Amount (the size of the bond) was negative and statistically significant. Because the costs of marketing bonds had fixed elements, some economies apparently were realized from larger issues. The effect of the war on borrowing costs was evident, especially for 1919; the coefficient for that year is positive, statistically significant, and quite large in magnitude. State dummy variables were jointly statistically significant, as were the firm-specific dummy variables.

STRONG VERSUS WEAK REGULATION AND OTHER REGULATION-INDUCED EFFECTS

The empirical measure of regulation's effect on the interest rate may underestimate the total effect. Another factor affecting the level of risk premium faced by any firm would be its total debt. A firm with a large debt would have to experience faster growth in future revenue than a firm with a smaller debt to be able to service and repay that debt. In the absence of such growth the firm might have to default, although it could also enjoy higher profits were such revenue growth to occur. The necessity for more rapid growth makes the firm's future more risky. For any single firm, a larger debt would thus require a higher interest rate. This suggests that each firm may face something akin to an individual supply curve for total debt: the larger the total debt incurred by any one firm, the higher the interest rate that firm may face. If this is the case then the reduction in risk brought about by regulation would have an effect similar to a downward shift in the supply curve. The amount that equilibrium price (interest rate) decreased would depend on the shape of the firm's demand curve and would be related to the amount by which total debt increased. In this case our estimate of the effect of regulation on the interest rate would measure the change in the equilibrium interest rate, which would be less than the downward shift in the firm's supply curve of debt.

Unfortunately, the data contained in *Moody's* are not sufficient to analyze the financial structure of the utilities with bonds in this sample. However, we looked at a related issue: did regulation lead to increased production of electricity? Because increased production came primarily through an increase in capital investment, this may be viewed as a reasonable proxy for increased investment, including bonded indebtedness.

Data on total output aggregated by state are available from the quinquennial *Census of Electric Light and Power Stations*. We used data for the years 1902 through 1927. Explanatory variables (also from Census sources) included urban population (because centrally generated electricity was almost exclusively urban in this period) and value added in manufacturing.[63]

[63] The observations for these explanatory variables were taken in the same or prior years as the observations for electricity output. Hence, for example, urban population in 1900 was used to explain total output in both 1902 and 1907.

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Various fixed-effects models were used in which state dummy variables were always included. The models differed in whether year dummies and year interactions with urban population and value added in manufacturing were included. Strong and weak regulation were included as dummy variables (equal to one, three years after the onset of regulation) and as integers measuring the number of years since the onset of regulation. The results, for the key regulation variables only, are summarized in Table 5.

The results are similar for all of the models. Weak regulation had a positive effect on output that was statistically significant at the 5-percent level in every case but one. Its magnitude ranged from 3.5 percent to 25 percent of the average output of all observations. The estimated effect of strong regulation was also positive, but its magnitude was somewhat smaller and it was not statistically significant. This is the opposite of the result found in the models explaining the risk premium, where strong regulation generally had more of an effect than weak regulation. One interpretation of this is that the presence of strong regulation affected the firm's demand curve for debt. This seems reasonable because strong regulation required the firm to obtain regulatory approval before issuing new debt (or other instruments). To the extent such regulation restrained the firm from increasing debt, it may also have hindered growth in output. Yet the lower effective quantity of debt would have been consistent with a greater impact of regulation on the reduction of the equilibrium risk premium, as we found.

CONCLUSION

The historical record of the process that culminated in state regulation of electric utilities suggests that reduced borrowing costs was a primary reason utility companies, with prominent leaders such as Samuel Insull leading the way, came to embrace regulation. It was argued that the utilities' customers also would benefit from regulation if the lower borrowing costs led to increased investment and output, and hence lower prices.[64] Our analysis suggests that regulation did reduce borrowing costs, but that the magnitude of the effect was small. Furthermore, regulation apparently led to increased output, perhaps as a result of increased investment and indebtedness. In states with strong regulation, however, commissions may have restrained utilities from incurring as much debt as they otherwise would have. In these states, the improved access to capital markets was reflected more strongly in a reduced risk premium.

There are other factors not included in this analysis that might have caused us to underestimate the true benefit of regulation. Investors may have expected the move to state regulation to eventually encompass more states.

[64] Emmons, "Franklin D. Roosevelt," using firm-level data, estimated a model showing that electric utility rates in 1930 were from 4.0 percent to 6.4 percent higher in states without regulation than in states with regulation. This is consistent with our results.

TABLE 5
REGRESSION RESULTS ON STATE-LEVEL TOTAL ELECTRICITY OUTPUT

Model	Variable	Estimated Coefficient	Asymptotic t Value	p Value	R^2
Regression measured as dummy=1 three years after onset of regulation					
Year dummies included; Year interactions with urban population and manufacturing value added included	Strong Regulation	5.41e+07	0.84	0.402	0.9545
	Weak Regulation*	1.56e+08*	2.16*	0.032*	
Year dummies included; Year interactions with urban population only included	Strong Regulation	7.93e+07	1.17	0.242	0.9534
	Weak Regulation*	1.71e+08*	2.34*	0.020*	
Year dummies excluded; Year interactions with urban population and manufacturing value added included	Strong Regulation	5.54e+07	1.09	0.276	0.9535
	Weak Regulation	1.42e+08	1.90	0.058	
Year dummies excluded; Year interactions with urban population only included	Strong Regulation	7.22e+07	1.34	0.182	0.9524
	Weak Regulation*	1.47e+08*	1.99*	0.048*	
Regression measured as number of years since onset of regulation					
Year dummies included; Year interactions with urban population and manufacturing value added included	Strong Regulation	2.73e+06	0.26	0.792	0.9555
	Weak Regulation*	2.20e+07*	2.46*	0.015*	
Year dummies included; Year interactions with urban population only included	Strong Regulation	4.25e+06	0.44	0.660	0.9543
	Weak Regulation*	2.29e+07*	2.68*	0.008*	
Year dummies excluded; Year interactions with urban population and manufacturing value added included	Strong Regulation	1.15e+06	0.18	0.856	0.9548
	Weak Regulation*	2.00e+07*	2.53*	0.012*	
Year dummies excluded; Year interactions with urban population only included	Strong Regulation	1.92e+06	0.29	0.770	0.9536
	Weak Regulation*	2.03e+07*	2.60*	0.010*	

* indicates the variable is statistically significant at the 5-percent level.

Notes: Estimations were done in Stata, using White heteroscedastic-consistent standard errors.

Sources: U.S. Department of Commerce, *Census of Electric Light and Power Stations*, 1912, table 30, p. 50; 1922, table 56, p. 94; 1927, table 29, pp. 43–44. U.S. Department of Commerce, Bureau of the Census, *Thirteenth Census*, 1910, Vol. VIII, Manufactures, table III, pp. 542–44; *Fourteenth Census*, 1920, Vol. II, Population, table 20, pp. 79–87, Vol. VIII, Manufactures, table 48, pp. 171–73; *Fifteenth Census, Manufactures 1929*, Vol. III, table 4, pp. 17–20.

INTERCONNECTION PAYMENTS IN TELECOMMUNICATIONS A COMPETITIVE MARKET APPROACH

David Gabel[1]

Introduction

Telecommunications networks are unique because they require a high degree of cooperation from all parties involved and because of the interdependency of network components. Technical standards, service definitions, and pricing arrangements all must be well understood by the various users of the network in order to ensure efficient provision of the network's services.[2] Therefore, in order to allocate properly the joint costs and benefits of the telecommunications network, a sound interconnection pricing policy is of paramount importance.

Establishing the price for interconnection, however, is a challenging undertaking, and there has been pressure on regulatory commissions to adopt interconnection arrangements that set termination charges at zero. This is due to the perception that regulators cannot measure costs correctly and have historically chosen interconnection prices that are too high.[3] In addition, proponents of zero termination charges argue that the market distortions from high interconnection prices have induced new entrants in telecommunication services since 1996 to target firms, such as internet service providers (ISPs), that terminate large volumes of traffic.

In this paper, we first discuss the concept of "Bill-and-Keep" whereby the party that receives a call pays for receiving the call. We explore if this outcome is efficient and consistent with competitive markets. Following the discussion of Bill-and-Keep we offer an explanation of why the flow of traffic has been imbalanced between incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs). We explain that this outcome is the natural outcome of the barriers to entry created by the incumbents in their refusal to provide collocation to internet service providers (ISPs).

Interconnection Payments, Termination Charges, and Bill-and-Keep -- Setting the Correct Price

Interconnection arrangements in the telecommunications industry have a long history. Interconnection first became a contractual issue in 1894 when Alexander Graham Bell's initial patents expired. Beginning in 1894, the Bell System had to enter into interconnecting contracts with Independent telephone companies, and the Independents similarly signed contracts with each other that governed the terms of interconnection.

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[1] Professor of Economics, Queen College, City University of New York, and Visiting Scholar, Massachusetts Institute of Technology Internet and Telecommunications Convergence Consortium.

[2] For a more complete discussion of telecommunication network characteristics, see Chapter 5, "Interconnection: Cornerstone of Competition" by William H. Melody in Telecom Reform: Principles, Policies, and Regulatory Practices, edited by William H. Melody, Den Private Ingeniorfond, Technical university of Denmark, Lyngby, 1997.

[3] Patrick DeGraba, Federal Communications Commission, Office of Plans and Policy (OPP) Working Paper 33, "Bill-and-Keep at the Central Office as the Efficient Interconnection Regime", Paragraphs 69, 91.

Bill-and-Keep,[4] whereby there are no termination charges and each carrier is required to recover the costs of termination and origination from its own end-user customers, was adopted in certain situations in the past, but the most prevalent form of interconnection was revenue sharing. For example, the typical interconnection contract for a toll call required that fifteen to twenty-five percent of the originating revenue be paid to the terminating local exchange carrier.[5] The contracts were established before the advent of federal or state regulation of the telephone industry, but the terms varied little after regulation was established. For local traffic, Bill-and-Keep, was adopted where the traffic was balanced. Where the traffic was unbalanced, carriers relied on negotiated agreements between them governing either reciprocal compensation or access charges to recover the cost of interconnection.

The originating party paid for the cost of interconnection under calling party pays arrangements, and where traffic was balanced under Bill-and-Keep. . Furthermore, the retail rates were generally designed so that the customers who initiated the calls paid for the calls, rather than having the cost of interconnection distributed evenly among the customers. This has been standard practice in the telecommunications industry on the basis that the decision made by an originating party to place a call is the decision that imposes costs on the network.

The history of interconnection of telephone companies, illustrates:

1. The costs of interconnection have traditionally been recovered from the calling party on the basis that the calling party is the cost-causer;

2. The practice of calling party pays predates the establishment of state or federal regulation; and;

3. Bill-and-Keep has been adopted in situations where traffic is balanced -- where traffic is not balanced, the carrier on which the majority of traffic originated has made payments to the terminating carrier.

Practical Constraints on Interconnection Pricing Arrangements

In a world with no externalities (positive or negative) and perfect information interconnection pricing would be straightforward for regulators. In such a world, telephone service would represent a service for which two parties benefit, and that a call should be placed so long as the sum of the benefits exceeds the costs. At the margin, costs would be shared based on the benefits obtained by each party. In the real world, however, it is impossible to allocate the benefits to the calling and called parties, and thus it is problematic to ascertain how costs should be shared -- i.e., we cannot allocate costs on the basis of benefits because we do not know how to measure the benefits. Lacking information on valuation, the appropriate policy fallback is a second-best solution – using cost-based rates.

Moreover, with the growth of competition in the telephone industry, it is even more important that prices must be established that govern the connection from one network to another. Regulators should be concerned that incumbent local exchange carriers (ILECs) will try to establish barriers to entry, and block entry by establishing too high of an interconnection price. Too avoid too high

[4] Bill-and-Keep contracts were negotiated some of the time, but only where traffic was balanced. In those situations where traffic was out of balance, the company that originated the majority of the calls made a settlement payment.

[5] David Gabel, "The Evolution of a Market: The Emergence of Regulation in the Telephone Industry of Wisconsin, 1893-1917," Unpublished Ph. D. Dissertation, University of Wisconsin—Madison, 1987, pp. 171-72.

of a price, regulators could impose a zero price on interconnection (i.e., Bill-and-Keep), but is this reasonable? We think not.

Most other industries do not rely on Bill-and-Keep -- e.g., financial services, credit and ATM cards, package delivery services, and access fees for airport gates.[6] In the telephone industry, we are now beginning to observe the operations of competitive markets at the start of the 21st century, and policy makers should not be enticed by simplistic and non-competitive zero-price solutions like Bill-and-Keep.

The Distribution of Benefits from Phone Calls

In this section we evaluate the proposition for Bill-and-Keep, and its policy implications. The strongest argument for Bill-and-Keep would be if the receiving party equally benefits from a call. This has been argued by some, but we disagree that the benefits of a telephone call are shared evenly by the caller and the receiver.[7]

Telephone calls are characterized by "joint demand" since there are at least two parties involved in any call.[8] Similarly, the call is "jointly provided" by both the caller's and the call receiver's network. Consequently, the issue arises as to how to allocate joint costs. In a world with no externalities (positive or negative) and perfect information this would be straightforward since the parties would be expected to share the costs in proportion to the benefits they receive from the call. In the real world, however, it is impossible to allocate the benefits to the calling and called parties, and thus problematic to ascertain how costs should be shared.

Since there are at least two parties to any telephone call, presumably both benefit from the call. Some experts have argued that this is justification for reversing the historical use of calling party pays, by shifting termination charges to the receiving party.[9] However, even though call receivers benefit from SOME calls, it is impossible to say how the benefits of the call are shared, and therefore it is bad policy to assume that both parties benefit equally, and to base policy changes on this assumption. For example, calls from telemarketers surely benefit the caller more than the receiver, and many would argue that these calls have negative value for the receiver since he/she is likely not to be interested, and is interrupted in the middle of another activity.

Proponents of mandatory Bill-and-Keep interconnection arrangements argue that callers make less calls since they must bear the entire costs of the call rather than sharing them with the receiver as would be the case under Bill-and-Keep arrangements.[10] However, the fact that call receivers have the option of having toll-free numbers (e.g., like many businesses choose to do to encourage more business) suggests that call receivers have the option of purchasing a specific service which encourages them to receive more phone calls, and that the network is not

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[6] For a more complete discussion of the economics of networks and network pricing issues see The Economics of Network Industries by Oz Shy, Cambridge University Press, 2001.

[7] Patrick DeGraba, Federal Communications Commission, Office of Plans and Policy (OPP) Working Paper 33, "Bill-and-Keep at the Central Office as the Efficient Interconnection Regime", Paragraph 4.

[8] Technically, joint demand occurs when a product is consumed simultaneously by more than one party (e.g. attendance at concerts and stadium events, use of highways and toll roads).

[9] See, for example, Federal Communications Commission, Office of Plans and Policy Working Paper 33 by Patrick DeGraba, **Bill and Keep at the Central Office as the Efficient Interconnection Regime**. Federal Communications Commission, Notice of Proposed Rulemaking In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, April 27, 2001.

[10] Allegiance Telecom -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Page 21

underutilized as suggested by proponents of mandatory Bill-and-Keep interconnection arrangements.

There is no empirical evidence that callers would place more calls under Bill-and-Keep arrangements. Under toll-free services, the call receiver pays because it has decided that the benefits justify the additional costs incurred – whereas customers who choose not to have toll free numbers are implicitly saying that they benefit more by making phone calls than receiving them. Moreover, the proliferation of products to screen unwanted calls (e.g., Caller ID or Call Waiting) clearly contradicts the assumption under Bill-and-Keep that calling and called parties benefit equally from phone calls.[11] Without these devices, only the calling party has complete information regarding the purpose of a telephone call, and thus it should bear the costs of termination. Since not all consumers can afford or desire call-screening devices, policy changes that unnecessarily encourage their purchase would be a costly technology distortion.

This is not surprising because no empirical research on this issue would be meaningful since there is no way to measure the distribution of benefits between a caller, a receiver, and even a third party who benefits while not being part of the conversation. Interconnection policy should not be based on a hypothesis with no empirical foundation or support in the operations of unregulated competitive markets. Moreover, the case of network externalities below strongly supports the argument that the caller benefits more than the receiver, and a calling party pays system is more likely to capture these network externalities.

In short, because we do not know the distribution of benefits on telephone calls, it is hard to conclude that Bill-and-Keep is efficient relative to reciprocal compensation. Furthermore, as discussed above, we know that in no other industry where traffic is out-of-balance do firms freely select Bill-and-Keep as a means for interconnection pricing.

Interconnection and Network Externalities[12]

Using a Calling Party Pays system as opposed to Bill-and-Keep is more likely to internalize positive network externalities between calling and called parties, and is one of the main justifications for interconnection charges. Suppose that as a result of the called party being able and willing to accept a call, the calling party receives a direct benefit. This is an externality flowing from the called party to the calling party. Assuming, as is likely the case, this externality is larger compared to the externality going in the other direction (which would seem logical since the call was initiated by the caller who presumably has higher willingness to pay), then there may be efficiency grounds to have the calling party subsidize the called party.

The incentive required to capture positive network externalities can be enacted through a termination charge since it encourages the receiving party to accept phone calls, whereas termination charges assessed on the receiving party will discourage the use of telephone services. A termination charge received by the terminating network will, through competition, be passed back to the called party by way of cheaper retail prices for services provided. If the calling party funds this termination charge, then this could be an efficient transfer between the two types of callers.[13] However, by imposing mandatory Bill-and-Keep such transfers will be

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[11] Allegiance Telecom – In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Page 21

[12] This section draws on the work of Julian Wright of the Department of Economics at the University of Auckland in New Zealand.

[13] An example where such network externalities are likely to be very important is the case of interconnection between fixed-line and mobile networks. Whereas mobile networks have penetration rates that are closer to 50%, a small decrease in the price offered to mobile customers can increase their participation and thereby provide a positive externality for existing fixed-line customers (and

eliminated. This will lead to serious inefficiencies where there are significant network externalities.

Economic Efficiency Principles

Under Bill-and-Keep, switching cost recovery would be folded into all of the other costs that must be recovered. The final rate would be either traffic-sensitive or a fixed per customer charge. However, if regulators cannot set traffic-sensitive rates correctly, as argued by the proponents of bill-and-keep, how can these costs be recovered efficiently?

Having the user pay a per minute rate would discourage the use of telecommunications since there will be an incentive for parties to not answer calls to reduce termination charges assessed on them – i.e., Bill-and-Keep would not capture the positive network externalities associated with the Calling Party Network Pays principle.

Per-minute charges also are not desirable for covering termination costs under the proposed Bill-and-Keep arrangements because they would "tip" the market towards monopoly since consumers would have an incentive to subscribe to larger and larger networks in order to avoid these charges.

Any proposal to replace usage sensitive terminating access fees with a fixed customer charge contradicts the view that economic efficiency dictates that traffic sensitive costs be recovered through traffic sensitive rates. Aside from the argument that the cost-causer is not the cost-payer, there are a number of reasons that Bill-and-Keep arrangements violate the principles of economic efficiency:

- Reforming the existing Calling Party's Network Pays (CPNP) regimes with Bill-and-Keep will require a reduction in per-minute charges to the caller and an increase in flat end-user charges to recover the lost revenue since the called parties' providers would have no other way to recover termination costs except through flat-fees on its customers;

- A fixed monthly per-line subscriber charge ignores the capacity costs associated with termination of phone calls – all customers would pay the same fee for termination of calls regardless of the number of calls received;

- In unregulated markets Bill-and-Keep interconnection arrangements exist only under the restrictive condition of balanced traffic – however, in dynamic and partially regulated markets like telephones there is no guarantee that the traffic between any two operators will remain balanced over time and thus a Bill-and-Keep arrangement does not afford adequate flexibility; and

- Under Bill-and-Keep and a fixed monthly subscriber line charge, the terminating company has less incentive to provide good service since it is not getting paid for the termination service on each call on a per call basis – there will be underinvestment in termination services and overinvestment in other services since recovering costs from a fixed monthly line subscriber charge does not send the proper signals on the cost of individual calls.

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networks). If the price of fixed-to-mobile calls is inflated and the higher price is used to subsidize low mobile subscription charges, the result can be an increase in welfare. Without providing this subsidy there would be less mobile customers. However, with fewer mobile customers, callers would have fewer options to call people who are away from their landline. Although a caller may be prepared to pay a high price to reach such people, the call will not be possible.

Bill-and-Keep amounts to setting termination charges at zero, which is clearly below cost since termination costs are non-zero.

Setting the Price of Interconnection -- the Case of Collocation of Internet Service Providers (ISPs) and Competitive Local exchange carriers (CLECs)

Traditionally interconnection pricing has been based on reciprocal compensation agreements reached between various local exchange companies (LECs). A new question that has recently arisen is what is the impact of traditional interconnection pricing arrangements on Internet service? Specifically, Internet Service Providers (ISPs) receive calls, but do not make calls. Consequently, some argue that this "one-way" traffic has led to a significant amount of money flowing away from incumbent local exchange carriers (ILECs) since the ISPs do not pay termination charges and have collocated facilities with competitive local exchange carriers (CLECs).

On this basis, regulators have begun to rethink how to price interconnection, and to consider Bill-and-Keep interconnection pricing arrangements in order to force ISPs to cover termination costs.[14] Under Bill-and-Keep, there are no reciprocal termination charges and each carrier is required to recover the costs of termination and origination from its own end-user customers. This paper argues that imposing mandatory Bill-and-Keep in order to correct for the ISP collocation "problem" is misguided and unsound.

The ILECs claim that CLECs have targeted ISPs in order to take advantage of high reciprocal compensation rates. However, it is not a problem that CLECs have targeted ISPs as customers. There is an excellent reason why ISPs should all collocate with CLECs, and it has nothing to do with reciprocal compensation. ILECs have said enhanced service providers such as ISPs cannot collocate in their central offices. Therefore, ISPs can save a tremendous amount of money by collocating with CLECs, allowing them to avoid the costs of loops and transport for termination of modem pools back to the central office. Indeed, even if reciprocal compensation were priced at zero, because ILECs will not allow collocation of ISPs, it would still be a great opportunity to take business for CLECs.

It should also come as no surprise that CLECs have targeted ISPs as customers. Since before the passage of the Telecommunications Act of 1996 it has been well understood that fledgling LECs would, at least in the early stages of competition, primarily target businesses and other high margin telecommunications customers. Empirical evidence suggests that the Internet expanded rapidly around the same time the Telecommunications Act opened the door for competitors to provide local telecommunications services in 1996 -- with the percentage of households with internet access expanding from 17% to 42% from 1996-2000.[15]

The marketplace for ISPs expanded significantly at the same time that newly formed CLECs began searching for customers to serve. While ISPs are only one type of business customer, there is a fundamental difference between ISPs and other businesses that made their business more attractive to the CLECs. The CLECs may have had an easier time attracting an ISP's business because there were no longstanding relationships with ILECs to overcome, and local number portability was not a concern. The ISP market was under-served by ILECs, and the CLECs attracted this business by offering state-of-the-art local fiber networks, and by offering

[14] Federal Communications Commission, Notice of Proposed Rulemaking In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, April 27, 2001.

[15] http://www.ntia.doc.gov/ntiahome/fttn00/charts00.html#f7 figure 1-1

to collocate ISP equipment.[16]

The beneficial relationship between CLECs and ISPs is clearly not a one-way street. CLECs and ISPs have become natural business associates because CLECs also provide certain synergies that are not present in the ILEC-ISP relationship. In order to avoid unnecessary switching and transport costs[17] ISPs require the ability to aggregate Internet bound traffic in a facility that is collocated with a LEC's facilities. Collocation allows the ISP to avoid the cost of first buying loops that carries dial-in traffic and then buying additional loops that carry the aggregated traffic back to the central office. The traffic needs to be returned to the central office in order to be shipped onto the Internet.

Collocation is normally not offered to ISPs by ILECs because the FCC declined to require that ILECs make collocation space available to Enhanced Service Providers ("ESPs").[18] Without a specific mandate to provide collocation space, ILECs have demonstrated that they will not offer collocation to outside firms. Even with explicit instructions, the ILECs have shown a desire to deny or delay offering collocation facilities.[19] Furthermore, ILECs do not have the same interest in competing with CLECs for ISP business, based on terms of collocation, because it would have a resounding impact on every rate the ILECs could charge for collocation facilities. It is apparent that the ILECs have made a conscious decision not to compete for the business of ISPs because it may well result in the ILECs having to offer collocation facilities at rates and terms that would encourage competitive entry into the ILECs core telecommunications markets.

