happen to offer on their program.[113]

This is an admittedly preliminary attempt at resolving the difficult first amendment issues presented in the Klan Cablevision case based upon the framework outlined in this Article. Perhaps others using a similar analysis might arrive at different conclusions. I would be surprised indeed if the suggestions I have offered led to a simplistic, mechanical jurisprudence, or avoided the need for difficult moral and political choices. Rather, I offer my analysis because I believe that the problems of the future cannot be solved using the intellectual frameworks of the past, no matter how much good they may have done us. Progress in

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small or because the original franchise contract was entered into before the statutory requirements took effect.

113. Professor Matsuda has argued for the right to regulate non-assaultive, non face-to-face and overtly political racist speech. *Language as Violence, supra* note 4, at 361-64 (remarks of Professor Matsuda); Matsuda, *supra* note 6. From what I have said, it should be clear that I do not believe that regulation of racist speech can or should go so far. My analysis suggests that forms of coercion may nevertheless result from allowing such speech in our communities. But I would require somewhat more proof before I was convinced that the degrec of coercion in racist political speech is sufficiently different in degree and kind from that produced by other forms of political speech—for example, the coercion produced by an anti-abortion protester who shouts pro-life slogans outside an abortion clinic.

politics and in law is not simply a matter of convincing others to think as you do. It also requires having the courage to change your own ways of thinking when changing times require it.