The ILECs would only be willing to create such barriers if they believe that the regulators will be willing to rescue them if a clever entrant finds away around the barrier. Regulators can improve the process of interconnection by holding parties to the terms of trade that they initially proposed. In the United States, the FCC has been too willing to accept the ISP traffic imbalance as a problem, rather than as an appropriate penalty imposed on an incumbent who created a barrier to entry and was unwilling to allow the efficient collocation of ISPs. As pointed out by the consulting firm Economics and Technology,

> "It would be entirely inappropriate at this time to now engage in what amounts to nothing short of a bail-out of those ILEC errors. In competitive markets, competitors live or die by their own business judgments and decisions, and it is

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[16] Focal Communications Corporation, Pac-West Telecommunications, RCN Telecom Services, and US LEC Corporation -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Pages 19-22

[17] See: Connecting Homes to the Internet: An Engineering Cost Model of Cable vs. ISDN. Master Thesis of Sharon Eisner Gillett, Massachusetts Institute of Technology, 1995. "Notice that if the number of T1 lines into the Internet provider grows large enough, an economic incentive is created for the Internet provider to co-locate its facilities with a telephone company Central Office, to minimize distance-sensitive T1 tariffs." at page 73; "The significant cost of the leased T1 lines needed to connect the Internet service provider to the local telephone network highlights another business and policy implication: ISDN Internet service would cost less to provide if these lines were not needed." at page 152; "One way to eliminate (or reduce) these T1 line charges is to co-locate the Internet service provider with the local telephone company Central Office (just as the cable Internet service provider expects to co-locate with the cable head end). In that scenario, an external T1 circuit is replaced with an intra-office wire." at page 153. The thesis is available at http://itel.mit.edu.

[18] See: In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325, Paragraph 581.

[19] The ILECs have generally viewed collocation as an attack on their business. Wall Street Journal article August 9, 2001, titled "Covad Blames Its Recent Troubles On Bells' Anticompetitive Tactics" http://interactive.wsj.com/archive/retrieve.cgi?id=SB997325985752689883.djm.

not the role of regulators to backstop these market choices by after-the-fact protective measures."[20]

Interconnection Pricing Arrangements should be Based on Capacity Charges

We recognize that one problem with the current pricing of interconnection is that termination in the switch is based on a per minute charge with an equal charge on and off-peak. It would be more efficient to charge for interconnection in the manner which costs are incurred. On digital switching machines, incremental interconnection costs are incurred when the interoffice trunk is terminated. This costs is easily identifiable and this capacity cost should be the basis for setting rates.

In the case of termination costs that are traffic sensitive, capacity charges are the most efficient recovery mechanism. Capacity charges are the best mechanism for recovering termination costs since the costs of terminating a call is determined by peak-usage. Provided that the capacity charges are based on forward-looking economic costs, they are an efficient means of recovering termination costs.

Capacity charges are an effective and efficient way for one carrier to pay another for using the other carrier's network. Yet, it would be virtually impossible to assess such charges directly on end users. Hence, it is reasonable -- and pro-competitive -- for each carrier to determine on its own how to recover the capacity charges from its customers.

It is also important to point out that technological advances also argue in favor of more carrier-paid capacity-based charges rather than direct end-user charges. Packet switching is replacing circuit switching, and carriers are interconnecting with high-capacity links. Consequently, increased reliance on per-minute rates instead of capacity charges is nonsensical:

> "... as high capacity dedicated circuits become the norm, measuring traffic on a per-minute basis will be increasingly outmoded and unnecessary, as voice and data traffic will be indistinguishable. Accordingly, maintaining compensation structures that require measurement and compensation on a per-minute basis will impose unnecessary operational constraints and costs on carriers and equipment manufacturers."[21]

The current tariffs for packet switching clearly illustrate that packet switching is offered on a capacity basis,[22] and cost analysts are able to determine easily the cost of providing capacity on a packet switch system. There is no evidence that firms that interconnect packet switching networks rely on Bill-and-Keep. Therefore, the imposition of Bill-and-Keep would be contrary to the manner in which telecommunications pricing has evolved to reflect the cost structure of new technologies.

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[20] Economics and Technology, Inc. -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Page 27

[21] Cbeyond -- In the Matter of Developing a Unified Intercarrier Compensation Regime, August 21, 2001 (CC Docket #01-92) -- Pages 5-6

[22] See, for example, Qwest, "Interconnection and Collocation for Transport and Switched Unbundled Network Elements and Finished Services," September 2001, at http://www.qwest.com/wholesale/downloads/2001/011017/77386_Issue_G_FD1.pdf, section 11; and "Verizon, Wireless Handbook, Exchange Access Frame Relay," http://128.11.40.241/east/wholesale/wireless/wireless_handbook_7.7.htm.

Conclusion

It is impossible to measure the "value" or "benefits" of a telephone call – especially for the party receiving the call. Value-laden policy decisions that have no empirical or theoretical basis are bad policy. The "cost-causer" pays approach is the most efficient approach to allocating costs since it avoids value-laden judgements about the benefits of phone calls and to whom they accrue. Moreover, the benefits of a call cannot be estimated before a call is made since one cannot possibly predict the precise "value" of a conversation.

Interconnection payment schemes in the telecommunications industry therefore should be based on market forces and:

- Reflect the fact that the benefits of phone calls are not evenly distributed between callers and receivers;
- Capture the positive network externalities associated with the Calling Party Network Pays principle so as not to encourage the underutlization of telecommunications services; and
- Impose capacity charges that reflect traffic sensitive costs instead of using fixed end-user charges to recover termination costs.

A one-fits-all interconnection pricing regime should not be used to cover the costs of interconnection of network traffic since this is not efficient in a market comprised of a variety of types of services, and which is very dynamic and innovative like telecommunications. Adopting such schemes to universally cover the costs of interconnection of network traffic is not sound policy since telecommunications networks are unique, require a high degree of cooperation from all parties involved, and because of the interdependency of network components. Cooperation is only economically efficient and conducive to competition when it is voluntary and contractual, and not imposed and mandatory as it would be under Bill-and-Keep interconnection pricing arrangements -- receiving no payment for handling traffic of rival firms would undermine competition in the telecommunications industry.

TWO

The First Amendment As Ideology

FREDERICK SCHAUER

Not surprisingly, Learned Hand said it best. Writing for the Second Circuit in *International Brotherhood of Electrical Workers, Local 501 v. NLRB*,[1] he captured beautifully the paradox I wish to explore here:

> The interest, which [the First Amendment] guards, and which gives it its importance, presupposes that there are no orthodoxies—religious, political, economic, or scientific—which are immune from debate and dispute. Back of that is the assumption—itself an orthodoxy, and the one permissible exception—that truth will be most likely to emerge, if no limitations are imposed upon utterances that can with any plausibility be regarded as efforts to present grounds for accepting or rejecting propositions whose truth the utterer asserts, or denies.[2]

I do not want to focus on Hand's restatement of the standard marketplace-of-ideas principle that the value of freedom of speech lies in its instrumental value in (probabilistically) increasing the likelihood of identifying truth and rejecting falsehood. Much that I say here is not dependent on that theory, and is compatible with numerous different perspectives on the underlying rationale or rationales for freedom of speech and freedom of the press. Rather, I will train my attention on Hand's two-part claim: first, that the value of freedom of speech is itself an orthodoxy of the same type that the principles of free speech would otherwise

refuse to countenance; and, second, that this orthodoxy is a permissible exception to the First Amendment's prohibition of orthodoxies. In what is to follow I will agree with the first part of Hand's claim and disagree with the second. I will argue that the view that a broadly protective understanding of the First Amendment is taken as an orthodoxy—or ideology, as I prefer to call it—in a large number of academic and professional environments, but that this is a phenomenon to be bemoaned and resisted rather than accepted or celebrated.

This is not an exercise in legal doctrine. In referring to the one permissible exception in *International Brotherhood of Electrical Workers*, Hand was not claiming that the First Amendment does not protect arguments against freedom of speech, nor was he urging a change in that state of affairs. With few exceptions,[3] no one has argued that the otherwise applicable principles of freedom of speech should be modified merely because the speaker urges the constriction or elimination of the free speech system itself. Undoubtedly, one who urges partial or even complete elimination of freedom of speech as we know it is fully entitled to the support of the First Amendment to provide legal immunity in making that claim.

Still, we owe to Mill the first observation that social intolerance of divergent opinion may at times be as much a source of concern as legal intolerance.[4] If, as Mill argued, positive value results from challenging received opinions, then a social or cultural environment in which such challenge is de facto difficult or impossible is as much to be condemned as an environment in which challenge to received opinion is prohibited by law.

I am concerned here with this form of inhibition of opinion. To put it more precisely, I want to focus on the social rather than the legal manifestation of Hand's statement and consequently address the question of whether a certain view of freedom of speech, or at the extreme, free speech itself, has become the orthodoxy, or ideology, and, if so, whether such a state of affairs is desirable.

What do I mean by "ideology"? The term is notoriously slippery and has numerous definitions in various domains. Under one definition, an ideology is "a prescriptive doctrine that is not supported by rational argument,"[5] but, at least at the outset, this is not what I am referring to here. Nor do I use the term "ideology" to refer simply to "any system of ideas and norms directing political and social action,"[6] or not nearly so simply to the concept of ideology in Marxist thought.[7] And I do not use

the term as it is most often pejoratively employed in contemporary discourse, pursuant to which an "ideology" is something supported by an "ideologue," who seems to be someone adhering to ideas we believe are wrong, with about the same level of fervor we ourselves apply to the ideas we believe are right.

Still, I do intend to benefit from the word's pejorative connotations, such that for me an ideology is a prevailing idea existing within an environment in which adherence to the idea is more or less required, and challenge to the idea is more or less discouraged. In this sense I use "ideology" as something close to Hand's "orthodoxy," both of which are to be distinguished from "ideas" *simpliciter*, the latter suggesting nothing about the circumstances in which the idea is maintained. It is entirely consistent to say that freedom of speech is a very good idea, and at the same time to say that the idea that freedom of speech is a very good idea might be an ideology, a state of affairs that would not be nearly so good.

As should be clear from the foregoing definition, the notion of an ideology presupposes some population within which the relevant idea is treated as an ideology, and, as such, the idea of ideology is domain-dependent and domain-specific. It is thus incumbent upon me to specify the domain within which I believe an ideology exists and to specify as well the idea within which I believe that domain has assumed ideological status.

As to the first, the domain about which I wish to speak is, primarily, the domain I know best—the domain of American academic institutions in general and American law schools in particular. I will be making claims that I believe also apply with particular (and probably even greater) force to the world of journalism, including both practicing journalists and schools of communications and journalism, to the world of libraries, including both practicing librarians and schools of library and information studies, to the world of the arts, including artists and writers and their affiliated organizations and academic institutions, and to the world of publishing.

What these institutions share in common is a particular devotion to (and, arguably, need for) freedom of thought, freedom of inquiry, freedom of speech, and freedom of the press. It is, perhaps not surprisingly, within these institutions that an ideological view appears to have developed about freedom of thought, freedom of inquiry, freedom of speech, and freedom of the press. That is, these seem to be the institutions

within which, despite their particular devotion to these freedoms, those freedoms are treated as implicitly inapt to discussion of the freedoms themselves. To put it more simply, there seems to be, within these domains, little free thought about free thought, little free inquiry about free inquiry, and little free speech about free speech.

Let me be somewhat more specific. My claim is that within these institutions the view prevails in ideological fashion that the appropriate amount of freedom of speech and press is somewhat greater than that now existing in the United States, or that now protected by the Supreme Court of the United States, or that protected by the Supreme Court of the United States in its periods of greatest protection, and that this view prevails as an ideology even though under any of these measures the degree of freedom of speech and press in the United States is substantially greater than that prevailing in any other country on the face of the earth.

This last comparative claim is important, for without it little distinguishes what I say about freedom of speech from what could be said about the desirability of equality, the undesirability of rape and torture, or the propositions that the Holocaust happened, that the earth is not flat, and that no American president has been a woman. With respect to these propositions, their virtually unanimous acceptance makes it difficult to distinguish the possibility that they might be held as ideologies from the possibility that they exist largely unchallenged simply because of the widespread and justified acceptance of their truth. Standard free speech theory would still maintain, correctly, that it would be unfortunate if conceivable challenges were stifled in one way or another, and a variant on standard free speech theory, one to which I will return presently, would maintain that it might still be important to generate challenges to these widely accepted views, however implausible such challenges might at first seem or might in fact be, just in order to attain the positive benefits of the challenge. Nevertheless, if one wanted to support an empirical claim about the existence of an ideological environment surrounding some correct proposition, it would be difficult to do so in a context in which the overwhelmingly accepted truth of the proposition made it empirically difficult to determine how much the lack of dissent was a function of truth and how much was a function of ideological pressure.

With respect to freedom of speech and press, this methodological difficulty is less severe. On almost every issue of free speech theory,

doctrine, and practice, virtually every country on the face of the earth diverges from the United States, and diverges in the direction of lesser protection. No other country, for example, approaches American law in the extent to which factually untrue statements are protected against actions for defamation or their equivalent. To be more specific, I know of no country that would decide *Ocala Star-Banner Co. v. Damron*[8] or *Hustler Magazine v. Falwell*[9] the way in which they were decided here. So too with many other areas, including national security, in which *New York Times Co. v. United States*[10] (the case of the *Pentagon Papers*) represents a willingness to protect the publishers of arguably unlawfully obtained information in a way unreplicated anywhere else. And with respect to the operation of the judiciary, cases such as *Florida Star v. B. J. F.*,[11] *Smith v. Daily Mail Publishing Co.*,[12] *Nebraska Press Ass'n v. Stuart*,[13] and *Landmark Communications, Inc. v. Virginia*[14] are a few among many providing ample evidence of an approach that is uniquely American. The same phenomenon exists in other areas as well. Many other countries, including most Western democracies, have laws prohibiting the incitement of racial hatred, and both *Brandenburg v. Ohio*[15] and the *Skokie* cases[16] are far more exceptional than they are exemplary of international understandings, the best evidence being that some international human rights documents, such as the Universal Declaration of Human Rights[17] and the 1965 Convention on the Elimination of All Forms of Racial Discrimination,[18] which would *require* its signatories to have the kinds of laws against racist speech that are *prohibited* under current American constitutional law.[19] Similarly, the commercial speech cases[20] are a continuing source of astonishment to non-Americans and so too are many, many other cases.

All of this is possibly but an example of the unenlightened state in which the rest of the world exists, waiting for Americans to carry the white man's burden by introducing advanced American ideas to an unadvanced and largely uncivilized planet. But even if a uniquely American view about freedom of speech and freedom of the press is indeed the superior view despite its current uniqueness, the existence of such divergent views throughout the world, especially in politically stable, economically successful, and socially advanced societies, suggests at the least that, unlike some of the views I noted above, these are real issues, leading to genuinely plausible disagreements with existing American understandings.

The evidence from abroad, therefore, to say nothing of the evidence from other segments of current American society and from American understandings of as recently as thirty years ago, suggests that there are genuine sources of rational disagreement among reasonable people, areas of legitimate difference of not-presumptively preposterous opinion. If that is so, then the absence within some domains, especially within domains otherwise specially devoted to openness of thought, inquiry, discussion, and publication, of these nonpreposterous views might be reasonably strong evidence of the existence of an ideological environment preventing those views from being taken as seriously as they are in so many other environments.

Now that I have engaged in all of these clarifying preliminaries, it is time to turn to the evidence. Is there empirical support for the proposition that, within the domains I have specified, a broadly protective understanding of free speech and free press, generally broader than that espoused by the Supreme Court of the United States in even its most protective moments, functions as a prevailing ideology and exists within an environment such that a challenge to it is far more difficult than support of it?

Let me start with some anecdotal evidence. First, consider the experience that led to the writing of Leonard Levy's *Legacy of Suppression*.[21] As recounted in the preface to the revised edition,[22] Levy, already in 1957 a distinguished historian, was commissioned by The Fund for the Republic, Inc., later called The Center for Democratic Institutions, to prepare a study of the original meaning of the First Amendment.[23] The study was to be used at a series of conferences and published by The Fund. When Levy consulted the evidence, however, he came to believe, contrary to his prior beliefs, that the Framers had had a far narrower conception of the scope of the First Amendment's Speech and Press Clauses than was commonly understood. In particular, he came to believe that the Framers did not intend to eliminate the law of seditious libel and may not have intended to eliminate anything other than prior restraints on political speech.[24] When these conclusions (the truth of which I have neither reason nor expertise to affirm or deny) were incorporated into the study, The Fund's director, Robert M. Hutchins, among the most distinguished intellectuals of the time, refused to publish them, although he and The Fund were quite willing to publish Levy's considerably more politically sympathetic portions relating to the religion

clauses. Levy wrote *Legacy of Suppression* as the indignant response of an author censored for daring to depart from the prevailing view about the history of censorship.

More recently, academics have found themselves accused of acting irresponsibly or unprofessionally (which is far different from and worse than being accused of being wrong) when they espouse a certain view about freedom of speech. Consider the following by Floyd Abrams, appearing in the *Harvard Law Review:*

> Although courts have thus far struck down those attempts [to pass laws restricting sexually oriented but non-obscene speech in cities, and regulations forbidding racist and sexist speech on college campuses], it is troubling that law professors actually have led the efforts to involve the government in limiting speech they deem to be offensive.[25]

Following the quotation was a footnote referring specifically to Catharine MacKinnon's *Feminism Unmodified: Discourses on Life and Law*[26] and to Charles Lawrence's article, "If He Hollers Let Him Go: Regulating Racist Speech on Campus."[27] Now why is this "troubling"? Certainly not because as law professors MacKinnon and Lawrence urged legal results inconsistent with existing doctrine. If that were the standard for condemnation, ninety percent of the legal professoriate would be at risk. Urging legal results at odds with the prevailing case law is much of (and in my view too much of, but that is for another day) what law professors do, and certainly Abrams could not be troubled by the fact that MacKinnon's and Lawrence's proposals were not supported by existing doctrine.

If that is so, then the source of the concern must be that their prescriptions for law reform go in one direction rather than another. If it is not troubling that law professors have "actually" suggested legal results inconsistent with, say, *Branzburg v. Hayes,*[28] *Hazelwood School District v. Kuhlmeier,*[29] or *Paris Adult Theatre I v. Slaton,*[30] then the only thing that "actually" makes it "troubling" that law professors such as Lawrence or MacKinnon have suggested legal results inconsistent with *Brandenburg v. Ohio,*[31] *Collin v. Smith,*[32] or *Miller v. California*[33] is that they have been on the side of lesser First Amendment protection rather than greater. This is not to say that MacKinnon and Lawrence are correct in their normative prescriptions, or that their normative

prescriptions are not open to published attack. It is to say only that there is no evidence to indicate they have acted in any way less faithfully to the role of law professor than those whose views differ from theirs, and to so indicate seems some evidence of an ideology at work.

Similarly, and again Professor Lawrence is the target, Nadine Strossen has suggested that it is in some way specially incumbent upon the academic to avoid arguments of a certain kind:

> However, Professor Lawrence and other members of the academic community who advocate [restrictions on racist speech because the restrictions would make a symbolic contribution to racial equality] must recognize that educators have a special responsibility to avoid the danger posed by focusing on symbols that obscure the real underlying issues.[34]

This I am sure would be a surprise to those who have argued that one of the virtues of freedom of speech consists of the symbolic advantages a strong free speech system brings.[35] But if it is a violation of the special responsibility of the educator to focus on restrictions of speech for symbolic purposes, then presumably it is just as much a violation of that special responsibility to focus on protection of free speech for symbolic purposes. Because neither Lee Bollinger nor any other legal academic seems ever to have been accused of betraying the special responsibility of the educator in urging reliance on symbols in the service of greater freedom of speech, then it appears that the charge of violation of professional duty is deployed depending only on the viewpoint espoused.

Again, the mere fact of harsh criticism of the views of Lawrence or others would be no evidence of the presence of an ideology. But when the criticism takes the form of suggestions of violation of professional responsibility, and when the criticism is directed only against people who hold certain views, then it is beginning to appear that part of that professional responsibility is to have a certain view about freedom of speech.

My own observations and experiences lead me to believe that these three examples are far more typical than epiphenomenal, being but a few instances of many in which both the discourse used against and the treatment of those with restrictive views about freedom of speech are different in kind from that used with respect to those otherwise similarly situated, but whose views are protective rather than restrictive. Of

course I certainly do not suggest that the phenomenon is universal. There are counterexamples to be sure (and I may be one of them). Still, I believe these examples represent rather than contradict a trend or tilt, and just as the presence of a bottle of dry German wine does not defeat the validity of the probabilistic generalization that German wine is sweet, and just as the presence of a stupid philosopher does not negate the probabilistic generalization that philosophers are clever, so too do I feel confident in the similarly probabilistic generalization that standards of evaluation and criticism are higher for those with less protective rather than more protective views about speech and press, and that the degree of social intolerance, to use Mill's term,[36] is considerably higher for those within the institutions of which I speak who have less protective rather than more protective views about freedom of speech and press, all other things being equal.

Some further support for this proposition appears to come from the periodical literature. Over the last ten years approximately 200 articles and student notes on free speech and free press have appeared in American law reviews each year. My own survey of titles, supported by randomly checking the articles themselves, indicates that in excess of ninety percent of these articles are prescriptive, urging certain doctrinal or theoretical approaches upon the courts (or sometimes legislatures), as opposed to those articles, generally historical or comparative, that are largely descriptive. Of this ninety percent, at least ninety-five percent of the prescriptions are in the direction of urging on courts or legislatures greater protection of the free speech or free press interests than the objects of the prescription currently recognize.

This casual empirical survey is potentially flawed, because a question about the baseline remains. Criticism of the Supreme Court is the generally prevailing mode of constitutional scholarship, and concluding that the Court was correct is not generally the way to fame, fortune, and tenure. Moreover, it is unlikely that American constitutionalists are representative of the political makeup of the country as a whole, and thus an appropriately controlled analysis would have to look at, for example, criminal procedure, due process, and equal protection doctrine in order to separate the question of speech-protective bias from liberal bias generally. Still, it does appear that this is the case, confirming not only what I believe to be the case about law journals, but also with respect to the journals in the other fields that are part of the relevant

environment and with respect to symposia and other events that are also part of the activities of the environment.[37]

I may of course be wrong about all of this. Nevertheless, I want to proceed on the assumption that I am right, and that there exists an environment in which a range of seemingly plausible, even if not ultimately correct, nonprotective views about freedom of speech and press are stigmatized within the academy, within the world of journalism, within the world of the arts, within the world of libraries, and within the world of publishing, such that many sociological and psychological forces provide impediments to the articulation of those views—similar in effect to the impediments imposed by various more formal restrictions.

But is this state of affairs troubling? Here we might return to Mill, who argued in his treatment "Of the Liberty of Thought and Discussion"[38] that governmental or social restriction of ideas on the grounds of the supposed falsity of the ideas was unwise for three reasons. First, the suppressed opinion might be true. No matter how sure we are that it is false, such assertions of infallibility, Mill argued, are unwarranted, and without the assumption of infallibility we cannot conclude that there is no possibility that the opinion we believe false might not be true.[39]

In the context of freedom of speech and press, the arrogance of an assumption of infallibility can be exacerbated by an equally troubling assumption of American superiority. When the received opinion resembles the American view and the rejected opinion resembles the view held in many (or in this case all) other countries, tendencies towards nationalism may reinforce the belief that the rejected opinion cannot possibly turn out to be true.

Recognition of Mill's point, therefore, would counsel in the direction of caution before assuming too easily that a degree of freedom of speech greater than that now prevalent in the United States would be preferable, and a lesser degree would be dangerous. Moreover, because the rejected opinion, that less freedom of speech (or, conversely, more respect for other interests coming into conflict with freedom of speech) might be a good thing, could conceivably, according to Mill, be true, then it might be important to guard affirmatively and actively against the tendencies toward its suppression. If, as Holmes observed, "[p]ersecution for the expression of opinions seems . . . perfectly logical,"[40] then there is likely

to be created an environment in which those with "no doubt of [their] premises or [their] power"[41] will employ what power they have to prevent articulation of the opposing opinion. If that power is the power to criticize as unprofessional, or the power to select participants for a symposium, or the power to choose articles for an academic journal, then there may very well be a use of that power to suppress the currently rejected opinion that less freedom of speech and freedom of the press might be a good thing.

Even if the received opinion is not false, Mill further argued, and even if the rejected opinion is not true, still in most cases the question of truth or falsity will be more complex. Even that which we are convinced is true is likely false in some respects, and even that which appears false may still contain a "portion of truth."[42] By allowing the challenge to that which we are certain is true, we have the tools available to refine that truth, discovering and eliminating partial errors and incorporating the best from views that are largely but not completely false.

Mill's argument was couched largely in terms of truth or falsity, but where social problems are concerned, the question is more likely to be one of soundness or unsoundness. Again, free speech itself provides a perfect example because a system of free speech is, first of all, highly complex, encompassing numerous legal doctrines, political and social institutions, popular understandings, and official practices. The more complex this array of practices, the more likely that some segment of this array might be in need of modification even while most of it is highly satisfactory, or that some doctrines will go "too far" while others might not go far enough. Moreover, most of these doctrines, practices, and institutions rest on empirical suppositions such as that embodied in ideas like the "chilling effect"; the belief that an act of suppression makes the suppressed idea more attractive; the belief that an act of suppression makes further and more dangerous acts of suppression likely; the belief that allowing the expression of hostile words has a cathartic effect, such that the expresser is consequently less likely to engage in hostile acts; and so on.

Again, it seems highly plausible that the basic ideas behind these and other empirical underpinnings of the idea of free speech are sound. But the more these ideas are empirical rather than logical in any technical sense, the more likely it is that any current understanding is somewhat, even if only slightly, off the mark. As a result, the more the ideas of free speech and free press are based on highly complex practices and contingent empirical understandings, the more likely it seems that the soundest ideas about free speech and free press will vary at least slightly from what we now think correct and incorporate at least some of what we now reject as false. If Mill is right in this part of his argument, then we approach the sounder understanding only by fostering an environment for discussion *of* free speech and free press that resembles the environment that the ideas of free speech and free press create for discussion of everything else.

Mill's third argument is perhaps the most intriguing. Even if the received opinion is completely true, he maintained, and even if the rejected opinion is completely false, challenges to the received opinion must be allowed or else the received opinion will turn into "dead dogma," learned by rote and not understood, and consequently over time impossible to defend against attacks upon it.[43]

Were Mill alive today and looking for just such a reflexively defended but rarely thought through principle, he would be hard pressed to find a better example than the principle of freedom of thought and discussion itself. With numbing frequency, the same platitudes and slogans substitute for argument whenever the subject of free speech arises within those institutions dependent on free speech for their existence. "The chilling effect." "Don't blame the messenger." "It's the first step on the slippery slope." "Suppression of opinion is what Stalin and Hitler did." "Speech is a symptom and not a cause." Some of these slogans may contain some truth. Still, the frequency with which they are used in place of argument, in place of analysis, and especially in place of empirical assessment of the empirical presuppositions on which they rest, may be a perfect example of the very "dead dogma" that Mill warned against.

If Mill is right that an unchallenged idea is at risk of being accepted only as dead dogma, and if he is right that an idea so accepted is less hardy in the long term than one that benefits from deeper understanding, then his insight provides much more than an argument against censorship. It provides an argument for furnishing a challenge to the received opinion even if none is "naturally" available. An argument against censorship is an argument against restricting an opinion that someone wants to offer. Arguments against censorship are classically liberal arguments, concerned with eliminating governmental intervention into the antecedently generated products of individual and social existence. Consequently, if it turns out that no one wants to offer such an opinion, then an argument against censorship has exhausted its utility. If, by

contrast, an argument against censorship is but a component of a more encompassing argument for the positive virtues of even unsound opinions, and Mill's warning about dead dogma seems of just this sort, then the lack of an opinion to censor is still problematic, for the positive virtues remain unserved. If a challenge to received opinion is necessary in order that the received opinion not become dead dogma, then the absence of that challenge is troubling even if the absence is not attributable to an act of censorship.

Thus, even were the current unanimity of voice about freedom of speech and press (within the environments I am discussing) not the product of the very social censorship that Mill castigated, it would still be cause for concern, because it could still help to lessen serious understanding of the values of freedom of speech and freedom of the press; but here solutions seem at hand. First, those with the power to select, whether for journal articles, conference presentations, or projects to be funded, could engage in a form of affirmative action, taking the fact of a view's being currently underrepresented as a reason for selecting it. That reason need not be conclusive, but it could be a factor, such that the very challenge to the prevailing understanding would provide an additional argument in favor of the article, paper, presentation, or project.

In addition, a similar kind of affirmative action could pervade the scholarship of those who do endorse the received view. I take it as virtually self-evident that one earmark of intellectual honesty is confrontation of the best arguments for the opposing position. If this is so, then the absence of people actually making those arguments, or the fact of the arguments being made less persuasively than they could, is insufficient reason to relax the standards of intellectual honesty. Arguments in favor of strong free speech protection, therefore, must, to be honest, confront the best arguments for a lesser degree of protection. All too often, however, the confrontation is with the arguments that Senator Helms uses to attract votes or contributions, or with the silliest statements made by angry citizens at public meetings, or with a range of Orwellian caricatures. With spectacular frequency, the arguments for freedom of speech and freedom of press are, when not couched in the platitudes and slogans I mentioned above, contrasted only with some blend of Hitler, Mao, Stalin, the Ayatollah Khomeni, and the Cincinnati District Attorney's office, with the argument consisting of the proposition that the choice is only between American-style free speech and free

press protection and the political programs of those I have just mentioned. Rarely do we see acknowledgment, let alone serious confrontation, of James FitzJames Stephen,[44] Willmoore Kendall,[45] Herbert Marcuse,[46] and many others whose arguments, whether sound or not, rise far above those of the most common targets.

Thus, if arguments for freedom of speech or arguments for some particular area in which free speech or free press could be greater are to satisfy this standard of intellectual honesty, they have an obligation either to find, or if necessary to create, the strongest argument for the contrary position. If the strongest argument is not strong enough, then what emerges does so because of its power as an argument, and will likely survive because of that very same power. If only weak arguments are dealt with, then there is no reason to believe that what emerges can defeat the best arguments, or will have the power to do so when they are actually made in the arena of public debate.

In the preceding section, and indeed in this entire article, I have been assuming that a broadly Millian argument about freedom of speech was sound, and I have been assuming as well that, if sound, it was fully applicable to freedom of speech itself. To be faithful to my own message, I must acknowledge that these assumptions themselves must be open to challenge. That is, it might be the case that Millian arguments about freedom of speech are false, and that as a result, there is no reason to apply them to free speech thinking. Or, more plausibly, it might be the case that good arguments for treating freedom of speech and freedom of the press as ideologies exist. Perhaps Learned Hand was right, and the orthodoxy of the First Amendment, contrary to what I have maintained here, is a permissible or even a necessary orthodoxy. That argument does not seem wholly implausible, although I remain doubtful, and I remain doubtful whether it can be accepted by someone purporting to be a scholar *of* the First Amendment. To deal with that question, however, would require dealing with the entire question of just what it is to be a scholar, and that inquiry is best left to others, or at least to other times.

Thus, I will conclude with the observation that the increasing presence of some number of genuinely repressive political forces is doubly unfortunate—first, because of the effects of those repressive actions; and, second, because the presence of Senator Helms and numerous others fuels the tendency of free speech scholars to think that because actual or potential censors are out there, the appropriate response is a call to arms

rather than a concern about dealing with the best arguments that might be made for less free speech protection rather than more. Adopting this course might be more effective advocacy, but it is a course of action increasingly likely to be unfaithful to the very principles it seeks to defend. Without allowing as much free speech about free speech as free speech advocates urge about everything else, those advocates risk creating the impression that they are themselves unwilling to confront the assaults on their own belief systems that they demand be confronted by others. Even putting aside the question of the extent to which scholarship and advocacy are compatible, advocates whose own actions betray the very cause they advocate are likely in the long run to be less effective. When the environments that depend on free speech allow free speech about free speech within those environments, they then can with greater credibility urge the benefits of free speech on others.

Notes

This is the written version of a talk given at the Institute of Bill of Rights Law, Marshall-Wythe School of Law, College of William and Mary, on April 5, 1991, and to the Association for Education in Journalism and Mass Communication, in Boston, on August 6, 1991. A version of this article appeared in the *William and Mary Law Review* 33, no. 3 (Spring 1992): 853–869. I am grateful for the support of numerous friends and colleagues who over the years have endured my tediousness on this topic.

1. 181 F. 2d 34 (2d Cir. 1950), *aff'd*, 341 U.S. 695 (1951).

2. *Id.* at 40.

3. See, *e.g.*, Carl A. Auerbach, "The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech," 23 *U. Chi. L. Rev.*, 173 (1956). Some qualified support for this view can be found in Karl R. Popper, *The Open Society and Its Enemies*, 265 note 4 (London: Routledge, 4th ed. 1963), and in John Rawls, *A Theory of Justice*, 216–21 (Cambridge: Harvard University Press, 1971), both arguing that when the threat to political freedom is real, restricting those who would limit political freedom is permissible even as other forms of limitation of political activity are not.

4. John Stuart Mill, *On Liberty*, 31–34 (David Spitz ed., New York: W. W. Norton, 1975 [1859]).

5. D. D. Raphael, *Problems of Political Philosophy*, 17 (London: Macmillan, rev. ed. 1976).

6. Antony Flew, *A Dictionary of Philosophy*, 150 (New York: St. Martin's Press, 1979).

7. See generally David McClellan, *Ideology*, 10–20 (Minneapolis: University of Minnesota Press, 1986) (describing Marx's view of ideology as arising from rather than acting on the material, social, and economic relationships of the labor process).

8. 401 U.S. 295 (1971). I pick this case because, from among all of the Supreme Court defamation cases after *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this one appears to have protected the greatest degree of journalistic negligence at the greatest apparent harm to the victim. I have discussed the case more extensively in Frederick Schauer, "Public Figures," 25 *Wm. & Mary L. Rev.*, 905, 910–13 (1984).

9. 485 U.S. 46 (1988) (denying public figure's emotional distress claim arising from a satire).

10. 403 U.S. 713 (1971) (per curiam).

11. 491 U.S. 524 (1989) (declaring unconstitutional an imposition of damages on a newspaper for publishing the lawfully obtained name of a rape victim).

12. 443 U.S. 97 (1979) (holding unconstitutional a West Virginia statute prohibiting newspapers from printing, without permission of juvenile court, the names of juvenile offenders).

13. 427 U.S. 539 (1976) (reversing a trial court order forbidding the press from publishing accounts of defendant's confessions prior to a highly publicized mass-murder trial).

14. 435 U.S. 829 (1978) (holding that a Virginia statute may not constitutionally bar the press from publishing truthful information from confidential proceedings of the Judicial Inquiry and Review Commission).

15. 395 U.S. 444 (1969) (per curiam) (reversing the conviction of a Ku Klux Klan leader prosecuted under an Ohio statute that punished mere advocacy of lawless action rather than actual incitement).

16. *Collin v. Smith*, 578 F. 2d 1197 (7th Cir.) (holding unconstitutional city ordinances that (1) prohibited the dissemination of materials promoting hatred toward persons based on their heritage; (2) prohibited the wearing of military uniforms during an assembly by members of a political party; and (3) required $300,000 in liability insurance before obtaining a parade permit when this requirement was used selectively to prevent certain parties from marching), *stay denied*, 436 U.S. 953, and *cert. denied*, 439 U.S. 916 (1978); *National Socialist Party v. Village of Skokie*, 434 U.S. 1327 (1977) (Stevens, J., as Circuit Justice, denying stay); *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam) (declaring unconstitutional the denial of a stay of an injunction prohibiting the Nazi party from parading and displaying the swastika in the absence of strict procedural safeguards including immediate appellate review). The Skokie litigation is usefully contrasted with a series of recent Canadian cases denying freedom of expression protection under the Canadian Charter of Rights and Freedoms to a range of neo-Nazis, anti-Semites, and Holocaust-deniers. The

most prominent of these cases is *Regina v. Keegstra*, 3 S.C.R. 697 (1990) (denying constitutional protection to teacher prosecuted for expressing anti-Semitic beliefs to his students). To more or less the same effect are: *Regina v. Andrews*, 3 S.C.R. 870 (1990) (refusing to extend constitutional protection to leaders of a white supremacist group prosecuted for publishing a newspaper that expressed anti-Semitic beliefs, including the proposition that the Holocaust was a Zionist hoax); *Canadian Human Rights Comm'n v. Taylor*, 3 S.C.R. 892 (1990) (denying constitutional protection to a group and its leader prosecuted for operating a telephone service that played prerecorded messages denigrating the Jewish race and religion); *Regina v. Zundel*, 31 C.C.C. 3d 97, 111–28 (1987) (ruling on appeal of a convicted Holocaust-denier, and refusing to hold unconstitutional a statute criminalizing the willful and knowing publication of a false statement that is likely to cause injury to a public interest). For a discussion of the relevant German law, also substantially less speech-protective than that of the United States, see Eric Stein, "History against Free Speech: The New German Law against the *Auschwitz*—And Other—*Lies*," 85 *Mich. L. Rev.*, 277 (1986) (discussing additions to the German Criminal Code dealing with rising anti-Semitism).

17. "Universal Declaration of Human Rights," adopted Dec. 10, 1948, reprinted in 43 *Am. J. Int'l Supp.*, 127 (1949).

18. Dec. 21, 1965, 660 *U.N.T.S.* 195.

19. See Jordan J. Paust, "Rereading the First Amendment in Light of Treaties Proscribing Incitement to Racial Discrimination of Hostility," 43 *Rutgers L. Rev.*, 565 (1991); see also Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 *Mich. L. Rev.*, 2320, 2345–48 (1989) (discussing various international and multinational acts that ban speech aimed at inciting racial hatred).

20. *E.g.*, *Bates v. State Bar*, 433 U.S. 350 (1977); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

21. Leonard Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge: Harvard University Press, 1960).

22. Leonard Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985).

23. *Id.* at vii.

24. *Id.* at x–xix. On this possibility, see also *Patterson v. Colorado*, 205 U.S. 454 (1907) (Holmes, J.).

25. Floyd Abrams, "A Worthy Tradition: The Scholar and the First Amendment," 103 *Harv. L. Rev.*, 1162, 1171 (1990) (footnote omitted) (reviewing Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America*, Jamie Kalven, ed., 1988).

26. Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987).

27. Charles Lawrence, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," 1990 *Duke L. J.*, 431.

28. 408 U.S. 665 (1972) (holding that First Amendment does not prohibit requiring news reporters to testify as to the criminal activities of confidential sources before state or federal grand juries); see, *e.g.*, Archibald Cox, "Freedom of Expression in the Burger Court," 94 *Harv. L. Rev.*, 1, 52–53 (1980) (arguing that perhaps the burden should be on the press when it claims First Amendment privilege not to reveal its confidential sources).

29. 484 U.S. 260 (1988) (holding that school officials could constitutionally exercise reasonable restrictions on content of speech in student paper).

30. 413 U.S. 49 (1973) (holding that state may constitutionally regulate obscene conduct on commercial premises in order to further legitimate state interests); see, *e.g.*, David A. J. Richards, "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment," 123 *U. Pa. L. Rev.*, 45, 72–73 (1974) (arguing that the underlying contractual philosophy of liberty of the First Amendment renders all obscenity constitutionally protected).

31. 395 U.S. 444 (1969) (per curiam).

32. 578 F. 2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953, and *cert. denied*, 439 U.S. 916 (1978).

33. 413 U.S. 15 (1973) (adopted a three-part test to determine whether a particular work is obscene and therefore subject to state regulation).

34. Nadine Strossen, "Regulating Racist Speech on Campus: A Modest Proposal?" 1990 *Duke L. J.*, 484.

35. See especially Lee Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America*, 248 (New York: Oxford University Press, 1986).

36. Mill, *supra* note 4, at 32.

37. Note, for example, the contrast between the Supreme Court's unanimous decision in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), rejecting an academic freedom claim of privilege from disclosing information to an EEOC investigation, and the equivalently unanimous, but in the opposite direction, views articulated in "Symposium, Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1940 Statement of Principles," 53 *Law & Contemp. Prob.*, 1 (Winter 1990).

38. Mill, *supra* note 4, at 17–52.

39. *Id.* at 18–19.

40. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

41. *Id.*

42. Mill, *supra* note 4, at 50.

43. *Id.* at 35.

44. James F. Stephen, *Liberty, Equality, Fraternity*, 74–90 (R. J. White ed., Cambridge: Cambridge University Press, 1967) (arguing that Mill mistakenly believes removal of restraints invigorates rather than softens character by providing comfort rather than obstacles; also arguing that liberty, like fire, is only "good" or "bad" because of the time and place of its existence).

45. Willmoore Kendall, "The *Open Society* and Its Fallacies," 54 *Am. Pol. Sci. Rev.*, 972 (1960) (postulating that Mill's formula for the uninhibited exchange of ideas erroneously presumes that all people value the truth above all else, and will result in as much intolerance as tolerance).

46. Herbert Marcuse, "Repressive Tolerance," in Robert Paul Wolff *et al.*, *A Critique of Pure Tolerance*, 81 (Boston: Beacon Press, 1969) (arguing that what passes for tolerance today is as much a "subversive" and oppressive practice as it was in the past).

PART II

UNTANGLING SPEECH, PROPERTY, AND LAW

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Transcript of Sherman Anti-Trust Act (1890)

Fifty-first Congress of the United States of America, At the First Session,

Begun and held at the City of Washington on Monday, the second day of December, one thousand eight hundred and eighty-nine.

An act to protect trade and commerce against unlawful restraints and monopolies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. Every contract, combination in the form of trust or other- wise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, at the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof; shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Sec. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be- forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of

CHAPTER 7

The meaning of 'speech'

THE COVERAGE–PROTECTION DISTINCTION

Many discussions of rights make the unfortunate mistake of masking the important distinction between the coverage of a right and the protection of a right. Unless we get clear about this distinction as it applies to all rights, we cannot get clear about specific rights, such as a right to free speech.

Rights of course are not unlimited in scope. A right to free speech does not include the 'right' to commit murder, to drive a car in a pedestrian zone, or to sell heroin. Nor does a right to free speech include a 'right' to commit perjury, or to extort, or to threaten bodily harm, although all of these are speech acts. But a right to free speech is generally taken to include the right to criticize public officials. Yet even this conduct is without legal protection if found to be defamatory and factually false. We could say that such defamatory utterances too are outside the scope of the right, but this is unduly crude. Perjury and extortion have nothing to do with what free speech is all about. Criticism of public officials most certainly does have something to do with freedom of speech, although under some circumstances the protection is lost.

If I am wearing a suit of armour, I am *covered* by the armour. This will *protect* me against rocks, but *not* against artillery fire. I can be wounded by artillery fire despite the fact that I am covered by the armour. But this does not make the armour useless. The armour does not protect against everything; but it serves a purpose because with it only a greater force will injure me.

So also with rights. They may cover certain conduct, by requiring greater persuasive force in order to restrict that conduct. If a particular act is covered by a right to engage in acts of that general type, it takes a better reason to restrict that act than would be the case if the act were not covered by a right. But some reasons may be sufficiently powerful to penetrate the coverage of a right, just as artillery fire may be sufficiently powerful to penetrate the coverage of the armour.[1]

The arguments for freedom of speech are to some extent distinct. They may apply in different circumstances, and in conflicting ways. I do not consider this a failure. Too much synthesis may result in a principle so abstract as to be useless or trivial, or a principle so qualified as to be hardly a principle at all.

But the arguments I have found to have some validity do have in common an emphasis on the separation between individual and government, a demarcation of not wholly congruent areas of authority. Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense. It is possible to use such arguments to justify a general limitation of government, but I make no such argument here. I am arguing only that the power of government to regulate speech should, for a number of reasons, be more limited than are its powers in other areas of governance.

Looking at all of the arguments presented in this Part, we can see that the determinative question is whether to grant to government the power to determine what shall be suppressed and what shall not. The question is one of justifying a practice.[19] Thus in any case the issue is not whether the suppression was proper, but whether the exercise of authority was valid. These are different questions, and they may at times yield different answers.

I might summarize the foregoing paragraphs by saying that the most persuasive argument for a Free Speech Principle is what may be characterized as the argument from governmental incompetence. This characterization is in part a transition to the remainder of this book, in which I attempt first to clarify and then to apply the Free Speech Principle. But clarification and application occur in the context of the reasons for recognizing a Free Speech Principle in the first instance. Development of a deep theory (or theories) must precede clarification and application of that theory. If the foundation is a weak assembly of platitudes, then the superstructure above it is highly vulnerable and of little value.

Bibliographical note to chapter 6

Works not previously cited that treat the relation between freedom of speech and the actual practice of governments include C. Hyneman, 'Free speech at what price?', *American Political Science Review* 57 (1962), 847; Peter Ingram, 'Principle and practice in censorship', *Social Theory and Practice* 4 (1977), 315.

PART II

EXPLICATION

Chap 6

1) can have weak arg - supp for FSP - the harm of suppression may be great enough to warrant FSP - still need to focus on speech - what about speech makes it diff / dang to regulate

2) Supp → Counterprod
   a) ↑ att of suppressed opinion
   b) ↑ legit of supp op [illegible] to hold it
   c) need safety-valve

3) Supp - delegit [illegible] - by force
   if state use coercion then legits use of coercion by others

4) Censorship cant be controlled - slip supp
   1) too broad
   2) too [illegible]
   So will spill over
   also "chill effect" self-censorship

5) slip supp: best arg
   is that govt incompet - govt cant be trusted to [illegible] [illegible] - so must be

is equally true that 'slippery slope' and 'where do you draw the line?' arguments are in most instances either invalid or greatly exaggerated. If an argument from the slippery slope is to succeed, there must be some reason why the slope is likely to be especially slippery in this area.

When we make a slippery-slope argument, we presuppose that there is something that is properly subject to restriction. At the heart of a slippery-slope claim is the belief that although it is permissible to regulate x, attempting to do so in practice will result as well in the regulation of y, where y is something that as a matter of the ideal theory cannot be regulated. A slippery-slope argument maintains that the attempt to regulate what can be regulated will have the effect of regulating something else that *cannot* be regulated. The question, then, is how this might occur. *When* do we slide down the slippery slope? Why is it not possible to stop? In looking for an answer, we see that slippery-slope claims can be divided into two different major types, and that both of these types have particular relevance to the question of freedom of speech.

The first type of slippery-slope argument, or the first source of a slippery-slope effect, is the phenomenon of conceptual vagueness, or, more precisely, linguistic over-inclusiveness. Thus, assume that x is that which can be regulated, and that y is that which, although it cannot permissibly be regulated, is nevertheless the source of our slippery-slope fear. Slippery-slope effects from linguistic over-inclusiveness occur when the *term* we use to describe x may also include y as well. It is quite possible that the infinite variety of linguistic and pictorial expression makes it impossible, given the current tools of our language, to specify with precision the utterances that are to be prohibited. If our descriptive language about speech is less refined or less precise than our descriptive language about other forms of conduct – and this seems by no means an implausible hypothesis – then any regulating rule may be particularly vulnerable to the vice of linguistic over-inclusiveness. And if this is so, then there is some validity to the claim that slippery-slope fears are more well-founded in reference to regulation of speech than in reference to other forms of conduct. Such a conclusion would support recognition of a Free Speech Principle solely to counteract the special slipperiness of this particular slope.

An alternative source of a slippery-slope effect is what might be characterized as the phenomenon of limited learnability.[17] Human beings have only so much mental space, and there is a practical limit on the complexity of the concepts that we can reasonably expect people to understand. Although it might be possible for a

group of lawyers, philosophers, or whatever to formulate a carefully delimited and highly complex code that would regulate all that can be regulated and nothing that cannot, it might very well be impossible to teach this code to all of the judges, jurors, prosecutors, and administrators who are part of the process of regulation. A code, or a definition of the object of regulation, may be only as complex as the understanding of the least teachable member of the enforcement chain. It is a fact of life that 'certain very complex codes break down because ordinary people can't keep all the distinctions, caveats, and exceptions straight in their heads.'[18] Unlike the case of linguistic over-inclusiveness, we assume here that it is possible in theory to formulate a precise definition. But if that definition requires for its application the understanding and internalizing of a corpus of theory beyond the capacities of the administrators, then each instance of lack of understanding increases the slippery-slope risk. If, as seems quite likely, the values of disagreement and challenge are especially counterintuitive, then the slippery-slope risk here is once again greater than normal, and there is again justification for employing the argument from negative implication to generate a Free Speech Principle that serves to counteract the special problems of learnability involved in the regulation of speech.

SOME TRANSITIONAL CONCLUSIONS

The divergent nature of the arguments in this chapter reflects to some extent the loose connexion among all the arguments presented in this entire Part. This approach has not been unintentional. Although I have criticized many arguments, supported others, and offered some of my own, I am less concerned with particular conclusions than I am with overall method. What is important is the exploration of the philosophical, psychological, and political assumptions supporting any argument for freedom of speech. Demonstrating the necessity of exploring to this depth is more important than what any individual explorer, including myself, may find.

Nevertheless, I do find some consistency in the arguments that tend to support a distinct Free Speech Principle. It is not imperative that all of the arguments for freedom of speech relate closely to each other, or that they be distillable into one principle or argument. One of the problems of much theorizing about freedom of speech is that there has been too much distillation and not enough dissection.

ment office, and those same reasons also inspire in them the want to retain those positions.

Yet any system of regulating political speech puts in control those with the most to lose from the activities they are regulating. There is a maxim of natural justice, *nemo debet esse judex in sua propria causa* (no man to be judge of his own cause), which is directly applicable here. Most systems of regulating speech involve just this problem. Even the intervention of a jury, which was thought so important in eighteenth and nineteenth century arguments about free speech, because the jury represents the people, is of little importance when much censorship is administrative, and when in addition administrators, legislators, executives and prosecutors, who make and enforce law, have a personal interest in the preservation of existing governmental structure.[12]

It is true that there is no hard empirical support for the proposition that governmental officials are likely to be over-aggressive censors for reasons of self-interest. And it is equally true that this argument sounds uncomfortably like a naïve conspiracy theory. I do not intend to take that position. But we routinely exclude the relatives of the parties of a lawsuit from serving on a jury without any empirical evidence that they would in fact be biased.[13] We also prohibit any beneficiary from being a witness to a will. It is the nature of the relationship that justifies the assumption of bias, and so too may similar assumptions apply to the regulation of speech, especially political speech.

It has been suggested that there exists in people a desire for unanimity, an urge to suppress that with which they may disagree even if there seems no harm to that expression. Justice Holmes is often quoted on this point.[14]

> Persecution for the expression of opinions seems to be perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises.

This desire to suppress, this longing for a consensus, may be stronger in reference to speech than in reference to other forms of conduct. There is something particularly public about speech. People speak with the intention and usually the result that other people hear their words. Conduct that is not communicative may be more easily avoidable. We may advocate freedom for others

because in many cases we need not confront the exercise of that freedom. We know it exists, but we do not have to see it existing. But speech may be different, with the consequence that the desire to enforce unanimity may be strongest with respect to speech. If some of these conjectures are correct, if the impulse to make speech conform is especially great, if the urge towards intolerance is greater with respect to speech than with respect to other actions, then the power to suppress may be over-used when that power is available. If there is this special urge to suppress, then a Free Speech Principle may be necessary merely to counter the tendency towards over-regulation.

Moreover, the distinctions necessary in any form of government regulation might be harder to draw when it is speech rather than other forms of conduct that is the subject of the regulation. Any exercise of state power involves an attempted 'fit' at two levels. The specific mode of regulation must fit the goals that provide the reason for regulating, and the actual conduct regulated must fit the particular regulating rule chosen. If distinctions are especially difficult to draw, the fit may be loose at both levels, creating a greater than normal risk of over-inclusive regulation.

The hypothesis here is that 'slippery slope' and 'where do you draw the line?' arguments may have special relevance with respect to regulating speech. This suggestion is hardly novel. Lord Chesterfield, speaking against the Theatres Act of 1737, remarked that:[15]

> There is such a connection between licentiousness and Liberty, that it is not easy to correct the one, without dangerously wounding the other. It is extremely hard to distinguish the true limit between them; like a changeable silk, we can easily see there are two different colors, but we cannot easily discover where the one ends, or where the other begins.
>
> Censorship is a double futility. It cannot prevent any single intended criticism; and it is bound to suspect a theoretically infinite number of unintended ones.

More recently, Joel Feinberg has expressed similar sentiments.[16]

> There are serious risks involved in granting any mere man or group of men the power to draw the line between those opinions that are known infallibly to be true and those not so known, in order to ban expression of the former. Surely, if there is one thing that is *not* infallibly known, it is how to draw *that* line.

Now it is true that the regulation of any form of conduct involves drawing lines, making distinctions, and granting power to make those distinctions to human beings who are far from infallible. It

tual organization, but it is better to have people yelling at each other in New York than shooting at each other somewhere else.'

The 'letting off steam' argument, by metaphorically equating the personality of the angry citizen with the boiler of a steam engine or the respiratory tract of a sperm whale, again indulges in some questionable behavioural speculation. Like the other arguments discussed in this section, it assumes that more argument will produce less violence, as if every human being were granted a fixed quantum of anti-governmental energy. If some of the allotment is used for argument, there supposedly remains less for violence. But this is not the only possible theory. It is equally plausible to suggest that disagreement and argument would increase anger, thereby increasing the possibility of violence.

Although I have no strong empirical evidence to support either proposition, I intuitively still have sympathy with the argument from catharsis. Violent rebellions and civil disobedience seem all too often the result of frustration. If there is a sense of participation, a feeling that someone is listening, a belief that there remains a chance to change things by words alone, then it is likely that there would be less frustration. Freedom to challenge authority with words will not be totally effective in defusing violence, in part because the words are not always effective. But even if freedom to criticize produces only slightly more reason and slightly less force, there is still much to be said for it.

THE ARGUMENT FROM NEGATIVE IMPLICATION

Most rights, in the sense that I am talking about rights, can be justified in either a positive or a negative way. When we provide a positive justification for a right, we offer reasons why the activity covered by the particular right is especially valuable, and therefore deserving of special protection. The process of offering a negative justification is somewhat different. Here we do not focus on the special value of the activity covered by the right, but rather focus on the special dangers of treating that activity in the same way that we treat other activity. A negative justification, therefore, concentrates on the special dangers of regulation, rather than on the special place the particular activity occupies within the realm of all activity. The argument is negative in the sense that it highlights evils rather than goods. Where a negative argument is valid, the resultant right may look quite similar to that produced by a positive argument. But a right is created from a negative justification only to ensure that the particular activity is ultimately treated

no less favourably than activity of equivalent value. We add special protection just to even things out, just to counteract the harmful tendencies that provide the basis of a negative justification.

In terms of this distinction, most of the justifications for recognizing a Free Speech Principle that I have discussed so far have been of the positive variety. These justifications have attempted to identify some way in which speech is particularly valuable, compared to other forms of conduct, such that it has a claim to special immunity from the general principles of governmental action. But it is possible also to offer a negative justification for a Free Speech Principle. Even if there is nothing especially good about speech compared to other conduct, the state may have less ability to regulate speech than it has to regulate other forms of conduct, or the attempt to regulate speech may entail special harms or special dangers not present in regulation of other conduct. If this is the case, if the regulation of speech is either less efficient or more likely to produce unpleasant side-effects than the regulation of other forms of conduct, then a Free Speech Principle will emerge by negative implication.

Throughout history the process of regulating speech has been marked with what we now see to be fairly plain errors. Whether it be the condemnation of Galileo, religious persecution in the sixteenth and seventeenth centuries, the extensive history of prosecution for expressing seditious views of those now regarded as patriots, or the banning of numerous admittedly great works of art because someone thought them obscene, acts of suppression that have been proved erroneous seem to represent a disproportionate percentage of the governmental mistakes of the past. Similar examples from contemporary times are scarcely more difficult to locate. Experience arguably shows that governments are particularly bad at censorship, that they are less capable of regulating speech than they are of regulating other forms of conduct. These superficial intuitions inspire a search for a deeper reason.

If such a reason exists, it would, as with the other arguments discussed in this chapter, be grounded on some psychological aspect of the process of regulating speech that makes it particularly inefficient. One reason may be the bias or self-interest of those entrusted with the task of regulating speech. In particular, the regulation of speech on grounds of interference with government, such as by treason, sedition and so on, is entrusted to those very people who, as governmental officials, have the most to lose from arguments against their authority. Reasons of power, prestige, mission, or money inspire in people the desire to attain govern-

was concealing an argument. As a result, there would be no particular occasion for curiosity or suspicion, and the argument from counterproductiveness seems inapplicable.[7] There are arguments for permitting such a march, arguments I touch on in the concluding section of this chapter and elaborate in Part III of this book, but the argument that the suppression will be counterproductive does not appear to be one of them.

THE FORCE OF ARGUMENT OR THE ARGUMENT OF FORCE?[8]

I do not hesitate to take as true the assertion that in general it is better to settle disputes by discussion than by force and violence, that decision-making by rational means is preferable to decision-making with fists, knives, guns or bombs. I do not mean that a particular decision to resort to force may not be a rational choice. I am not ready to concede, for example, that the American Revolution was an irrational act. Nor am I saying that everyone is rational, only that it would be nice if people were, and any policy conducive to rational discussion and prejudicial to decision by force is probably worth pursuing, or at least considering, for those reasons alone. Thus, what I mean is that as an ideal a decision procured by reason, discussion and argument will be more likely to produce satisfactory results and will have fewer unpleasant side effects (such as death or dismemberment) than a decision procured by force of arms.

From this assumption it is plausible to argue that suppression is an unwise policy because it increases the likelihood that the initial use or threat of force (here, the act of suppression) will produce further resort to forcible means of making decisions. This argument is based not on the actual existence of an ideal state of rational deliberation, but on the belief that suppression will foster irrationality and use of force, and that freedom of argument and discussion will promote calm and reasoned deliberation.

More specifically, this argument has been presented as part of a broader theory of the advantages of peaceful change. Certainly peaceful change is itself a desirable goal, so much so that for many, including Popper and Russell, the capacity of a society to allow for peaceful change is a defining feature of the concept of democratic government. Russell defined democracy as 'a method of settling internal disputes without violence'.[9] Within the framework of this ideal, it is possible to see freedom of speech as a way of substituting logical persuasion for force, or, in the words of Thomas Emerson, of achieving a desirable 'balance between stability and

change'.[10] If people have the opportunity of debating all issues, so the argument holds, then they will be more likely to rely on this process and less likely to resort to violence. Conversely, if there is a prohibition on criticism of official policy, then those who strongly object to official policy will be more prone to violence, because they will then see violence as the best way of achieving their objective.

Under this view freedom of speech will produce more stability and less violence in two ways. First, people may place greater trust in a government that is willing to hear and consider a wide range of arguments. But if they see government as irrational, or arbitrary, or closed, then faith in government generally and governmental leaders in particular will diminish, and respect for the rule of law will decrease commensurately.

Second, individuals who have an opportunity to object to governmental policy during and after the process of its becoming law are likely to feel that they have participated in the process of making laws, and may be therefore more inclined to obey even those laws with which they disagree. This is the 'legitimization' argument I discussed in the context of the argument from democracy.

We can look at this issue not just from the perspective of the individual, but also from the perspective of the government. Freedom to challenge may provide advantages to government by furnishing an imperfect but inexpensive method of testing putative governmental policies. Clearly not all proposed governmental action will be successful. The state may err in choosing its goals, and, more likely, it may err in choosing the means for the pursuit of those goals. If the only way to test these means is by trial and error, then the costs of implementing the policy, as well as the harms caused when the trial turns out to be an error, are substantial costs to society. To the extent that policies may be evaluated, challenged, and criticized before being put in effect, then some error in policy may be exposed without the costs of actually implementing the proposed policy.

Finally, there is what is variously referred to as the 'safety-valve', 'letting off steam', or 'catharsis' argument.[11] This argument maintains that there will always be in a society those who so strongly object to governmental policy that they will be inclined towards violent acts unless we let them 'blow off steam' by objecting, however heatedly, in words. Otherwise they will be inclined to object violently with guns or bombs. The argument parallels one frequently heard in reference to the United Nations, an argument I can paraphrase as follows: 'Yes, the United Nations is an ineffec-

the proscribed doctrine after all. Erroneous doctrines thrive on being expunged. They die if exposed.

I am not now concerned with the last sentence of the quoted paragraph, for I have discussed that problematic claim in the context of the argument from truth. But the sentiments preceding make an interesting point. Is it possible that the act of suppression fuels the fire of noxious doctrine?

Part of the argument is based on the assumption that we make a mistake when we take too seriously what seems to be an erroneous belief. But this seems peculiar. Why does it follow that taking a belief or a group seriously heightens its credibility? We take polio, smallpox, tidal waves, earthquakes, burglary and rape very seriously without anyone suggesting that any of these events are beneficial or would be thought to be so merely because we treat them as grave dangers. Why is the National Front, for example, any different? A possible answer is that by taking them seriously, by bothering to suppress them, we acknowledge that they have enough strength and popularity to constitute a danger. Therefore, it can be argued, we admit their presence as a substantial force by the act of suppression, providing an aura of respectability and thus increasing the probability of their gaining new adherents. People are more likely to side with a large group holding extremist views than they are willing to be a lone voice crying out in the wilderness. There is still safety in numbers.

This argument has an intuitive plausibility, but these intuitions seem grounded in the *motives* of suppression, or, more precisely, in distrust of those motives. Milton, for example, contended that when the state suppresses an opinion people are likely to wonder why the state does not let the opinion be expressed and then show why and how it is false. Is the state afraid that the opinion is true and therefore will prevail? In a similar vein, Bagehot suggested that an imposed conformity of opinion produces an unacceptable quantity of doubt.

Even without this suspicion, people are naturally curious. If the doctor instructs me not to remove a bandage for three weeks, I am likely to disobey and peek before ten days are gone. People are equally likely to be curious about the opinions they cannot hear, perhaps to the point of being substantially more interested or susceptible to persuasion than if the opinion were not suppressed. In addition to this natural curiosity, people are inclined to suspect the motives of a suppressing government. They are likely to feel that that which is kept from them might be true, by virtue of the

very fact that it is kept from them. Why, they might wonder, can we not hear this? Maybe there is something to it?

The argument assumes first that suppression will be less than fully effective. It assumes that the curious and suspicious can learn in some way about the opinion they are not permitted to hear. This assumption seems well-founded, but there is no way in which the assumption can be tested, because an effective act of suppression would be effective against my discovery of the suppressed opinion. Still, there seems something to the hypothesis that suppression is rarely completely effective. Machiavelli's observation in *The Prince* that enemies must either be caressed or totally annihilated seems especially apt here.

Moreover, we encounter here an assumption of rationality similar to that discussed in the context of the argument from truth. If people are suspicious of suppressed opinions, it is largely based on their belief that opinions that really are false can be allowed expression without danger. Although, as I have mentioned earlier, this view seems largely unjustified, it still commands much popular support. That is especially important here, because the issue now is not whether people are rational, but whether people *think* they are rational. If people believe that false opinions will invariably be rejected, then it is not surprising that they will distrust the motives of a suppressing government, and this will contribute to the disutility of suppression.

In addition to relying on some questionable behavioural assumptions, the argument that suppression is counterproductive is of limited application. It presupposes that the goal of suppression is preventing people from coming to believe the erroneous opinion. Although this is indeed the aim of many acts of suppression, there are other objectives as well.[6] When the harm at which suppression is directed is not the possibility that the suppressed view will be accepted, but rather some more direct result of a particular instance of expression, then the argument is unavailing. For example, it was argued in the United States that the American Nazi Party should be prevented from marching in areas with concentrated Jewish populations because those Jews would be offended, arguably to the point of physical illness, by seeing, hearing, or even knowing about the march. In this situation it is unlikely that the act of suppression would cause American Jews, or others, to be more receptive to the opinions of the American Nazi Party. The primary purpose of suppression in this instance would not be the fear that the views of the Nazis would be accepted; hence here there could be no suggestion that the state

scepticism, proponents of this view look upon a demonstrably false proposition as having no value, and therefore no claim to any further hearing.

This view has some superficial appeal. If we are searching for truth, plain error does nothing to help the process. It reduces the proportion of true propositions among all propositions expressed, thereby diluting the frequency of truth and making it harder to locate. A needle is harder to find in a haystack than in two pieces of hay.

Yet many have taken issue with the surface logic of denying value to falsity. Most of these arguments have focused on the valuable by-products of false statements. In the *Areopagitica* Milton argued that awareness of error is necessary for 'confirmation of truth', and that truth will be healthier when forced to meet and conquer its opponents. 'I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race, where that immortal garland is to be run for, not without dust and heat'. And in the third part of Mill's argument for liberty of thought and discussion he claims that if people fail to understand why the true opinion is true and the false opinion false, they will acquire knowledge by mere rote, and not understand the 'real' truth. Should this continue, truth will turn into 'dead dogma', lacking the power to survive new attacks. Only by the continuing fight with error, Mill argued, does truth legitimately become accepted. What distinguishes knowledge from superstition was the *understanding* acceptance of truth. Thus falsehood should be allowed to circulate in order to give truth the force with which to endure.

Mill was concerned as well with the benefits to the individual of going through the mental exercise of justifying truth and rejecting falsity, an exercise that could not take place without some falsity to reject. To the same effect is the statement of Justice Jackson of the United States Supreme Court. 'The danger that citizens will think wrongly is serious, but less dangerous than atrophy from not thinking at all'.[3]

The argument looks upon false doctrine as a gymnasium for intellectual exercise to produce stronger minds. But the argument is premised on an optimistic view of how people react to falsity. Like any strong rationalist version of the argument from truth, the argument from intellectual exercise supposes that people have the capacity to reject falsehood consistently, and will do so when falsity is encountered. As with the argument from truth, this argument is only as strong as the rationalist assumptions on which it

is premised. But unfortunately falsity is often to many people more appealing than truth, especially when accepting falsity requires less effort than identifying truth. There is a valuable lesson here in the metaphor of the path of least resistance.[4] The argument from intellectual exercise is premised on the value of challenge, but this value is illusory if it turns out that false views are accepted. Gymnastics on the parallel bars is superb exercise for those who can do it, but no exercise at all for those who fall off and injure themselves.

The argument from intellectual challenge thus suffers from the same problems as the argument from truth. The benefits of the challenge must be weighed against the harms that would flow from acceptance of error. Because in many cases the expected harm may outweigh the expected benefit, the argument from intellectual challenge provides a justification no stronger than that provided by the argument from truth.

IS SUPPRESSION COUNTERPRODUCTIVE?

Some have argued that suppression is counterproductive, not serving the goals that give rise to the desire to suppress. Many acts of suppression are based on the desirability of promoting true beliefs and eliminating false ones. In this sense censorship is an attempt to promote the received view and extinguish its negation. Presumably, then, any particular act of suppression is premised on the assumption that it will be effective; that as to the opinion suppressed, this opinion will be less accepted after the suppression than before. Conversely, the received opinion will be more accepted after the suppression than earlier. Although no act of government is guaranteed effective, an act of suppression presumes at the very least that the probability of effectiveness, if not necessarily greater than .50, is at least greater than the probability of its having the opposite effect.

It is this presumption that has frequently been challenged, the argument being that the act of suppression is often at least as likely to foster acceptance of the erroneous view as it is to promote its rejection. The argument is supported by several behavioural hypotheses, the first of which is aptly summarized by William Haley:[5]

> Mankind is so constituted, moreover, that if, where expression and discussion are concerned, the enemies of liberty are met with a denial of liberty, many men of goodwill will come to suspect there is something in

in a line of demarcation between the individual and government. That line may neither be straight, distinct or easy to locate, but it represents a division nevertheless. In relying on this separation between the individual and the organization of government, the argument from autonomy shares numerous characteristics with the most valuable features of both the argument from truth and the argument from democracy. I will return to this relationship in the concluding section of the following chapter, because the values represented by the various arguments for freedom of speech share more in common than the original formulations of those arguments may have suggested.

Bibliographical note to chapter 5

Arguments from individual autonomy are found as well in Glenn Tinder, 'Freedom of expression: the strange imperative', *Yale Review* 69 (1980), 162; Irving Younger, 'The idea of sanctuary', *Gonzaga Law Review* 14 (1979), 761. For commentary on Scanlon, see Robert Amdur, 'Scanlon on freedom of expression', *Philosophy and Public Affairs* 9 (1980), 287; Allen Buchanan, 'Autonomy and categories of expression: a reply to Professor Scanlon', *University of Pittsburgh Law Review* 40 (1979), 551.

CHAPTER 6

The utility of suppression

ARGUMENTS FROM UTILITY

In 'The Theory of Persecution', Frederick Pollock observed that 'It is not the demonstration of abstract right, but the experience of inutility, that has made governments leave off persecuting.' Such appeals to utility are still widely accepted. Arguments from natural right are not universally attractive, and the consequentialist arguments from truth and democracy have significant flaws. Part of the magnetism of arguments from utility is that utilitarian considerations are relevant even in deontological systems.[1] Even if utilitarian considerations do not solve *all* problems, they may still be quite useful.

The pervasive appeal of utilitarian arguments has produced many diverse arguments supporting a principle of freedom of speech. The most important of these are discussed in this chapter, although the diversity in arguments produces some looseness of structure.

A shared feature of utilitarian arguments for free speech is a highly psychological orientation. The arguments depend upon hypotheses about the way in which individuals and groups actually deal with certain forms of discourse. To that extent the arguments cry out for empirical support for their psychological and sociological assumptions. Regrettably the empirical research to support or refute these arguments has not been undertaken in a systematic way. Thus the arguments treated here share a weakness as well, in depending for their validity on untested empirical assumptions.

THE CHALLENGE OF ERROR

In *Liberty, Equality, Fraternity* James Fitzjames Stephen assumed that *if* we could be absolutely certain that a proposition were true and its negation false, there would be no reason not to suppress the negation. Some contemporary writers have made the same assumption.[2] Although at times conceding the value of a healthy

authority ultimately 'to decide matters of moral, religious or philosophic doctrine (or of scientific truth)', because those in the Original Position would not grant that authority,[12] the state therefore has no mandate to limit the information upon which this choice may be made by the individual for the individual. In this form the argument is hardly novel. Locke, in the *Letter Concerning Toleration*, grounds much of his argument on the premise that solely the individual is authorized to decide questions of faith. 'The care of souls is not committed to the civil magistrate, any more than to other men'. Even earlier Spinoza drew the connexion between mental autonomy and freedom of speech in his *Tractatus Theologico-Politicus*.[13] These are all variations on the theme that places reliance on a division of authority between state and individual, a division that may be based on notions of inherent autonomy, or on the terms of a social contract, or, as suggested by Charles Fried, on ideas of comparative institutional competence.[14]

In any form, the argument is not without flaws. The so-called 'right' of civil disobedience is to a great extent the foundation of the theory, because the right of access to persuasion (whether from factual information or normative arguments) is in turn grounded on a right to disobey even those laws that are just and that are in the interests of society. Perhaps the individual does retain this degree of autonomy. And probably an individual who chose to act autonomously in the most informed and intelligent manner would, if rational, seek out many opinions before making a decision. But there is a difference between what the rational individual would do and what the state should do. A limitation on the state's power to interfere with the information available makes sense only if the state must recognize the right of civil disobedience. The argument from autonomy is plausible only if the state can be deemed to say, 'You can obey, or you can pay the penalty; it makes no difference to us.' But this seems odd. It seems more reasonable to hold that if a law is indeed just, then the state is politically and morally authorized to enforce compliance, not merely collect penalties for non-compliance. We do not expect the state, having enacted a law, to be neutral on the issue of whether it is obeyed. The conclusion from this is not that there is no such thing as individual autonomy or individual sovereignty. Rather it is that it would be anomalous for the state to recognize that autonomy, at least in respect to areas in which the state validly may regulate. Personal moral philosophy cannot always be congruent with political philosophy. If a law is just, then a state is neither morally nor politically precluded from attempting to ensure compliance. Limiting that information

that might produce non-compliance is not the only means at the state's disposal in attempting to ensure compliance, but there is no reason given in the argument from autonomy that compels us to prohibit the state from using this tool.

Moreover, because the argument from autonomy 'rests on a limitation of the authority of states to command their subjects rather than on a right of individuals', it is much more adaptable to governments on the authoritarian model than a democratically conceived society. For if it is applied to the democratic model, then presumably the people could change the rules of the game, a fact that Scanlon himself recognizes. But this seems to be what takes place in any case of suppression. Suppression in a democratic society is most commonly suppression in the name of the people. The suppression is never based on unanimous consent of the population, but neither is any other governmental action. In order for the argument from autonomy to hold up, it must be rooted in social contract theory, in some original position of unanimity. But if this is the case, the argument fails to tell us why the state's authority is more limited in dealing with speech than it is in dealing with other forms of conduct. It is circular to answer that individual autonomy supplies the reason, because what is missing is some reason why a group of individuals in the original position would choose to recognize some sort of 'right' to disobey just laws.

These difficulties notwithstanding, the argument from autonomy represents a significant contribution to free speech theory. It shares a natural rights foundation with some of the other ideas discussed in this and the preceding chapters, and like other arguments it relies on concepts of individuality and dignity. The value of the argument from autonomy is that it is an argument that is directed at *speech*, rather than at the entire range of interests that might with some minimal plausibility be designated 'individual'. The argument from autonomy stresses the motives of those who would suppress *arguments*, not the motives of those who suppress individuality. It is an argument for freedom of communication in a limited sense, and that is its greatest strength. As an argument for freedom of speech, rather than merely a particularized application of an argument for freedom in a broad and abstract sense, the argument from autonomy employs broadly liberal principles to address specifically the problem of free speech.

The natural rights underpinnings of the argument from autonomy are not universally appealing. But even from a positivist or utilitarian perspective the argument from autonomy is important because it emphasizes freedom of speech as a principle embedded

Socrates is asserting a claim of sovereignty, or autonomy, over his own mind, an autonomy that leaves to him the final choice on any matter, even if by choosing one alternative rather than another he must accept some physical punishment inflicted by the state. This notion of individual sovereignty, or individual autonomy, now associated with Kant, provides the foundation for a theory of freedom of speech premised on the ultimate sanctity of individual choice.

My earlier treatment of freedom of conscience is relevant here. When we refer to freedom of conscience, we ordinarily mean some sort of private domain of the mind, some area that is under the exclusive control of the individual. This domain is off limits to the state, not only as a matter of moral right, but also as a matter of necessity.[8] If I say that I am following my conscience, I mean that I am retreating into that portion of my personality that is an exclusive preserve against governmental interference. Similarly, references to freedom of thought mark off an area of exclusive control by the individual, an area that simultaneously sets the outer boundaries of permissible (and practical) state intrusion. The concept is not altogether unlike the distinction between self-regarding and other-regarding actions, or Dworkin's distinction between personal and external preferences, or the arguments of those who seek to limit governmental power by resort to appeals to notions of personal dignity. Human dignity or human personality may be perceived as inherently personal. It is *mine*, intrinsically and morally beyond the force of government coercion. The argument I am outlining here makes an analogous distinction. The distinction is easier to accept, however, because it employs a much narrower conception of the area that is under exclusive individual control. Because thought may be inherently as well as morally beyond the reach of state power, it is plausible to suggest that the province of thought and individual decision-making is an area, or the only area, in which the individual is truly autonomous. As a narrower conception of the range of autonomy, this formulation is largely immune from many of the attacks on theories that postulate substantially larger areas of self-regarding actions.

From this conception of individual autonomy Thomas Scanlon, in a very important article, constructs an impressive argument for freedom of expression.[9] Beginning with the premise that the 'powers of the state are limited to those that citizens could recognize while still regarding themselves as equal, autonomous, rational agents', Scanlon seizes on the autonomy component of that premise to argue that 'a person must see himself as sovereign

in deciding what to believe and in weighing competing reasons for action'. '[A]n autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do'. Thus Scanlon's argument hinges on the fact that the ultimate choice as to any question, whether of belief or of action, rests with the individual. Even when an act is prohibited by law, even properly, the autonomous individual retains the choice whether to obey the law or to violate the law and take the consequences. These are decisions that government cannot and must not make, as they are wholly within the boundaries of individual sovereignty.

Scanlon derives the substance of his argument for freedom of speech from this notion of absolute individual sovereignty in matters of choice. If the final decision is properly for the individual, then that individual's decision ought to be as informed and intelligent as possible. Thus the information material to this individual decision ought not to be restricted. Scanlon's argument touches Meiklejohn's point that the government cannot pre-select the information available to the sovereign electorate. Scanlon makes essentially the same argument, but he sees the issue from the perspective of individual rather than electoral sovereignty. Thus Scanlon argues that no government has the authority to distort the individual's ultimate choice by preventing him from hearing any argument solely because it is on one side of an issue rather than another. He focuses not so much on what is restricted but on the reasons for the restriction. 'Those justifications [for restricting speech] are illegitimate which appeal to the fact that it would be a bad thing if the view communicated by certain acts of expression were to become generally believed.' Scanlon's theory, therefore, is best characterized not as a right to speech, but rather as a right to receive information and, more importantly, a right to be free from governmental intrusion into the ultimate process of individual choice. It is a right to be free from an assault on what Felix Frankfurter called the 'citadel of the person'.[10]

Scanlon's argument, although couched in the style of Kant and of the *Apology*, also has a strong contractarian basis. Individual autonomy is closely related to the concept of a state with limited powers. Indeed, they are opposite sides of the same coin. The individual is sovereign and autonomous because, quite simply, this area of ultimate choice has not been ceded to the state. Writing in a more recent article, Scanlon associates his theory with the writings of Rawls, designating the argument for freedom of speech as the Principle of Limited Authority.[11] Because the state has no

harms of *not* permitting individual choice? Here we see liberalism as grounded in notions of dignity, self-respect, equality and independence of personality. Liberalism in this form is prominent in the work of Ronald Dworkin.[3] If we accept the importance of treating each person with *equal* respect, and of treating each person as independently valuable, then, the argument goes, we must treat each person's choices with equal respect as well. To deny a person his right to choose, especially as to what Dworkin calls 'internal' preferences, is to deprive him of his dignity by denying the respect that comes from acknowledging his choices to be as worthy as the choices of anyone else.

I have yet to say anything specific about speech. But it should by now be apparent that an argument for freedom of speech is easily extracted from the premises of dignity I have just described. On this conception of individuality the act of suppression provides the cornerstone of the argument for freedom of speech. When the state suppresses a person's ideas, or when the state suppresses that person's expression of those ideas, the state is insulting that person and affronting his dignity. There is a close link here with the concept of equality. When we suppress a person's ideas, we are in effect saying that although he may think his ideas to be as good as (or better than) the next person's, society feels otherwise. By the act of suppression, society and its government are saying his thoughts and beliefs are not as good as those of most other people. Society is saying that his ideas, and by implication he himself, are not worthy. He is not deserving of treatment as an equal member of society.

The easy criticism of this view is to point out that it is just not true that anyone's ideas are as good as anyone else's. Such an extreme form of relativism or subjectivism is scarcely comprehensible. We do not need a particularly strong commitment to certainty or objectivity to take some ideas to be better than others, and some propositions to be more likely true than others. A theory resting on a bizarre subjectivism is on a shaky foundation. When we say that some actions, such as helping injured people or contributing to charity, are better than other actions, such as polluting rivers or torturing cats, we make evaluations and condemn certain choices. Yet we scarcely think of insult or dignity in this context. Nor does it do to say that the latter examples are different because they involve harm. That begs the question, because the argument from dignity as an argument for free speech is useful only if it holds that insult and indignity caused by suppression are more serious than harm caused by the speech at issue, an analogue of a

point I stressed in chapter 1. A Free Speech Principle based on the premise that speech causes no harm is a Free Speech Principle of very narrow range.

We must look closer at the concept of equality. The argument from human dignity is based largely on the view that failing to treat *A*'s ideas as being of equal value with everyone else's ideas is like treating *A* as an unequal member of society. It is not sufficient to answer that *A*'s ideas may not be as good as *B*'s, *C*'s, or *D*'s. A person would not forfeit his general right to equality by being less good in some respects than the norm in society. If *A* is stupid, clumsy, rude, inconsiderate, loud, boring and dirty, he is still entitled to equal treatment by the governing authorities. Why not the same for *A*'s ideas when they are wrong, offensive and ill-conceived?

But society does not treat everyone the same. Even those societies with the strongest egalitarian aspirations make distinctions among people on the basis of ability, industry, or other criteria ideally related to the reasons for requiring a distinction. Equality is much less an idea of sameness than it is the limitation of the criteria of selection to differences relevant to some legitimate purpose. The evil of racial and religious discrimination, for example, lies not in the fact of making distinctions, but in the reasons for making the distinctions. We object to distinctions that either do not relate to requiring a choice (as in discrimination in employment) or that distinguish when there is no reason to make a choice at all (as in requiring certain races to sit in the back of the bus). But we would not object to distinguishing along racial lines in calculating the level of lighting at a television station.

If we look at distinctions in the speech arena, to distinctions among ideas, we find the concept of equality to be of little independent assistance.[4] It is both true and trivial that a governing authority should avoid meaningless distinctions among utterances. But a principle of free speech operating as a side constraint is useful only if some distinctions among speech are plausibly advantageous to the public interest. That does not mean such distinctions necessarily should be made. If that were so, there would be no point in discussing a Free Speech Principle. But if some distinctions among utterances are related to legitimate ends of government, as surely they are, then a principle of equality no more tells us to ignore these distinctions than it tells us to refrain from making relevant distinctions in any other area of conduct.

If dignity and equality do justify some immunity of speech from the principles of government action that would otherwise prevail,

CHAPTER 5

Individuality and free speech

THE LIBERAL IDEOLOGY

Freedom of speech is commonly thought of as a liberal doctrine. Freedom of speech, freedom of religion and some freedom in personal way of life are usually considered to be among the primary components of that amorphous credo that is commonly called 'liberalism'.[1] Liberalism is frequently characterized by a particular preoccupation with individualism and individual rights, especially as against the state or against the majority. Liberalism places great stock in personal choice, personal freedom, and the value of variety, or diversity. It is concerned with the interests of the individual, and is often accused of being less aware of and less concerned with social interaction and communal values.

The arguments I have discussed in this book, particularly the arguments in chapters 2 and 3, in large part belie this reflexive association of freedom of speech with liberalism. Upon closer analysis both the argument from truth and the argument from democracy emerged in a form that does not look especially liberal. I do not mean that anything presented so far is necessarily inconsistent with liberalism. Rather, the arguments have not been notably concerned with the individualism and choice that constitute the foundations of liberal ideology. The values underlying the arguments from truth and democracy are more social than individual. In the previous chapter, however, the liberal flavour of the concept of free speech began to appear. Yet in the context of the specific purpose here, the result was a dead end. The arguments from self-fulfilment appeared under critical scrutiny to be little more than arguments for general liberty. We learned little in particular about free speech except that free speech can be subsumed under some broad notions of personal freedom. The arguments provided scant assistance in justifying a Free Speech Principle.

When we speak of liberalism, or for that matter when we speak of liberty, we suggest principles based on individuality. Although we may argue that respect for individuals is the keystone of the

best society, our primary concern is less for social benefits than it is for the good of individuals *qua* individuals, and not individuals *qua* members of a social group. Liberalism embodies a profound respect for individual differences, and as a consequence places great emphasis on individual choice. By respecting freedom as choice, liberalism recognizes (as it must) that freedom is hardly a worthwhile topic of consideration if everyone's freedom is directed toward the same desires, the same choices and the same actions. Freedom that does not produce diversity when that freedom is exercised is psychologically unrealistic as well as fundamentally inconsistent with the liberal creed. Diversity of action is not merely a result of liberalism. It lies at the core of liberalism. A theory of government represented by a presumption in favour of freedom is grounded on the disutility of conformity, or at least on the conscious refusal to regard conformity or uniformity as important primary goods. By encouraging diversity and individual choice, and by raising barriers to governmental or social interference with those goals, liberalism sees itself as especially concerned with human dignity, a dignity that is insulted when there is insufficient respect for personal choice.

These ideas can often turn into platitudes, as they may have in the previous paragraph. But because such ideas appear so often in various explications or applications of liberalism it is worthwhile to repeat these ideas in a way that ties them together. I do this so that it becomes easier to analyse and evaluate the position of free speech within the particular liberal conception of freedom.

IS THERE A RIGHT TO DIGNITY?

What is at the core of these appeals to individuality, individual freedom and individual choice? We may take two tacks in responding to this question. First, we may look at the *results* of respecting, permitting, and even encouraging individual choice. I am referring not to the psychological effects on the person exercising the choice, but to the products of the process of choosing, the choices actually made. From this perspective the diversity occasioned by individual choice may be most important. I consider this alternative in the next section of this chapter, in evaluating the premise that variety is the ultimate goal of liberalism.

But looking at the products of choice is not the only alternative. We may look instead not at what is chosen but at the act of permitting the choice to be made. What interests do we acknowledge when we permit people to exercise their free will?[2] What are the

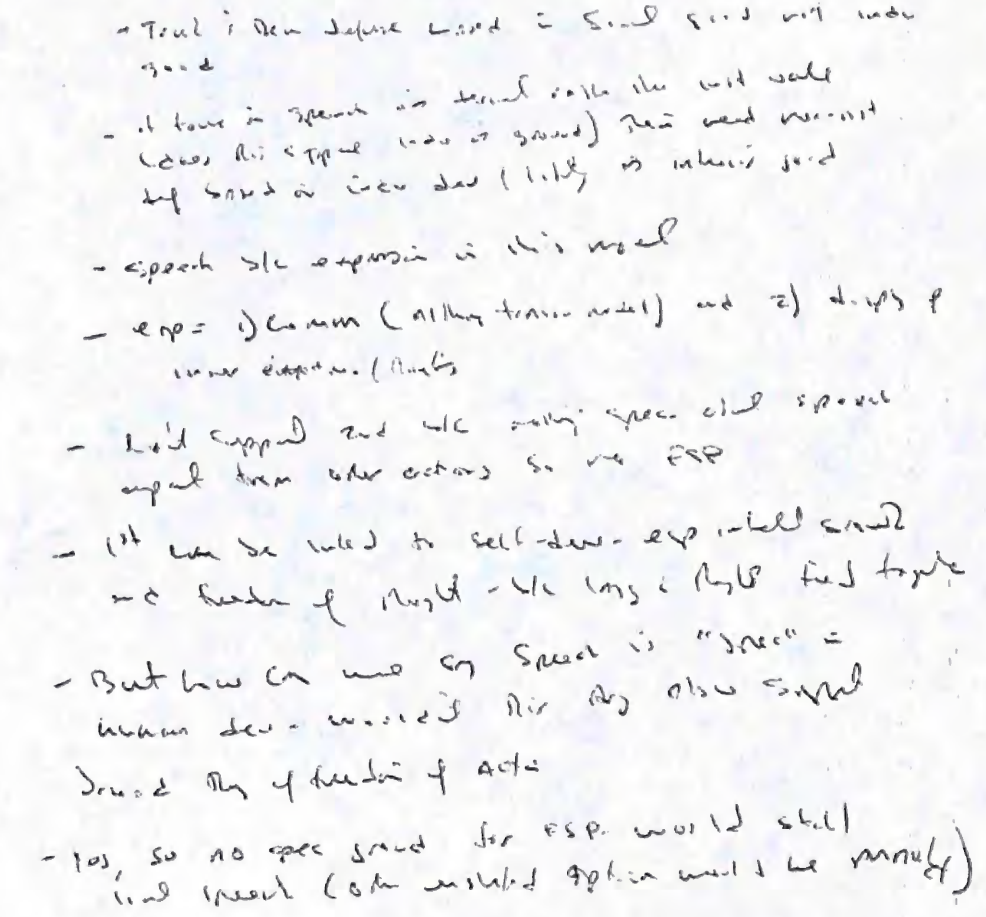
in multitudinous varieties of conduct. The argument from self-fulfilment can be a powerful argument for freedom in a very broad sense, but it tells us nothing in particular about freedom of speech. Freedom of speech under such a theory is merely a component part (or an instance) of that general Good that we often call 'freedom' or 'liberty'. Therefore, to the extent that we support or provide for freedom in this general sense, we find that freedom of speech is included *pro tanto*. Conversely, and more significantly, to the extent that a given society or government has for some reason elected to limit individual liberty in the broad sense, there remains no reason freedom of speech should not be subject to equivalent limitations.

This conclusion is virtually identical to the conclusion I reached about the natural rights argument for speech as self-expression. In both cases it may be possible to generate an argument for individual freedom in a broad sense, but in neither case is there an argument that is directed towards showing why freedom of speech is any more valuable than anything else we may be or should be free to do. Without this distinction, most talk of a right to free speech is at best misleading.

The importance of these distinctions is highlighted when we realize that this and most other discussions of freedom of speech are exercises in what Rawls calls 'nonideal theory'. It may be (although I do not wish to argue the point here) that an ideal society would in fact grant rights in a strong sense to engage in a very wide range of conduct. If this were the case, freedom of speech would to some extent be subsumed within this broad freedom, rendering an independent Free Speech Principle less important. But existing societies, often for very powerful reasons, do not grant strong rights of general liberty. As long as this is the case, the search for a Free Speech Principle remains important. Moreover, any plausible principle of general liberty will be subject to an exception for exercises of liberty that cause harm to others. Yet, as the examples in chapter 1 were designed to demonstrate, our pretheoretical understanding of freedom of speech assumes that many speech acts that do cause harm to others will be protected despite the harm they cause. But if freedom of speech is merely a component of general liberty, the principle of free speech will not protect the speech in these and many other examples. Only by divorcing a theory of free speech from a theory of general liberty will a principle of free speech of any strength emerge.

Bibliographical note to chapter 4

Self-expression and self-fulfilment are the basis of theories in Edwin Baker, 'Scope of the First Amendment freedom of speech', *UCLA Law Review* 25 (1978), 964; Edwin Baker, 'Commercial speech: a problem in the theory of freedom', *Iowa Law Review* 62 (1976), 1; Kenneth Karst, 'The freedom of intimate association', *Yale Law Journal* 89 (1980), 624; David A. J. Richards, 'Free speech and obscenity law: toward a moral theory of the First Amendment', *University of Pennsylvania Law Review* 123 (1974), 45. An interesting variation is Allen Buchanan, 'Revisability and rational choice', *Canadian Journal of Philosophy* 5 (1975), 395. For an imaginative effort to ground freedom of speech in the use and development of language, see Paul Chevigny, 'Philosophy of language and free expression', *New York University Law Review* 55 (1980), 157.



cies *homo sapiens*. But it is equally plausible to conclude that the needs and wants that man *shares* with other animals are, for that reason, more basic and therefore more important.

Those sympathetic towards natural rights arguments in moral and political philosophy will find the argument for freedom to communicate appealing because that argument attempts to demonstrate that communication is indeed an important interest. But the argument does not demonstrate why freedom to communicate is more important than other well-recognized interests, and thus it does not show why freedom to communicate should be an independent principle of political philosophy.

The argument from self-fulfilment underscores the importance of communication, but the argument can be deployed with equal force in reference to most human needs or desires. If an argument from inherent goodness supports a right to free speech, so too can it support a right to eat, a right to sleep, a right to shelter, a right to a decent wage, a right to interesting employment, a right to sexual satisfaction, and so on *ad infinitum*. But when a list of rights becomes coextensive with the list of wants, or even with the list of fundamental needs, we lose any strong sense of having a right. Because governmental action of any kind almost always is directed towards satisfaction of some important need or want of the population, a right to free speech that rests on the same footing can no longer sensibly operate as a side constraint against such action in furtherance of the public interest. The Free Speech Principle, if it exists, operates as a side constraint, or trump. But if all of the suits are trumps, we are in effect playing at no trumps.

FREEDOM OR FREEDOM OF SPEECH?

The argument from self-fulfilment suffers from a failure to distinguish intellectual self-fulfilment from other wants and needs, and thus fails to support a distinct principle of free speech. But the same conclusion follows even if we accept the primacy of intellectual self-fulfilment. For the sake of argument, let us assume that there is something special about the power of reason that commends the development of its particular faculties to special treatment. Let us assume further that intellectual development occurs primarily, as many have argued, through a process of mental exploration, a process by which a range of alternatives gives the mind room in which to expand and the challenge with which to develop.

Under these assumptions, communication does seem rather

important. Communication informs us of the choices and hypotheses made or suggested by others while also allowing us to refine our own thoughts through the necessity of articulating them. But once again the connexion between communication and the realization of human potential is, although seductively appealing at first glance, still logically incapable of generating a true Free Speech Principle. The fact that *A* may cause *B*, or even that *A* must cause *B*, does not entail the proposition that only *A* can cause *B*. There is no reason *X*, *Y* or *Z* cannot also cause *B*. Even if communication is a sufficient condition for intellectual self-fulfilment, it does not follow that it is a necessary condition. The fact that communication will produce the desired result does not mean that that same result cannot also be produced by *experiences*. It seems as likely that intellectual self-realization can be fostered by world travel, by keen observation, or by changing employment every year, to give just a few examples. These and many other experiences can open one's eyes, triggering deeper thought and consequent development of the intellect. There is nothing in the argument that shows communication to be necessarily better than any of these other methods of mental development.

Moreover, even if communication is a necessary condition for intellectual advancement, that does not make it a sufficient condition. The value of communication in the process of intellectual development is of necessity limited by the range of experiences that are the subjects of the communication. F. A. Hayek, in *The Constitution of Liberty*, argues that we over-estimate the importance of freedom of thought and ideas at the expense of underestimating the value of actually *doing* things. He argues that speech follows experience, and therefore that freedom of speech is meaningful only when there is freedom of action, because new ideas spring from new environments and additional experiences. Hayek's argument is not without flaws, but it is particularly apt here. If we are concerned with the development of the mind, then choice, diversity, individuality and novelty are every bit as important in the entire range of human conduct as in the particular segment of man's activities that we call 'communication'.[7] If we take Hayek's point that the value of communication is dependent upon what it is that can be communicated, then the other forms of conduct are logically prior to and therefore possibly more important than communication.

I do not mean to be taken as saying that communication is not valuable. I am only arguing that it is but one aspect of an Aristotelian argument for an extremely wide-ranging freedom to engage

mind. The theory aims to protect not *a* thought, but the process of thinking.

Here it is important to remember that language is not only the medium of communication, it is also the medium of thinking. We think not in complete abstractions, but (most commonly) in words. Our ability to think creatively, therefore, is to a great degree dependent upon our language. If communication is stifled, the development of language is restricted. To the extent, therefore, that we curtail the development of linguistic tools, we chill the thought process that utilizes those very same tools. Although Waismann and others have emphasized that language must follow our thoughts, it is in many respects equally true that thoughts follow our language. Each is a cutting edge for the further development of the other.

The theory that communication and personal relationships are central features of human development has roots in the writings of Aristotle. If man is a political and social animal, then communication and the use of language are vital components of humanity, because we relate to other people predominantly by linguistic communication. This argument is not that communication facilitates certain types of relationships (although of course it does). Rather it is that communication is an integral part of human nature, at least when human beings are viewed in this social and political way. If communication is that basic to mankind, it is argued, then its special protection is easily justified.

At the heart of this argument, whether characterized in terms of individual values or in terms of social and political values, is the concept of self-development. The argument is based on the proposition that a person who uses his faculties to their fullest extent, who is all that it is possible to be, is in some sense better off, and in an Aristotelian sense happier, than those whose development is stultified. And because it is thinking, reasoning, rationality, and complex interrelationships with others that distinguish humanity from other forms of animal life, then it is the faculties of reason and thinking that are at the core of self-development. What is seen as the ultimate goal for man is the fullest use of the capacity to think, the greatest degree of mental exertion, the exploration of the limits of the mind.

But minds do not grow in a vacuum. Intellectual isolationism is almost wholly inconsistent with intellectual development. The image of the mountaintop guru, developing great ideas in a sublime and isolated existence, is far more myth than reality. For one thing, we learn to think as we are taught language. Further intel-

lectual self-development comes from communication of our ideas to others. Our thoughts are refined when we communicate them. Often we have an idea in some amorphous and incipient stage, but see it develop or see its weaknesses for the first time when the idea must be specifically articulated in a form intelligible to some other person.

Seen in this light, communication is an integral part of the self-development of the speaker, because it enables him to clarify and better understand his own thoughts. Communication may also be inseparable from the self-realization of the hearers, the recipients of communication. Mill (whose disclaimer of making appeals to natural rights should not be taken too seriously) was concerned both with the development of the mind and with the values of choice and diversity. He saw reason and intellect as faculties that improved with exercise, and in his view the greatest practice came from exercising the powers of choice, of intellectual discrimination. Communication makes an individual aware of choices he may not be able to imagine or formulate alone, and thereby furthers the self-development of the recipient of a wide variety of different ideas and opinions. As we hear more ideas, then we have more ideas to evaluate. And as we are compelled to evaluate more ideas, then we have more opportunity to practise the important skill of evaluating and choosing among ideas.

If we accept the premise that mental self-fulfilment is a primary good, then the way in which the communication of ideas is related to intellectual development provides an apparently sound argument for a special freedom to communicate, and a correlative freedom to be the object of communication. But the superior (compared to other forms of animal life) rationality of human beings does not necessarily lead to the conclusion that the development of this particular faculty is more important than the development or satisfaction of other desires or needs less peculiarly human. Other characteristics not exclusive to humanity also profit from development and fulfilment. Our physical well-being, our non-intellectual pleasures, our need for food and shelter, and our desire for security are also important, although these are wants we share with the rest of the animal world. Because any governmental or private action to restrict communication is usually justified in the name of one of these or other similar wants of all or part of humanity, a particular protection of communication under this version of a natural rights theory must assume that communication is *prima facie* more important than these other interests. This priority is often justified by reference to the unique characteristics of the spe-

argument, we discover that there emerges no Free Speech Principle at all, because we must conclude that there is nothing special about speech. My mode of dress is usually a form of self-expression, as is the length of my hair and the style in which I wear it. Both my choice of occupation and residence are frequently ways of expressing myself. Choosing to drive a Ford or a Mini might not be an obvious form of self-expression, but choosing a Ferrari or an Hispano-Suiza most certainly is. If I have beaten this point beyond submission, it is only to emphasize that self-expression is an unworkably amorphous concept, subtracting far more than it adds to any sensible view of what free speech means.

Speech as communication is of course a method of self-expression, but the concept of self-expression is not helpful to an analysis of free speech. When speech is considered merely as one form of self-expression, nothing special is said about speech. Because virtually any activity may be a form of self-expression, a theory that does not isolate speech from this vast range of other conduct causes freedom of speech to collapse into a principle of general liberty. If the Free Speech Principle is derived from the value of self-expression, then any of the foregoing examples would be included within the Free Speech Principle. Any form of voluntary conduct may be to the actor a form of self-expression, and we are left with only a justification for a broad and undifferentiated principle of general liberty. Unless we can derive an argument for freedom of speech that is independent of the arguments for general personal freedom, there is little need to emphasize free speech. True, we might refer to free speech as a more concrete example of an abstract principle, but if that is all we are doing we have lost the special force of a Free Speech Principle. We might reject the existence of a Free Speech Principle, but accepting it is inconsistent with treating free speech merely as an instance of freedom of self-expression. If, as in the self-expression model, freedom of speech is coextensive with freedom of action, the state is no less constrained in dealing with speech than it is in dealing with any other form of human activity. In Robert Nozick's utopia this might be of little consequence, but existing states assert and exercise greater authority over the individual than Nozick would concede to be legitimate. Real states restrict action quite frequently, and often quite legitimately. If freedom of speech is freedom of self-expression, anyone who has conceded some of his freedom of action must, *pro tanto*, have conceded his freedom of speech. If there is an independent principle of free speech, this is an unnecessary concession.

A NATURAL RIGHT TO COMMUNICATE?

Rejecting a theory that equates freedom of speech with freedom of self-expression forces us to return to freedom of speech as freedom to communicate.[6] If there is a natural right to communicate, apart from any natural right to general liberty, it is most sensibly derived from the idea of freedom of thought. Freedom of thought (or its synonyms freedom of belief and freedom of conscience) seems particularly amenable to a naturalistic justification, because few things can more easily be perceived as inherently good than the independent use of one's mind to come to such conclusions as it wishes. However, the very value of freedom of thought points up the futility of considering freedom of thought to be an important principle of political theory. We can think silently. It is not necessary to speak or write in order to think. And when we think silently, our thoughts are beyond the reach of government sanction. Obviously thoughts can be *influenced* by government. Propaganda is an example, and so is a system of explicit or implicit rewards. But a silent thought *qua* thought is immune from punishment, and to that extent is discretely different from outward expression or communication. Prisoners in some of the Nazi concentration camps supposedly sang a song entitled 'Meine Gedänke Sind Frei' (My Thoughts Are Free). The intended meaning is particularly relevant – whatever you may do to me, whatever you may physically compel me to do *or say*, my thoughts are still free because they remain beyond the reach of your powers.

Government sanctions may penalize belief to the extent of driving it deeply underground. Punishing those known to hold certain beliefs, compelling the affirmation of belief, requiring the disclosure of belief, and precluding people with certain beliefs from holding government positions are all restrictions on freedom of thought. But they are restrictions only on *expressed* thought. These restrictions operate against overt manifestations of thought, and against those who are unwilling to lie for their beliefs, but this is not the same as punishing the thought alone. The largely internal nature of what we ordinarily call a thought puts that thought to a great extent beyond the power of governmental punishment.

Thoughts and beliefs, however, are not static. They develop, they change, they are embellished or combined, and at times they are rejected. The argument for a natural right to free speech is premised on the assumption that this process operates effectively only when there is communication. Reading, writing, speaking and exchanging ideas with others is perceived to be of critical importance if thoughts are to develop and grow in the human

fulfilment, the one being inseparable from the other. Free speech is thus said to be justified not because it provides a benefit to society, but because it is a primary good.

In this form the argument is freed from most of its *obvious* weaknesses. The argument demands close attention, and a discussion of the argument will occupy the balance of this chapter.

SPEECH AS EXPRESSION

Treating freedom of speech as a primary good suggests that we should be looking not at freedom of speech but rather at freedom of *expression*. References to 'freedom of expression' are as common as references to 'freedom of speech'. 'Freedom of expression' is protected by the European Convention on Human Rights, and 'freedom of expression' is the term most commonly used in academic writing about the subject. 'Expression' avoids the strictly oral connotations of 'speech', and thus 'expression' may be preferable because it more clearly includes writing and pictures. Or, the preference may be explained solely by the fact that 'expression' is the longer word. But if 'expression' is anything more than a synonym for 'communication', a view of speech as expression must be derived chiefly from the naturalistic concepts that constitute the subject of this chapter. We must consider whether freedom of speech is something more than the freedom to communicate.

Much of the unfortunate confusion of freedom of speech with freedom of expression can be traced to the fact that 'expression' can have two quite different meanings, meanings that are often uncritically interchanged in this context.[5]

First, 'expression' can mean communication, requiring both a communicator and a recipient of the communication. For example, if my new colour television set insists on presenting its offerings solely in black and white, it would be quite natural to say that I would *express* my dissatisfaction to the manager of the store where I bought the television set. If someone is a good public speaker, we may say that he *expresses* himself well. If someone's prose style is ambiguous and ungrammatical, we are likely to say that he cannot *express* himself in writing. In this sense the word 'expression' could easily be replaced by the word 'communication' without any significant change in meaning (except to the extent that to express oneself well in speaking or writing implies a certain elegance of style that is not suggested by the word 'communication').

On the other hand, the word 'expression' can also be used to describe certain activities not involving communication. This is

the other meaning of 'expressing', or 'expressing oneself', a meaning that generates the locution 'self-expression'. For example, my reaction to the absence of colour on my new colour television set might be to throw a paperweight at the television screen. In that case I could be said to be *expressing* anger, or *expressing* hostility. I would be *expressing myself*, although there was no communication. 'Expression', on the one hand, can refer to communication, and, on the other hand, it can refer to any external manifestation of inner feeling. The existence of these two senses of the word 'expression' has created confusion about just what it is that freedom of speech is intended to protect.

The confusion is compounded because communicating, the first sense of 'expression', is one very important way of 'expressing oneself' in the second sense of 'expression'. Artists, poets and novelists, for example, are expressing themselves in the sense that they are doing something that is an extension of their emotions, and at the same time they are expressing their ideas and their emotions *to* viewers and readers. One who protested against the war in Vietnam by shouting obscene epithets at public officials might both have been expressing his own anger (which does not require a listener), and at the same time have been communicating a message of objection to government policy. Although in this book I am (I hope) expressing my ideas to the reader, I am also expressing myself in the second sense by choosing to write it. Moreover, I am expressing myself in this second sense by choosing to be an academic rather than a farmer, a postman, or a neurosurgeon, and by choosing to reside in Williamsburg rather than in Rangoon. Some choices, of course, are consequent upon (or derivative from) other choices and may therefore be less expressive or not expressive at all. My choice of residence may be a primary choice, in which case it would be a form of expression, or it may on the other hand be the only place in which I can practise my chosen profession, in which case it would be derivative from a form of expression. I am not arguing that every intentional act is necessarily a form of expression (although that is not an implausible position), but only that the range of expressive activity is broad, and that 'expression' in this sense is very different from 'expression' in the communicative sense. The problem occurs when we try to separate these meanings of 'expression', and when we look at the relation of the two meanings to the principle of freedom of speech.

It is certainly possible to argue that a free speech principle is in fact a free expression principle, encompassing other forms of self-expression as well as communication. But if we look closely at this

als. These criticisms may be correct, but they are incomplete unless they recognize that much of liberal doctrine is premised on the benefits to society as a whole that come from individual choice and diversity. But although the concepts of social and individual interests are useful tools for looking at rights in general, they are just two sides of the same coin, at least for any arguments that view the interests of society as the composite of the interests of the individuals who comprise society.

In contrast to this social side of individual interests, both this chapter and the next focus on freedom of speech as an individual interest in a narrower (and stronger) sense. Here the ultimate point of reference is the individual, not the state, or society at large. Although society may benefit from the satisfaction of individual interests, the arguments discussed here treat such benefits as incidental to a primary focus on individual well-being. An individual interest in this strong sense remains important even if society might in some way, or on balance, be worse off for recognizing it.[2] Here individual well-being is an end in itself.

The arguments discussed in this and the next chapter are interrelated, and the division is neither wholly distinct nor wholly satisfactory. But individual autonomy and choice is sufficiently important that it seems right to treat it as separate from a discussion of individual development. The latter will be treated now; the former is the subject of the next chapter.

The question is whether free speech is a component of the 'good life'. Is free speech an integral part of human nature, or self-realization? The emphasis is on free speech as an autonomous value, not a value instrumental to some social objective. Free speech has at times been suggested to be a good in itself, without need of further justification. This hypothesis is the point of departure for this chapter.

Some would find it sufficient to stop at this point, contending that freedom to say what you wish is of course good, not needing further argument or analysis. These people claim to intuit the intrinsic goodness of free speech. But recognition of a Free Speech Principle requires more. There may be value in intuitionist thinking in social and political philosophy, but almost any activity with which governments normally interfere can be maintained under some theory to be inherently good. To say merely that free speech is inherently good is insufficient to establish a Free Speech Principle, because it does not distinguish speech from a wide range of other voluntary actions. Here intuitions are insufficient. A Free

Speech Principle requires that speech be treated differently, and only if a reason for such differential treatment exists can we say there is a Free Speech Principle.

The view of freedom of speech as an intrinsic good is most commonly articulated in terms of a particular perception of human nature, and a particular perception of the ideal aspirations of mankind.[3] This approach sees man as continually striving for improvement and self-development, and it sees free communication as an integral part of this objective.

But this argument is fundamentally misguided. Equating freedom of speech with happiness, or holding it essential to pleasure, is simply false. Many people indeed believe that freedom to express their opinions is a primary component of their happiness. But others are as likely to be satisfied with other freedoms, or prefer the security or intellectual anaesthesia that accompanies rigid controls on expression. The warning of the Grand Inquisitor in *The Brothers Karamazov* demands respect. It is not a necessary truth that people equate happiness with freedom in a broad sense. To equate happiness with a particular type of freedom is even less warranted.[4] Moreover, there are numerous interests to consider – the interests of speakers, the interests of listeners, and the interests of third parties affected by the consequences of speech. An attempt to justify free speech purely in terms of happiness is met by the often-conflicting pleasures involved, as well as by the argument's tenuous empirical assumptions.

Aristotelian conceptions of happiness present a stronger argument for freedom of speech as an intrinsic good. The argument is then grounded not so much on what man is as on what man ought to be. This conception of the rich life is derived from ideas of personal growth, self-fulfilment, and development of the rational faculties. Under this conception, one who is enjoying the good life may be neither content nor euphoric in the ordinary sense. He may not even be happy in the ordinary sense, for his happiness resides not in, for example, sensual satisfaction, but in knowing that he has maximally developed all the *potential* that distinguishes man *qua* man from all other creatures. He should feel satisfied in the knowledge that he is realizing his full potential. If it is the power of reason that distinguishes man from other forms of animal life, then only by fully exploiting this power can one be said to enjoy a full life. Because the basis of this conception of the full life is complete use and development of the mind and thinking process, speech is said to be an integral component of self-

decisions it makes. The special concern for freedom to discuss public issues and freedom to criticize governmental officials is a form of the argument from truth, because the necessity for rational thinking and the possibility of error in governmental policy are both large and serious. There is little certainty in questions of governmental policy, and the consequences are particularly serious when the chosen policies turn out to have been mistaken. If the expected harm is the product of the degree of uncertainty and the extent of damage should the chosen policy be erroneous, the risk of harm in governmental policy is enormous, and therefore the risk in assuming infallibility is equally enormous. The argument from democracy adds the lesson that political speech is different in kind as well as in degree. No facet of the argument from democracy is conclusive, but it provides several reasons for treating political speech as a wholly different creature. It thus gives added force to the argument from uncertainty, when that argument is applied to questions of governmental policy, power, and control.

Bibliographical note to chapter 3

Theories of free speech grounded in the functioning of the political process are also explored in Lillian BeVier, 'The First Amendment and political speech: an inquiry into the substance and limits of principle', *Stanford Law Review* 30 (1978), 299; William Brennan, 'The Supreme Court and the Meiklejohn interpretation of the First Amendment', *Harvard Law Review* 79 (1965), 1; Frank Morrow, 'Speech, expression, and the constitution', *Ethics* 85 (1975), 235. On the relationship between political process and individual rights theories of free speech, see Ronald Dworkin, 'Is the press losing the First Amendment?', *New York Review of Books* (December 4, 1980), 49. And on the relation between political speech and the forum in which it occurs, see Frederick Schauer, ' "Private" speech and the "private" forum: *Givhan* v. *Western Line School District*', *The Supreme Court Review* (1979), 217; Steven Shiffrin, 'Defamatory non-media speech and First Amendment methodology', *UCLA Law Review* 25 (1978), 915.

CHAPTER 4

Free speech and the good life

MUST FREE SPEECH BE INSTRUMENTAL?

The arguments discussed in the preceding chapters hold in common a consequentialist approach to freedom of speech. Both the argument from truth and the argument from democracy treat free speech not as an end but as a means. In the former argument free speech is a means of increasing knowledge, discovering error, and identifying truth; in the latter it is a means of ensuring the proper functioning of a state based on the principles of self-government. Each of these arguments values open communication for what it does, not for what it is.

The argument from truth and the argument from democracy also have a common emphasis on the interests of society at large rather than on the interests of the individual. Freedom of speech is most commonly conceived to be an individual interest; but there are two types of individual interests, and they must be distinguished. Some individual interests are valuable by virtue of the benefits derived by the persons exercising the interests. Other individual interests are recognized not primarily because of their ultimate value for the individual, but because the value to the person exercising them is instrumental to the value that accrues to society from the widespread exercise of individual interests. Both the argument from truth and the argument from democracy are examples of this latter variety of individual interests. The individual rights they generate are but a mediate step towards maximizing the goals of society at large. These individual rights are grounded in the societal interests in the exercise of individual rights, a relationship recognized and described most clearly by Roscoe Pound.[1]

From this perspective the arguments treated in the preceding chapters all derive their strength from some conception of what is good for society as a whole, rather than from any concern with the well-being of individuals in a narrower sense. There are those who criticize liberalism for being excessively individualistic, or for failing to recognize the importance of relationships among individu-

press from actions for defamation, invasion of privacy, or contempt, an immunity grounded in large part on the writings of Meiklejohn, is due in part to a view of the press in an institutional context, as a check on governmental power. By contrast, the severe contempt and defamation sanctions that exist in Great Britain may be explained in part as the failure to accept such an institutional role for the press.

The process of communication is the principal way, and perhaps the only way, in which a mass of atomic individuals can join as the independent force envisaged by the model of pure self-government. The public may appear to have little power, but public opinion can have a great deal of power, and the process of communication enables the former to be converted into the latter.

Nothing in what I have said just now is necessarily inconsistent with the earlier formulations of the argument from democracy. By recasting the argument in this way, however, I have stressed the most important feature of the argument, the role of public officials as responsible and responsive to the people. I have concurrently de-emphasized the conception of the electorate as a national debating society. The two notions are not unrelated, but it is the former that has more direct contemporary application.

Even when reconstituted in this way, the argument that emerges remains narrow, because of its almost exclusive emphasis on public or political matters. We could argue, of course, that all subjects are indirectly related to the governmental process, or that a more complete view of democracy includes a broader range of issues.[9] At this point, however, the argument becomes quite attenuated. I can make little sense of a notion of self-government in art, literature, or science. But there is no reason to stretch the argument beyond its breaking point. The narrowness of the argument from democracy is also its greatest strength. The argument fails to provide a justification for a broad Free Speech Principle, but it does furnish several strong reasons for giving special attention and protection to political speech and criticism of government.

A RETURN TO FALLIBILITY

I have been treating the argument from democracy as if it were wholly distinct from the argument from truth. There is nothing in the origins of the argument from democracy to suggest any close relationship. Meiklejohn himself mocked the argument from truth as primarily a game for 'intellectual aristocrats' (such as Holmes) who were seen by him as remarkably unconcerned with issues of

self-government. Yet the arguments are not nearly so distinct. An examination of the paradoxes and other weaknesses of the argument from democracy reveals that much of its strength derives not from its independent force, but from the extent to which it is a discrete and important subset of the argument from truth.

Almost as an offhand remark, Meiklejohn observed that the body politic 'must recognize its own limitations of wisdom and of temper and of circumstance, and must, therefore, make adequate provision for self-criticism and self-restraint'.[10] This seems crucial because it is the only plausible and useful explanation of why a sovereign electorate should place limits on its own sovereign power. Meiklejohn did not think this particularly important, which is not surprising, because it is largely unrelated to and surely inconsistent with his argument from popular sovereignty. What it is is the same lesson about caution in the face of uncertainty that emerged from the discussion of the argument from truth. It is fallibility writ large, a restatement of what both de Tocqueville and Mill saw as the tyranny of the majority. Far from being an argument from majoritarian democracy, it is an argument against majoritarian democracy.

The power of the majority, and especially an erring majority, was recognized even in classical times. Horace described *'civium ardor prava jubentium'*, usually translated as 'the frenzy of the citizens bidding what is wrong'.[11] It is not so much that protection is needed particularly against a majority, as opposed to other forms of leadership. As majorities are not of unlimited wisdom, temper, or prudence, neither are other types of rulers immune from these weaknesses of humanity. One of the reasons we prefer democracy, so we think, is that these weaknesses are less prevalent in majorities than in individual tyrants. Moreover, majorities have fewer potential victims of their tyranny than do individual despots. But the weaknesses of the majority still exist. Just as individual tyrants can be wrong, so too with large groups, such as majorities. We wish to preserve the freedom to criticize the policies of the majority because those policies may be wrong, just as any other judgment may be wrong. Criticism may help the majority or its designates see error, and recognize their fallibility.

The argument from democracy does not dissolve completely into the argument from truth. The self-government model reminds us that when we are dealing with governmental policies, and with the performance and qualifications of our leaders, we are playing for higher stakes. By virtue of the power we grant to government, the effects of its fallibility are magnified by the importance of the

the following two chapters; but it is worthwhile here to observe that, viewed as a form of equal respect for individuals, the argument from democracy does not give an independent argument for a Free Speech Principle. It is, however, a reminder that the *issues* relevant to self-government are especially important, and that individual interests and dignity are almost always implicated by decisions relating to the exercise of political power. The argument from democracy may constitute, then, a principled reason for giving pride of place to political speech, but only as part of a Free Speech Principle derived from sounder independent principles.

The argument from democracy generates yet another argument related more to the equality aspects of democracy than to the concept of popular sovereignty. Predominant among the problems that have concerned political theorists throughout modern history is that of the legitimacy of majority rule. What is the moral obligation of the minority to obey a particular law enacted by the majority over the objections of the minority? I do not wish here to rehearse the abundant answers that have been given to this question. One answer, however, is particularly relevant to this aspect of the problem of free speech. One reason for precluding the majority from withdrawing the minority's freedom to dissent is that the minority's right to object, to attempt to influence the majority, to have some say in the formulation of final policy, provides the moral basis for binding everyone to the rule ultimately adopted. This final rule, the 'law of the land', then is seen not so much as the work only of the majority but as the work of everyone who did or could participate in its formulation. Speaking, attempting to influence others to your point of view, is one way, perhaps *the* way, of so participating.

The argument has in one sense gone full circle. Under many formulations of the argument from democracy, freedom of speech is valuable because it allows *listeners* to receive all information material to the exercise of voting rights by members of a sovereign electorate. Indeed, the emphasis on the rights of the listener rather than on the rights of the speaker is one of the most important contributions of the argument from democracy. But now the focus instead is on the *speaker*. Especially when we look upon freedom of speech as a speaker's interest, the core of the theory has much more to do with individual dignity and equality, the moral right of equal participation, than it does with any notion of electoral sovereignty, or even with any pragmatic or utilitarian calculation of how government may function most effectively.

Upon closer analysis the argument from democracy moves fur-

ther and further away from its source in the theories of sovereignty and self-government. This is not at all startling. The paradox presented at the beginning of this section merely illustrates that the conception of sovereignty supporting the argument from democracy is itself fundamentally flawed, not only as the foundation for a principle of free speech, but also as a more general theory of democracy. This point has been exhaustively treated by others, and I need not recapitulate those arguments here. Popper's discussion of the 'paradox of sovereignty' is a particularly effective attack on over-simplified views of popular sovereignty, and the limitations he and others have exposed both weaken and narrow the argument from democracy.[7] That argument is not merely restricted to democratic societies, but it is premised on and to some extent restricted to a particular conception of democracy that otherwise commands little serious attention. Just as the emphasis on popular sovereignty leads to such paradoxical conclusions as the right of the people to alienate that sovereignty by electing an absolute despot, so does the emphasis on electoral sovereignty in the argument from democracy help very little in explaining why rights of free speech are rights against a majority, why they are in any way immune from the principles of majority rule. An argument that cannot explain these matters is not an argument for a Free Speech Principle.

The complexity of modern societies further narrows the range of application of the argument from democracy. The more a governmental structure is removed from the paradigm of the New England town meeting, the less applicable becomes Meiklejohn's sterile formulation of the argument from democracy. But this distance between reality and the town-meeting model suggests an alternative formulation of the argument from democracy. As our leaders become elected rulers rather than servants, governmental superstructures are more likely to become as concerned with perpetuation of their own power as with acting in what they perceive to be the public interest. I do not mean to offer propaganda for the minimal state, or a testimonial to the ideas of Robert Nozick. I am making the much more modest observation that the same motivations that lead people to aspire to governmental office also lead those people to want to retain those positions. Freedom to criticize the government is a check on the survival instincts of self-perpetuating governmental organizations.[8] Freedom of speech, and perhaps more particularly freedom of the press, can be an integral part of a system of government based on separation of powers and checks and balances. The extraordinary immunity of the American

here alone, majority rule is the best available test of truth. Alternatively, truth may not be the issue. Popular sovereignty incorporates a majority's right to be wrong. Where democracy is accepted, popular will is taken to prevail over any other method of arriving at knowledge, no matter how much better these other methods may seem. And accepting that the people have a right to be wrong entails accepting that wrongness can hardly be the criterion for denying the people access to information and opinions that may bear upon their decisions.

A PARADOX OF POWER

The argument from democracy pivots on the particular conception of democracy from which it was spawned. The entire argument is generated by the single principle of a sovereign electorate. Paradoxically, the same concept of sovereignty that provides the foundation for the argument from democracy also exposes the argument's most prominent weaknesses.

If the people collectively are in fact the sovereign, and if that sovereign has the unlimited powers normally associated with sovereignty, then acceptance of this view of democracy compels acceptance of the power of the sovereign to restrict the liberty of speech just as that sovereign may restrict any other liberty. Moreover, there is no reason to say that the sovereign may not entrust certain individuals with certain powers. The power to delegate authority is implicit in the unlimited power that sovereignty connotes. But if the people may entrust Jones with the exclusive obligation and authority to round up all stray dogs, why may it not entrust Brown with the exclusive obligation and authority to determine truth or falsity, or to exercise a power of censorship over publications?

Recall from chapter 1 the implications of recognizing a Free Speech Principle. The Free Speech Principle functions as a distinct restraint on governmental power, as a specific limitation on what as a general rule are accepted to be the powers of a sovereign majority. If we accept that the majority may legislate by itself, or through representatives, on anything, then a Free Speech Principle exists only if it is an exception to the general rule of majority sovereignty; only if it is a right, of indeterminate strength, against the majority. Any distinct restraint on majority power, such as a principle of freedom of speech, is by its nature anti-democratic, anti-majoritarian. If this were not the case, then the majority would be no more restrained in dealing with speech than in dealing with

any other form of conduct, and free speech would be little more than a platitude.[5]

Thus, the very notion of popular sovereignty supporting the argument from democracy argues against any limitation on that sovereignty, and thereby argues against recognition of an independent principle of freedom of speech. To the extent that we support individual rights of expression, argument and criticism, we make claims inconsistent with a view of democracy founded on the absolute sovereignty of the people as a whole. Even viewing freedom of speech not so much as an individual right but as a social interest in individual expression,[6] the application of that view still entails granting the individual a right to speak when in some instances the majority might want to restrict that speech. The more we accept the premise of the argument from democracy, the less can we impinge on the right of self-government by restricting the power of the majority. If the argument from democracy would allow to be said things that the 'people' do not want to hear, it is not so much an argument based on popular will as it is an argument against it.

My argument may prove too much. By the same token the 'people' by majority vote could withdraw from the minority the right to vote, an action fundamentally opposed to any plausible conception of self-government. This paradox is resolved by looking to the idea of equality. Equal participation by all people in the process of government is even more fundamental to the ideal of self-government than is the idea of majority power. Indeed, given the foregoing paradox, equal participation most commends the argument from democracy. If everyone is to participate equally, then everyone must have the information necessary to make that participation meaningful. The argument from democracy thus transformed still argues powerfully for broad freedom to communicate ideas and information relevant to the processes of government. But as we shift from a sterile notion of democracy as majority rule to democracy as equal participation, free access to information becomes more a matter of respect for individual dignity, individual choice, and equal treatment of all individuals, and less an idea grounded in notions of sovereignty.

If equal participation in government is premised on an assumption of equal competence and universal rationality, the theory lacks both intuitive and empirical support. A plausible theory of equal participation must rest not on an assumption of competence, but on the view that equality is an independent and autonomous value. I discuss these individualistic conceptions of freedom of speech in

together. It is self-government in the purest form. A key feature of the town meeting is that there are no government officials in the sense of political leaders; there is only a moderator whose sole function is to organize the meeting and enforce the rules of order. Members of the population propose ideas, debate those ideas, and then adopt or reject them by vote of all the people.

Meiklejohn saw all democracies as New England town meetings writ large. His thesis extended the ideal of popular sovereignty embodied in the town meeting to the larger and more complex republic. To Meiklejohn the size and complexity of the modern state did not diminish the theoretical absolute sovereignty of the populace. As final decision-making authority rests in the people who attend the town meeting, so does that same authority rest in the people who populate the more cumbersome modern state. As the essential feature of the town meeting is the open debate and public deliberation that precedes any decision, so also is open debate and public deliberation an intrinsic and indispensable feature of any society premised on the principle of self-government.

The argument from democracy is composed of two critical elements that support a principle of free speech. The first is the necessity of making all relevant information available to the sovereign electorate so that they, in the exercise of their sovereign powers, can decide which proposals to accept and which proposals to reject. Because the people are the ones who make the decisions, the people are the ones who need to receive all material information before making any decision. Although a restriction on the general liberty of the individual would not necessarily affect the democratic governmental process, a circumscription of speech would limit the information available to those making the decisions, impair the deliberative process, and thereby directly erode the mechanism of self-government. Because we cannot vote intelligently without full information, it is argued, denying access to that information is as serious an infringement of the fundamental tenets of democracy as would be denying the right to vote.

Second, freedom of speech is perceived as the necessary consequence of the truism that if the people as a whole are sovereign, then governmental officials must be servants rather than rulers. This in turn generates several more specific foundations for freedom of speech. It reminds us that, in a democracy, our leaders are in office to serve the wishes of the people. Freedom of speech is a way for the people to communicate those wishes to the government, and any suppression of the public's stated demands is inconsistent with the notion of government's existing for the pre-

cise purpose of responding to the demands of the population. It is noteworthy that petitioning for the redress of grievances, closely connected with freedom of speech, is the basis both of Magna Carta and the Bill of Rights of 1689. Petitioning for the redress of grievances is also conjoined with freedom of speech in the First Amendment to the United States Constitution.

Additionally, if the government is the servant, censorship by government is anomalous. It results in the servants pre-selecting the information available to the sovereign, although, argued Meiklejohn, logic would suggest precisely the opposite.

Finally, and probably of the greatest importance, the role of government as servant compels a recognition of the right to reject and criticize our leaders. Under a theory of self-government, this lies at the very core of democracy. Criticism of public officials and public policy is a direct offshoot of the principles of democracy. In 1720 John Trenchard and Thomas Gordon, writing under the pseudonym 'Cato', argued for the right publicly to examine and criticize our rulers as a principle divorced from more individualistic or libertarian notions of free speech.[3] The argument from democracy re-establishes this independent basis for the freedom to criticize governmental policy and governmental officials.

In some respects the argument from democracy is related to the survival theory of truth discussed in the previous chapter. By placing ultimate power in the people, this version of democracy, characterized by popular sovereignty and majority rule, implicitly embodies the view that political truths are, by definition, those that are accepted by the majority of the people. If the people are sovereign it is not for governments to decide what is true and what is false, especially in matters political, because as servant the government has an institutional role of trust based on and requiring impartiality or neutrality towards the people, and therefore towards the various ideas held by the people.[4] Inherent in the ideal of self-government is the proposition that it is for the people alone to distinguish between truth and falsity in matters relating to broad questions of governmental policy.

The survival theory of truth seems more plausible for questions of political policy than for most other categories of human knowledge. It is not unreasonable to argue that we are further from certainty regarding questions of political theory and policy than we are in other categories of thought, and that even if some objective test is conceivable, we are a long way either from finding it or from agreeing on what it might look like. In view of the rampant disagreement existing over issues of public policy, perhaps here, and

Such freedom is held to be necessary for two purposes. First, freedom of speech is crucial in providing the sovereign electorate with the information it needs to exercise its sovereign power, and to engage in the deliberative process requisite to the intelligent use of that power. Second, freedom to criticize makes possible holding governmental officials, as public servants, properly accountable to their masters, the population at large.

The argument from democracy has been most carefully articulated by the American political philosopher Alexander Meiklejohn, although we can see similar ideas in the writings of Spinoza, Hume and Kant.[2] Freedom of speech is most commonly associated with liberalism, but the argument from democracy has found some appeal among those who reject the fundamental tenets of liberalism. By emphasizing the ultimate power of the people as a group and the relationships among people, the argument from democracy avoids the (perceived) atomistic and elitist character of liberalism in general and of the argument from truth in particular. For example, Robert Paul Wolff, although holding the position indicated by the title of his book *The Poverty of Liberalism*, remains sympathetic towards a version of the argument from democracy.

I have already delayed too long in defining what I mean here by 'democracy'. This is a word that has come to mean all things to all people. The word 'democracy' has gained so much emotive force as to lose virtually all meaning it ever had. Its descriptive content is minimal and it is now a term of almost pure political approval. Democracy is today so commonly accepted as the proper way of organizing a state that all governments feel the necessity of describing themselves as 'democratic', regardless of how autocratic they may be. All entrenched governments are 'democracies', and all revolutionary movements against those governments are 'democratic'. More than almost any other word in common use in political discourse, 'democracy' has come to have so many meanings as to be totally useless as a word of description.

For the purposes of this chapter, I feel obligated by tradition to continue to use the word 'democracy', but I will use it in a much stricter sense. I take democracy to mean a system that acknowledges that ultimate political power resides in the population at large, that the people as a body are sovereign, and that they, either directly or through their elected representatives, in a significant sense actually control the operation of government. I do not use the word 'democracy' as synonymous with any system that provides for peaceful change (Russell and Popper), with any system designed for the benefit of the people (Bentham, James Mill, and

many Marxists), with any system providing a maximum amount of equality (some Marxists), or with any system evidencing great respect for the interests of individuals (de Tocqueville, J. S. Mill, and many modern theorists of pluralistic democracy). Although all of these factors may be and frequently are to some extent present in societies based on popular sovereignty actually exercised, they need not be. Such factors do not define democracy. 'Democracy' as I use it here is not defined as rule *for* the people, but as rule *by* the people. The latter may entail the former, but the reverse is clearly not true.

It is not significant in the context of this chapter whether any of the alternative formulations of a theory of democracy is in some way more 'correct', or whether any of these formulations are more desirable political theories. All I am maintaining here is that the argument from democracy, the subject of this chapter, is an argument that derives its force from the initial supposition that governments ought to be structured to provide, usually through a system of frequent and open elections with universal suffrage and with some principle of majority rule, a state in which the population at large has sovereignty in theory and in practice. It is a system that embodies the very idea of self-government. Most significantly in this context, it is a system of government that gives the people the right to be wrong.

THE ARGUMENT EXPLAINED

The argument from democracy as understood today was most prominently articulated by Alexander Meiklejohn. Although he presented his argument as a theory of interpretation of the United States Constitution, the constitutional basis for his position is tenuous. His rigid distinction between public and private speech is unsupported by constitutional text or doctrine, and is unworkable in practice. Nor is there any indication that the First Amendment was ever intended to or could in fact be given the absolute force he ascribes to it. But as a matter of political philosophy, his arguments are important and worthy of close scrutiny, especially in this part of the book, where I am concerned more with the foundations of a principle of free speech than with its strength.

Meiklejohn was much taken with the notion of self-government, and consequently was strongly influenced by the institution of the town meeting, a form of government prevalent in small towns in New England. Under a town meeting form of government, all major decisions are taken by the entire adult population assembled

focus our attention on fallibility, on the possibility that 'we' may be wrong and that 'they' may be right. To the extent that suppression of opinion may be inconsistent with this understanding of our fallibility, the argument from truth at least gives us pause before we so quickly assume the truth of received opinion. It gives us one reason for treating the suppression of opinion differently from the way we treat other governmental action.

More importantly, this focus on the possibility and history of error makes us properly wary of entrusting to any governmental body the authority to decide what is true and what is false, what is right and what is wrong, or what is sound and what is foolish. As individuals are fallible, so too are governments fallible and prone to error. Just as we are properly sceptical about our own power always to distinguish truth from falsity, so should we be even more sceptical of the power of any governmental authority to do it for us. It is a wise caution to heed when we must decide how much authority we will give to those in power to determine what is right and to suppress what is wrong.

The argument from truth may be based not only on its inherent scepticism about human judgment, but also on a more profound scepticism about the motives and abilities of those to whom we grant political power. The reason for preferring the marketplace of ideas to the selection of truth by government may be less the proven ability of the former than it is the often evidenced inability of the latter. To the extent that this is implicit in the argument from truth, there is a strong link between the argument from truth and the argument from democracy, which is the subject of the next chapter.

Bibliographical note to chapter 2

Consideration of Mill should also refer to the criticism in Maurice Cowling, *Mill and liberalism* (Cambridge: Cambridge University Press, 1963); Willmoore Kendall, 'The "Open Society" and its fallacies', *American Political Science Review* 54 (1960), 972. Also questioning the assumptions about the power of truth is Yves Simon, 'A comment on censorship', *International Philosophical Quarterly* 17 (1977), 33. Also useful are Francis Canavan, 'John Milton and freedom of expression', *Interpretation* 7 (1978), 50; Francis Canavan, 'Freedom of speech and press: for what purpose?', *American Journal of Jurisprudence* 16 (1971), 95. A more recent work by Zecheriah Chafee, including commentary on the judicial opinions of Holmes and others, is *Free speech in the United States* (Cambridge: Harvard University Press, 1941). Karl Popper's views on freedom of enquiry pervade most of his work, but the major source is *The open society and its enemies*, fifth edition (London: Routledge and Kegan Paul, 1966).

CHAPTER 3

The argument from democracy

A CONDITIONAL ARGUMENT

The argument from truth can be characterized, following Thomas Scanlon, as a 'natural' argument.[1] It proceeds directly from what Scanlon perceives as natural moral principles (for example, the desirability of truth), rather than being instrumental to any particular theory of the design of political institutions. By contrast, the argument from democracy is characterized by Scanlon as 'artificial', because it is derived from and is contingent upon one particular theory of government, a theory by no means universally accepted. I find the distinction somewhat tenuous, because we can give natural moral arguments for democratic processes, which in turn would include those principles necessary for democracy to operate. Still, the distinction is useful here, because it highlights at the outset the conditional nature of the argument that is the subject of this chapter.

The argument from democracy, as its name indicates, requires for its deployment the *a priori* acceptance of democratic principles as proper guidelines for the organization and governance of the state. To the extent that the argument from truth is valid, its validity applies to any form of social organization. But the argument from democracy is wholly inapplicable to autocracies, oligarchies, or theocracies. Such forms of government are less frequently advocated today than in the past, but they certainly are not extinct. The argument from democracy, in presupposing certain principles of governmental structure to be discussed presently, is an argument relevant to a narrower range of societies than most other arguments for freedom of speech.

The argument from democracy views freedom of speech as a necessary component of a society premised on the assumption that the population at large is sovereign. This *political* basis for a principle of freedom of speech leads to a position of prominence under the argument for speech relating to public affairs, and even more prominence for criticism of governmental officials and policies.

ment from truth in its strongest form would apply with equal force in all of these instances. Yet at first sight it seems more reasonable to say that the strength of the argument from truth should be evaluated in reference to the certainty we have in the particular proposition at issue. If the degree of the state's interest in suppressing the advocacy of slavery is the same as the degree of its interest in suppressing the advocacy of a socialist economy, a logical application of the argument from truth would be more likely to support the act of suppression in the former case than in the latter, because we are more certain of the falsity of the good of slavery.

To make such a claim, however, would be to deny the usefulness of *categories* of propositions, and to look instead to particular propositions. Categorization in free speech theory is in one sense a compromise. It is a compromise between two competing insights. One insight is that it is over-simplified and erroneous to treat all propositions in the same way, especially in light of the varying degrees of certainty that attach to different propositions. The other insight is that we are reluctant to allow any governmental body with power to suppress to make decisions concerning suppression on the basis of *its* certainty of the falsity of the opinion to be suppressed. We attempt to reconcile these competing considerations by creating categories of expression. There is nothing unseemly about categorizing here, but we must realize that the process of categorization is rather more artificial than natural, and that the forces leading us to categorize might also lead us to make those categories ever smaller, ultimately denying the existence of categories altogether.

If we accept the validity of categorization, it follows that freedom of speech (for the population at large) as a method of gaining knowledge may be least persuasive in the realm of factual or scientific propositions. In this area we have the greatest amount of verifiable confidence in received opinions. There may be many good reasons for permitting people to argue that the moon is made of green cheese, but the possibility that that proposition may be true is hardly the most important of these reasons. The very fact that we usually consider the laws relating to defamation and misrepresentation as outside the scope of many of the principles of freedom of speech demonstrates that intuitively we make the distinctions I am suggesting here. If I am prosecuted for selling as 'Pure Orange Juice' a liquid containing only water, sugar, and artificial flavouring and colouring, it is not and should not be a defence that some extreme sceptics would be reluctant to exclude

completely the possibility that we could be mistaken about when a liquid is orange juice and when it is something else.[21]

Many factual propositions are of course less certain than the proposition that there are five fingers on my left hand. Because of errors in observation, interpretation and description, the factual statement we accept as true may be false, and the statement we reject as erroneous may be true, just as such possibilities exist for statements about ethics, religion or politics. But in the majority of instances involving factual or otherwise verifiable propositions the possibility of error is miniscule, and the risks of assuming our infallibility are consequently smaller. When this is the case, the argument from truth is of quite limited assistance to an argument for freedom of speech.

A LIMITED JUSTIFICATION

The argument from truth is plagued by two major flaws. Most fundamentally, the argument from truth, as an argument for general freedom of speech throughout society, rests on an assumption about the prevalence of reason, for which the argument offers no evidence at all, in the face of numerous counter-examples from history. It may be correct to say that decisions ought to be made by those who will rationally consider all arguments, and that those in such a position ought to tolerate or encourage the widest range of opinion and disagreement. It is quite something else to say that society at large is in fact such a group, at least without more in the way of empirical support. Knowledge is not necessarily a one-way process. Additional propositions can retard knowledge as well as advance it. Truth can be lost just as it can be attained. Unless knowledge can be shown to have some inherent power, or unless truth is self-evident, there is no reason to assume that open debate and discussion will automatically and in every case be beneficial.

Moreover, any strong version of the argument from truth must elevate the search for knowledge to a position of absolute priority over other values. In this form the argument is so powerful as to be unworkable. If we weaken the argument to take account of other interests that may at times predominate, we find the argument from truth to say little more than that the quest for knowledge is a value that ought to be considered. In such a form the argument from truth says very little.

Although the argument from truth fails to provide the doctrinal support claimed by its advocates, it is nevertheless useful. It does

The argument from truth presupposes a process of rational thinking. Indeed, one of its virtues may be that it encourages this process. Yet because the process of rational thinking is the foundation of the theory, the theory weakens or dissolves when the process does not obtain. Even if we assume that rational thinking is the norm, there may be times when the process does not function properly. When, because of emergency, passion, or anger, there is no opportunity to reflect on the wisdom of an expressed opinion, and there is no opportunity for counter-argument, there is no reason to rely on the argument from truth. Those chiefly responsible for engrafting the argument from truth to American constitutional doctrine were also those who recognized that when there was a 'clear and present danger' there would be no opportunity for rational consideration of various arguments.[19] At such times there is less justification for allowing expression of the apparently false opinion. Take Holmes' classic example of a man's falsely shouting 'Fire!' in a crowded theatre. It would be most unreasonable to say that such expression should be permitted because others have the opportunity to express the opinion that there is no fire, followed by discussion and investigation to determine which of the two opinions was correct. The 'clear and present danger' test has implications far beyond American constitutional doctrine. Neither the argument from truth nor any other argument can be applied when the conditions for its validity are not present.

CATEGORIES OF KNOWLEDGE

In my discussion of the argument from truth thus far, I have treated truth as if its evaluation and identification were wholly independent of the nature of the proposition asserted. Clearly this is a gross over-simplification, albeit one prompted by the usual statement of the argument from truth. That argument hinges in large part on the lack of certainty in the received opinion. To this extent the validity of the argument varies in direct proportion to the degree of uncertainty inherent in the *category* of proposition involved. Comte argued for censorship of certain normative ethical opinions by saying that no one could reasonably demand freedom to disagree with the truths of mathematics. Even accepting his questionable premise about truth in mathematics, his conclusion follows only if all knowledge is in the same epistemic category. This is plainly unjustified. Knowledge in mathematics and logic is more certainly attainable than is knowledge in many other

areas, and an argument based on the possibility of error cannot fail to recognize the difference.

The argument from truth may easily be characterized as an argument from uncertainty. Uncertain of our beliefs, we allow, perhaps even encourage, the expression of opposing views in order to have the opportunity of rejecting or modifying our erroneous beliefs. The more (properly) certain we are of our beliefs, the less likely we are to advance knowledge by the expression of opposing views. The more certain we are, the less telling is the uncertainty we may sometimes have about our opinions. And then, the less is the force of this reason for the argument for freedom of speech. Matters of taste present the paradigmatic example. If the state were to propose suppressing bad literature or bad art,[20] we would be quick to argue against this on the ground that judgments about artistic matters are ones of which there is little certainty and little agreement about what is good and what is bad. We could consistently still hold that there are objective standards for aesthetic evaluation, for that means saying some things *are* good and others *are* bad. But this is a far cry from reaching agreement as to what is good and what is bad. Standards in aesthetics are more highly variable than are standards in most other subjects. Here the danger of suppressing that which may at some future time be considered good or valuable presents a powerful argument for allowing the expression of the currently unacceptable opinion. (I do not claim this to be the only argument, nor do I claim this to be the strongest argument. I shall discuss other arguments relating to artistic freedom in chapters 4 and 7.)

Similar considerations apply to religious, political, or moral views. One of the reasons that the traditional expositions of the argument from truth have gained such great acceptance is that those expositions were directed primarily at the expression of normative propositions in ethics, politics and religion. In these fields there is quite little consensus; consequently there is a large risk of suppressing an opinion that may subsequently be taken to be correct.

Thus, even within a category of propositions, such as within the category of political and moral propositions, there are differing degrees of uncertainty. Although neither Mill nor any modern moral sceptic would be willing to say that we can be absolutely certain that the torture of innocent children is bad, or that respect for others is good, these plainly are beliefs in which we can have more confidence than in the belief that the Labour Party ought to be in power in Great Britain, or the belief that affirmative action to remedy past racial discrimination is a salutary policy. The argu-

rejected ideas indeed are correct, then increasing the pool of ideas will in all probability increase the total number of correct ideas in circulation, and available to those who can identify them as correct. Any perceived inability of the population at large to discern truth does not necessarily deny to that population a valuable function in the truth-seeking process. But there is no particular reason why the group that offers the hypotheses must be the group that decides which hypotheses to accept and which to reject.

In discussing fallibilist theory, we often forget that it is only *possible* that the received opinion is erroneous, and therefore only *possible* that the rejected opinion is true.[18] When we say that all views should be permitted expression so that knowledge may advance, this necessitates being willing to achieve *some* increase in knowledge at the expense of tolerating a great deal of falsity. In order to locate all the sound ideas, we must listen to many unsound ideas. When we allow the expression of an opinion that is only possibly true, we allow the expression of an opinion that is also possibly, perhaps *probably*, false. If the expression of the opinion in question involves no unpleasant consequences even if it is false, unsound, or useless, then there is a potential benefit at no cost. But it is simply a mistake to say that the expression of false or unsound opinions can never have unpleasant consequences.

The predominant risk is that false views may, despite their falsity, be accepted by the public, who will then act in accordance with those false views. The risk is magnified in those circumstances in which people have seemed particularly disposed towards the acceptance of unsound ideas. One good example is race relations. History has shown us that people unfortunately are much more inclined to be persuaded of the rectitude of oppressing certain races or certain religions than they are likely to accept other unsound and no less palpably wrong views.

Moreover, unpleasant side effects may accompany the expression of erroneous views even when there is no risk of widespread acceptance. By side effects I mean those consequences that are not directly attributable to the *falsity* of the views expressed. People may be offended, violence or disorder may ensue, or reputations may be damaged. It is foolish to suppose that the expression of opinions never causes harm. Generally, but not always, the expression of unsound opinions causes greater harm than the expression of sound opinions. When we allow the expression of an opinion because it is possibly true, we often accept an appreciably higher probability of harm than the probability of the truth of a seemingly false opinion. As a result, the strength of protection

of the right to dissent afforded by the argument from fallibilism is directly proportionate to the value placed on the goal of searching for knowledge. There is absolute protection only if the search for knowledge is the transcendent value in society. If the search for knowledge does not have a lexical priority over all other values, the possibility that the rejected view may be correct will often be insufficient to justify allowing it to be expressed – depending, of course, on the evaluation of the harm expected to flow from its dissemination.

To cut off access to possible knowledge is undoubtedly a harm. But the question to be asked is whether we should take a large risk in exchange for what may be a minute possibility of benefit. Unfortunately, we cannot be sure we have properly weighed the harms and benefits unless we know what benefits the suppressed opinion might bring. And this is impossible to assess so long as that opinion is suppressed. Therefore we are merely guessing when we suppress; but we are also guessing when we decide not to suppress. If the expression of an opinion possibly causes harm, allowing that expression involves some probability of harm. If the suppression of that opinion entails the possible suppression of truth, then suppression also entails some probability of harm. Suppression is necessarily wrong only if the former harm is ignored. Therefore a rule absolutely prohibiting suppression is justified only if speech can never cause harm, or if the search for truth is elevated to a position of priority over all other values.

Mill assumed that in all cases we could act in furtherance of the policy embodied in the received opinion, while at the same time permitting the expression of the contrary opinion. But in some cases the very act of allowing the expression of the contrary opinion is inconsistent with acting on the received opinion. For example, we prohibit slavery in part because of a received opinion that racial equality and respect for the dignity of *all* people is the morally correct position. If we allow people to argue that slavery is morally correct, many others will be offended, their dignity will be insulted, and there is likely to be increased racial disorder. The expression is thus detrimental to acting on the received opinion, to furthering racial equality and respect for the dignity of all. A strong version of the argument from truth would hold that the possibility, however infinitesimal, that slavery is good makes tolerating the harm that will flow from the expression of that opinion worthwhile. But the size of that possibility and the extent of the potential harm are irrelevant only if the search for knowledge must always prevail over other values.

rational thinking can be assumed, maximum freedom of discussion is a desirable goal. In systems of scientific and academic discourse, the argument from truth has substantial validity. Those who occupy positions in these fields may not always think rationally, but we are at least willing to say they should, and are inclined to try to replace those who do not think rationally with those who will.

It is one thing to say that truth is likely to prevail in a select group of individuals trained to think rationally and chosen for that ability. It is quite another to say that the same process works for the public at large. Only if the process is effective throughout society can the argument from truth support a Free Speech Principle to limit government power. We must take the public as it is. A scientist who is irrational can or at least should be replaced. A population with a similar failing cannot be replaced. The extent of reason in society is a fact with which we must work, and it is a fact that a plausible theory must accommodate.

It is hardly surprising that the search for truth was so central in the writings of Milton, Locke, Voltaire, and Jefferson. They placed their faith in the ability of reason to solve problems and distinguish truth from falsehood. They had confidence in the reasoning power of *all* people, if only that power were allowed to flourish. The argument from truth is very much a child of the Enlightenment, and of the optimistic view of the rationality and perfectibility of humanity it embodied. But the naïveté of the Enlightenment has since been largely discredited by history and by contemporary insights of psychology. People are not nearly so rational as the Enlightenment assumed, and without this assumption the empirical support for the argument from truth evaporates. The most prominent weakness of Popper's *The Open Society and Its Enemies* is the assumption that the populace has the rationality Popper sees in scientific enquiry. It is no easy task to apply *The Logic of Scientific Discovery* to a public often unwilling or unable to be logical.

I do not mean to be taken as saying that falsity, ignorance, or evil have inherent power over truth, knowledge, or goodness. Rather, I mean only to deny the reverse – that truth has inherent ability to gain general acceptance.[16] The argument from truth must demonstrate either that true statements have some intrinsic property that allows their truth to be universally apparent, or that empirical evidence supports the belief that truth will prevail when matched against falsehood. The absence of such a demonstration, in the face of numerous counter-examples, is the most prominent weakness of the argument from truth. History provides too many

examples of falsity triumphant over truth to justify the assertion that truth will inevitably prevail. Mill noted that 'the dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes'. My point is that, *contra* Mill, the point would be the same if we removed the persecution and instead let truth battle with falsehood rather than the forces of oppression. Mill's assumption that the removal of persecution will allow truth to triumph in all cases is every bit as much a 'pleasant falsehood'.

Of course we know that falsity at times prevailed over truth only by having finally discovered truth with respect to a particular issue. Thus discussions along this line usually distinguish between the long run and the short run. Those who reject the assumptions of the Enlightenment point to instances in which truth and reason have not prevailed. In response, those who place their faith in the power of reason observe that when erroneous views have at times been accepted they have also been discredited in the long run. But the validity of this response depends on just how long the long run is. If there is no limit to its duration, the assertion that knowledge advances in the long run is both irrefutable and meaningless. Yet if the relevant time period is discrete and observable, history furnishes far too many counter-examples for us to have much confidence in the power of truth consistently to prevail.

The elements of rational thinking that prompt and justify the argument from truth undoubtedly are present at various points in society. Although there is no indication that this capacity to separate truth from error is invariably or even consistently present in the population at large, this is not sufficient completely to reject the argument from truth. Certainly the argument retains validity for select groups in which rationality can be presumed. More importantly, the free expression of all views by the entire population, even if a less than perfectly rational population, assists those who can most effectively separate truth from error. The process of advancing knowledge by offering and evaluating challenges and alternate hypotheses depends in part for its effectiveness on the number and variety of such challenges. Although the public may not be the body to identify most effectively sound policies and true statements, its size and diversity make it the ideal body to *offer* the multitude of ideas that are the fuel of the engine for advancing knowledge.[17] By allowing the freest expression of opinion, we increase the number of alternatives and the number of challenges to received opinion. If some proportion of currently

argument. Stripped of the unnecessary absolutism, Mill's argument demands close attention.

Mill focuses our attention on the possibility that truth may lie in the suppressed opinion. If this is so, then a general policy of prohibiting the expression of opinions thought to be false extinguishes *some* knowledge and perpetuates *some* error. As Mill recognizes, however, we can say much the same thing about *acting* on a belief. If any belief might be wrong, then so might any action be wrong. Yet we cannot and do not let recognition of our fallibility paralyse us into inaction. We can function only if we act in accordance with our strongest beliefs, while still acknowledging that we may be in error. Mill responds by assuming a fundamental distinction between holding a belief and acting on a belief, and taking complete liberty of contradiction to be the very condition that allows us to act in accordance with our uncertain beliefs. We act on a belief rationally only if we know it to be the 'best' belief available, and we know a belief to be best only if we have heard all the others.

This argument again appears to overstate the case. As Geoffrey Marshall's example of the Flat Earth Society points out, there are ways of establishing rational assurance other than by standing our beliefs next to all the other beliefs. But the more serious objection is that the distinction between holding a belief and acting on a belief is not to the point. The apt distinction is between acting on a belief and *expressing* a belief, and it is this distinction that may well not exist, because expressions of belief (speech) often affect the conduct of others. If there is a risk that people may come to believe and act on opinions thought by others to be false, then suppressing the false belief is one way of acting on the true belief.

Although Mill's argument is too strong, there is value in his observations. We achieve rational confidence in our views, confidence sufficient to justify action, in most instances by comparing those views to others already evaluated. We can sensibly prefer one view to others only by knowing what the others are. Having heard other views, we can have confidence in a view that has survived all currently available attacks. This at least increases the justification for acting on the surviving belief.

On Liberty can be read as assuming that there is some objective truth, even if we are never sure we have found it. As a result, Mill has been criticized by those who reject the notion of objective truth.[13] If we are always uncertain, they say, then we never know if we have identified truth. These critics accuse Mill of inconsistency in saying that we can never be certain, but that we can search

for truth. Apart from the fact that these arguments confuse truth with certainty, confuse a state of the world with a state of mind, the arguments are largely irrelevant to the issue at hand. The question is not certainty, but epistemic advance.

This point is brought out in much of the work of Karl Popper. By stressing falsifiability rather than verifiability, and by characterizing the advance of knowledge as the continual process of exposing error, Popper frees the argument from truth from the problem of certainty. The identification of error may not bring us closer to truth, but the identification of an error is still desirable, and the rejection of an erroneous belief is still an epistemic advance.[14] Popper's argument from the identification of error thus parallels Mill's argument from truth. Both share the same core principle – allowing the expression of contrary views is the only rational way of recognizing human fallibility, and making possible the rejection or modification of those of our beliefs that are erroneous.

THE THEORY AND THE REALITY

Mill, Popper, and their followers have refined the argument from truth by explaining how knowledge is more likely to be gained in a society in which all views can be freely expressed. But they have still neglected the critical question – does truth, when articulated, make itself known? Does truth prevail when placed side-by-side with falsity? Does knowledge triumph over ignorance? Are unsound policies rejected when sound policies are presented? The question is whether the theory accurately portrays reality. It does not follow as a matter of logical entailment that truth will be accepted and falsehood rejected when both are heard. There must be some justification for assuming this to be an accurate description of the process, and such a justification is noticeably absent from all versions of the argument from truth.

The argument from truth may well be the statement of an ideal. Listening to other positions, suspending judgment (if possible) until opposing views are expressed, and considering the possibility that we might be wrong virtually defines, in many contexts, the process of rational thinking. At least it is a substantial component of the definition.[15] Rationality in this sense may not always lead to increased knowledge, and there may at times be better methods of searching for truth. But all academic disciplines presuppose that this type of rationality has value, and it would be difficult to prove this presupposition unwarranted. When such

odds with the idea of truth embodied in our language of evaluation as to be virtually useless. A theory of majority rule for truth distorts out of all recognition our use of words like 'true', 'good', 'sound', or 'wise'. Subjectivism may argue for greater freedom of speech, but not in a way related to the argument from truth. I will return to this theme in later chapters, but we can confidently pass over the consensus theory here. Defining truth (and, in turn, knowledge) solely in terms of a process answers none of the important questions about free speech. If free speech is justified because it defines the process that produces knowledge, and if that knowledge is in turn defined by the very same process, we are saying nothing at all. It is entirely possible that the process of open discussion is the best way of arriving at knowledge. But this is the causal link that the survival theory of truth fails even to address.

The focus on this causal link between freedom of speech and increased knowledge is arguably the greatest contribution of Mill's *On Liberty*. Earlier writers simply assumed that truth would reveal itself in the interplay of competing belief.[9] Truth was considered self-evident, needing only to be expressed to be recognized. By contrast, Mill saw the importance of explaining the way in which error would be replaced by knowledge. A paraphrase of Mill's argument may aid in precise analysis:

> The relationship between discussion and truth is a product of the uncertain status of our beliefs and the fallibility of the human mind. Because we can not be absolutely certain of any of our beliefs, it is possible that any given belief might be erroneous, no matter how firmly we may be convinced of its truth. To hold otherwise is to assume infallibility. Because any belief might be erroneous, the suppression of the contrary belief entails the risk of upholding the erroneous belief and suppressing the true belief. The risk is magnified in practice because most beliefs are neither wholly true nor wholly false, containing instead elements of both truth and falsity. Only by allowing expression of the opinion we think false do we allow for the possibility that that opinion may be true. Allowing contrary opinions to be expressed is the only way to give ourselves the opportunity to reject the received opinion when the received opinion is false. A policy of suppressing false beliefs will in fact suppress some true ones, and therefore a policy of suppression impedes the search for truth.

Although Mill did not so qualify his argument, at best it tells against suppression only when an opinion is suppressed on the grounds of its alleged falsity. There are times when opinions are suppressed precisely because they are (or are perceived to be) true.

More commonly, opinions are suppressed because their expression will or is thought to cause certain undesirable consequences unrelated to the truth or falsity of the suppressed opinion.[10] Stephen Norris offers the example of the purported scientific basis for the opinion that some racial groups are genetically intellectually inferior to other racial groups.[11] Even if this were true, he argues, it is at least plausible that we might wish to prevent its dissemination in the interests of fostering racial harmony and eliminating *excess* reliance on genetic differences. We can imagine other examples of opinions suppressed because their expression is thought to impair the authority of a lawful and effective government, interfere with the administration of justice (such as publication of a defendant's criminal record in advance of a jury trial), cause offence, invade someone's privacy, or cause a decrease in public order.

When these are the motives for suppression, the possibility of losing some truth is relevant but hardly dispositive. Most formulations of the argument from truth assume that the suppression is based solely on the truth of the received opinion and the falsity of the opinion to be suppressed. When suppression is based on some other goal, the argument from truth, even if valid, is not wholly to the point. If the argument from truth generates a Free Speech Principle, then we justify suppression based on any interest other than the search for truth by weighing the interest in discovering truth against the other interests sought to be protected.

The corollary of this is that the argument from truth, if valid, also presupposes that the search for truth is the pre-eminent value in society – when it has, in Rawlsian terms, a lexical priority over all other interests. To the extent that Mill uses the argument from truth to support an argument for liberty of discussion absolute in strength (although not unlimited in scope[12]), he makes two implicit assumptions. He assumes that all suppression is based on the asserted falsity of the suppressed view. This, however, is simply wrong. Additionally, he assumes that the search for truth is superior to any other social interest. This assumption too is, at the very least, open to question, and it presents a problem to which I shall return. Thus the argument from truth is dispositive *ex necessitate* only if these two assumptions are both true. In fact, they are most likely both false.

For now it is sufficient to note that the absolutism inherent in Mill's principle of free discussion is the weakest point of his argument. But no argument should be rejected merely because its proponent overstates the case, or attributes unnecessary force to the

full, open enquiry is, by definition, false, wrong, or unwise. Whatever is agreed or accepted is, conversely, true, good, or sound. One might call this a consensus theory of truth. Under this theory there is no test of truth other than the *process* by which opinions are accepted or rejected.

When truth is defined in this way, the 'marketplace of ideas' metaphor is most apt, because the economic analogy is strongest. Under the purest theory of a free market economy the worth of goods is determined solely by the value placed on them by operation of the market. The value of an object is what it will fetch in a free market at leisurely sale. Similarly, the consensus or 'survival' theory of truth holds that truth is determined solely by the value that ideas or opinions are given in the intellectual marketplace.[6] Under this view the results are defined by the process through which those results are produced. The goal is then not so much the search for knowledge as it is the search for rational thinking. Given this definition of truth, knowledge flows from rational thinking as a matter of logical necessity. The argument substitutes a tautology for the problematic causal link between discussion and knowledge. Since the result is defined by the process, it is the process and not the result that matters.

This is a consummate sceptical argument, and it is no surprise that its pardigmatic expression ('the best test of truth is the power of the thought to get itself accepted in the competition of the market') comes from Holmes, whose scepticism pervades all his writings.[7] If we reject the possibility of attaining objective knowledge, and reject as unsatisfactory any method of discovering truth, defining truth as a process rather than a standard becomes compelling.

The survival theory of truth is alluringly uncomplicated; but as the basis for the principle of free speech it suffers from crippling weaknesses. Foremost among these weaknesses is that the argument begs the question. If truth is defined by reference to and in terms of a process, then why is the process of open discussion preferable to any other process, such as random selection or authoritarian fiat? Why is open discussion taken to be the only rational method of enquiry?

The survival theory, in refusing to acknowledge independent criteria for truth, provides no guidance for preferring one method of decision to any other. The survival theory does not purport to demonstrate *why* open discussion leads to knowledge, because it rejects any objective test of truth. Moreover, the survival theory does not tell us why open discussion leads to more desirable results

of any kind. Thus the theory prompts us to ask why we should prefer rational thinking to any other form of thinking. But then the theory *defines* rationality as willingness to participate in open discussion and receptiveness to a variety of ideas. The survival theory thereby skirts the entire question by assuming open enquiry as valuable *a priori*. But we are still left with no criteria for evaluating whether this method of enquiry is better than any other. By taking open enquiry as sufficient *ex hypothesi*, the survival or consensus theory provides no assistance in answering the question of why free discussion should be preferred.

In his essay *On Liberty*, Mill suggests a version of the survival theory of truth in referring to the complete liberty to contradict a proposition as 'the very condition which justifies us in assuming its truth for purposes of action'. Perhaps rational assurance flows more easily from hearing opposing views. Perhaps freedom of contradiction is an important consideration in assuming the truth of any proposition. But that does not transform freedom to contradict into a sufficient condition, or even a necessary condition, for truth. We presuppose, at the very least, independent criteria of verifiability and falsifiability. Geoffrey Marshall has noted in response to Mill's argument that we should still have rational assurance 'that the Earth is roundish' even 'if the Flat Earth Society were an illegal organization'.[8] In those circumstances we would certainly want to look closely at why the contrary view was banned, so as more carefully to scrutinize the received view. But the very fact of allowing the expression of the opposing opinion is not what provides us with our assurance about the shape of the Earth.

The consensus theory seems slightly less bizarre in the context of ethical rather than factual or scientific propositions. But even with respect to ethics, a consensus theory incorporates a strange and unacceptably extreme subjectivism. If we define moral truth as what in fact survives, then we are committed to saying that Nazism was 'right' in Germany in the 1930s, and that slavery was equally 'correct' or 'wise' in parts of the United States prior to the Civil War. Nor is it satisfactory to respond by saying that these were not fully open systems, and that only propositions arising out of open systems can properly be recognized as sound. If that were the case, then any prevailing American view on anything in the last thirty years would have been correct, because there has been virtually unlimited freedom of discussion in the United States during that time.

A form of subjectivism that defines truth solely in terms of the strength of an opinion in the marketplace of ideas is so totally at

and by the word 'truth' in the limited context of the 'argument from truth' as an argument for accepting a principle of freedom of speech.

For one thing, the argument from truth is not inconsistent with any plausible form of scepticism. That is, it does not require accepting the possibility of acquiring knowledge with *certainty*. More than in most other areas of enquiry, it is crucial here to distinguish knowledge from certainty. We can approach a standard measure, such as the standard metre, by narrowing the range of tolerance (increasing the degree of accuracy) even if we can never exactly duplicate the standard metre. So too can we approach truth, or acquire knowledge, despite the lack of absolute certainty.[4] The lack of certainty does not, as some have mistakenly argued, mean that no uncertain belief is preferable to any other. Even if we can never achieve 100 per cent certainty, we can still prefer 99 per cent assurance to 55 per cent assurance, which in turn is better than 6 per cent assurance. In this context we can describe the search for truth, or the search for knowledge, as the search for beliefs of which we are more confident, rather than as the search for beliefs of which we are absolutely certain. It may or may not be that there *are* things of which we can be absolutely certain. That epistemological controversy is not at issue here. I am suggesting only that the argument from truth is not rebutted simply by the assertion that there can be no complete assurance in some or all areas of enquiry. As long as some epistemic states are preferable to other epistemic states,[5] the argument from truth remains an important statement (but not necessarily a valid argument), because the argument holds open discussion to be *a* way, or *the* way, of approaching the preferable epistemic state.

It should now be clear that the notion of truth in the argument from truth is not dependent on any one theory of truth, and can be said to cut across any plausible theory of truth. Under any theory of truth some propositions are true and others false, or at least some propositions are more likely true than others. As long as this is the case, then we have something to aim for, regardless of whether the standard for determining truth is correspondence, coherence, pragmatism, or whatever.

This view of truth appears to collapse any distinction between fact and value, between factual statements and normative statements. Later in this chapter I will probe more deeply into the relevance of the distinction to free speech theory. But here I am unconcerned about what appears to be an egregious oversimplification. All I have said about the function of 'truth' in the

argument from truth applies, *mutatis mutandis*, to any cognitivist theory of ethical or moral knowledge. Moreover, our use of descriptive language in ethical discourse presupposes that we can be wrong as well as right. And if being right is better than being wrong, then what I have said about factual knowledge applies to ethical knowledge, and applies as well to questions of social or political policy. Similar observations apply to the use of prescriptive language. If we can say 'ought', then we can say 'ought not' as well, and we presuppose that only one of these is correct with respect to a particular proposition at a particular time and place. The argument from truth can thus sensibly be interpreted to make analogous claims about moral or other prescriptive statements as it does about factual statements.

In the language of epistemic or normative appraisal, each positive word has a negative corollary. For 'true' there is 'false', for 'knowledge' there is 'ignorance', for 'good' there is 'bad' or 'evil', for 'wisdom' there is 'error' or 'stupidity', for 'sound' there is 'unsound', and so on. The argument from truth can be characterized in terms of these negative words as easily as in the positive words. In many ways the search for falsity, error, evil, or unsound policy can be as important as the search for truth, wisdom, goodness, or sound policy. In order to be fair in evaluating the argument from truth, we must acknowledge the breadth and flexibility of the claims it makes.

THE PROGRESS TOWARDS KNOWLEDGE

Stipulating that increased knowledge is a valuable end does not help to answer the central question – does granting a special liberty of discussion and communication aid us in reaching that end? Is the marketplace of ideas more likely to lead to knowledge than to error, ignorance, folly, or nonsense?

To many people this question answers itself. They assert that free and open discussion of ideas is the only rational way of achieving knowledge, and they assume that the mere assertion of this proposition is proof of its truth. This is of course unsatisfactory. Without a causal link between free speech and increased knowledge the argument from truth must fail. Examining this link is the primary purpose of this chapter.

One way of avoiding the difficult task of establishing this connexion between discussion and knowledge is by *defining* truth in terms of the process of discussion; that is, define truth as that which survives the process of open discussion. Whatever is rejected after

fore the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge'.

These statements are but a small sample of what has been throughout modern history the ruling theory in respect of the philosophical underpinnings of the principle of freedom of speech. Under this theory, often characterized as the 'marketplace of ideas', truth will most likely surface when all opinions may freely be expressed, when there is an open and unregulated market for the trade in ideas. By relying on the operation of the market to evaluate any opinion, we subject opinions to a test more reliable than the appraisal of any one individual or government.

The theory can be said to rest in part on the value of an adversary process as a means of discovering truth. The Anglo-American legal system uses the adversary system to determine the facts in a court of law. So also, according to the argument from truth, should society enshrine the adversary system as the method of determining truth in any field of enquiry.[2] Freedom of speech can be likened to the process of cross-examination. As we use cross-examination to test the truth of direct evidence in a court of law, so should we allow (and encourage) freedom to criticize in order to test and evaluate accepted facts and received opinion. Undergirding the analogy to cross-examination is an additional analogy to economic theory. Just as Adam Smith's 'invisible hand' will ensure that the best products emerge from free competition, so too will an invisible hand ensure that the best ideas emerge when all opinions are permitted freely to compete.

No one formulation of the argument from truth is authoritative. The numerous characterizations differ from one another just as they differ in detail from the over-simplified version of the theory just presented. Still, certain core principles are found in all expressions of the doctrine. They all share a belief that freedom of speech is not an end but a means, a means of identifying and accepting truth. Further, they have a common faith in the power of truth to prevail in the adversary process, to emerge victorious from the competition among ideas. Finally, they share a deep scepticism with respect to accepted beliefs and widely acknowledged truth, logically coupled with a keen recognition of the possibility that the opinion we reject as false may in fact be true. A heavy dose of fallibilism is implicit in the view that freedom of speech is a necessary condition to the rational search for truth.

This general characterization of the argument from truth ignores many variations and refinements added by contemporary theorists. At this point, however, these relatively minor differences are

less important than the validity of the fundamental assumptions shared by all formulations of the argument from truth, and upon which any version of the argument must rest.

The validity of the argument from truth turns initially on the legitimacy and importance of its goal. Only if truth is worth pursuing can a method of identifying truth claim recognition as a principle of political theory. The argument from truth is premised on the initial assumption that the quest for truth is a desirable aim.

In the context of a discussion of freedom of speech, I have no cause to question the assumption that truth is valuable. Whether one adopts a Platonic or Aristotelian position that truth is intrinsically and self-evidently good, or a Millian argument for truth on the basis of the principle of utility, or any of the more contemporary arguments for the value of truth,[3] the advantages of truth are almost universally accepted. To evaluate and contrast the various arguments for the value of truth would take me too far afield from the subject of free speech. Here I take truth as an autonomous value, requiring no further justification.

Holding truth to be an autonomous value is not equivalent to holding it to be the only value. Neither is it the same as saying that the search for truth must prevail in any case of conflict with other values, nor that truth and knowledge are always good and falsity and ignorance always bad. Identification of a goal as valuable does not entail accepting that goal as the only value. Of course it is possible to assert that truth (and the knowledge of it) is the pre-eminent value in any rational society. Indeed, such a view is implicit in some strong versions of the argument from truth. But it is unnecessary to exalt truth to such a position in order to take truth to be a valuable objective. At this point in the analysis we need not fetter the argument from truth with needless force. I maintain here only that truth is very important; that the search for truth is therefore a desirable goal; and that a society with more knowledge is better off than one with less knowledge, *ceteris paribus*. The argument from truth, and with it the vision of the marketplace of ideas, is premised on the belief that an open market in argument and opinion leads to increased knowledge. The argument therefore presupposes that the advance of knowledge is good for society, a presupposition I see no reason to challenge.

Although the argument is most commonly described as a search for *truth*, that word has the potential for introducing unnecessary complications. I wish to disencumber the argument from truth of most of the epistemological baggage carried by the concept of truth

more complete analysis and description of certain rights often leads people to believe that only one concept is involved, and that one concept has an essence, or central core.[13] This belief is wrong on both counts. It may turn out that free speech is not one right, or liberty, or principle, but rather a collection of distinct (although perhaps interrelated) principles. One of the goals of this book is the separation of some of these different principles, and the demonstration that not all of them will withstand close philosophical scrutiny. But even after this task is complete, we may be left with not one principle, but a group of principles. There is no reason this cannot be the case, and it is important that any analysis not be distorted by trying too hard to fit two (or more) hands into one glove. Most likely the concepts we join together under the oversimplifying rubric of 'free speech' have at best a family resemblance, and although there *may* be a closer relationship than that, there is no reason this *must* be so. Freedom of speech may have but one core, and there is nothing unseemly about looking for one. But it may instead have several cores. If this is what the analysis reveals, there is no reason to think that something is missing.

Bibliographical note to chapter 1

In addition to those sources referred to in the text and notes, general philosophical consideration of freedom of speech is found in Fred Berger, ed., *Freedom of expression* (Belmont, California: Wadsworth, 1980); Paul Freund, 'The great disorder of speech', *The American Scholar* 44 (1975), 541; Kent Greenawalt, 'Speech and crime', *American Bar Foundation Research Journal* (1980), 645; Geoffrey Harrison, 'Relativism and tolerance', in *Philosophy, politics and society (fifth series)*, P. Laslett and Fishkin, J., eds. (Oxford: Basil Blackwell, 1979), 273; John Bruce Moore, 'On philosophizing about freedom of speech', *Southwestern Journal of Philosophy* 6 (1975), 47; Joseph Tussman, *Government and the mind* (New York: Oxford University Press, 1977). John Locke's *A letter concerning toleration*, J. W. Gough, ed. (Oxford: Basil Blackwell, 1948), is focused on the issue of religious tolerance, but remains an essential source for those interested in the roots of free speech theory.

CHAPTER 2

The argument from truth

THE VALUE OF TRUTH

Throughout the ages many diverse arguments have been employed to attempt to justify a principle of freedom of speech. Of all these, the predominant and most persevering has been the argument that free speech is particularly valuable because it leads to the discovery of truth. Open discussion, free exchange of ideas, freedom of enquiry, and freedom to criticize, so the argument goes, are necessary conditions for the effective functioning of the process of searching for truth. Without this freedom we are said to be destined to stumble blindly between truth and falsehood. With it we can identify truth and reject falsity in any area of human enquiry.

This argument from truth dominates the literature of free speech. Milton's *Areopagitica*, the earliest comprehensive defence of freedom of speech, is based substantially on the premise that the absence of government restrictions on publishing (particularly the absence of licensing) will enable society to locate truth and reject error. More than two hundred years later, Mill employed the quest for truth as the expressed keystone of his plea for liberty of thought and discussion. Starting from the premise that the opinion we suppress on account of its supposed falsity may turn out to be true, or that the suppressed falsehood may contain a 'portion of truth', he argued that the elimination of suppression would consequently increase the likelihood of exchanging error for truth. More recently, this theme has surfaced in the judicial and extra-judicial writings of those American judges who have been most influential in moulding the theoretical foundations of the First Amendment to the United States Constitution, in particular Holmes, Brandeis, Frankfurter, and Hand.[1] Holmes, for example, argued that 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'; and Frankfurter observed that 'the history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths. There-

If free speech is coextensive with or derived from principles of general liberty, then a rejection of such principles must be *pro tanto* a rejection of freedom of speech. Finally, recognizing that speech is protected despite the fact that speech can cause harm means that the identification of harm caused by a particular speech act does not for that reason alone justify the regulation of that speech act. If there is a Free Speech Principle, and if it covers at least some of the examples mentioned earlier (as any plausible Free Speech Principle must), then it takes more than the identification of harm to provide a sufficient reason for regulation.

The issue may be viewed in terms of *tolerance*, although that word has a distracting emotive effect because it hints at a *prima facie* right of interference to which tolerance is the exception. Still, advocates of tolerance would not approve tolerating axe-murderers and child-molesters; those most intolerant would hardly advocate not tolerating my preference for well-done meat even if they prefer it rare. The decision to tolerate that which is different is usually based on the harmlessness of the tolerated activity, the disutility of regulation, or the positive advantages of diversity and individual choice. Any principle of toleration thus includes some tolerance of speech with which we disagree. To that extent tolerance is relevant to the problem of freedom of speech. But if we are considering free speech as an independent principle, then a reason for tolerating speech must be distinct from arguments for toleration in general.

FREE SPEECH AND THE LANGUAGE OF RIGHTS

Our thinking about specific rights is frequently muddled by the *words* we commonly use to describe those rights. It is important to remember, however, that rights are far more complex (and usually more qualified) than the particular words we use to talk about those rights in everyday conversation. In this sense the language of rights is a form of technical language, providing little more than a convenient way to refer to a complex concept containing a bundle of interrelated definitions, liberties, privileges, immunities, and duties. The words we use to describe this complex concept make reference and discussion simpler, but often serve to obscure what we are in fact talking about.

Recognizing the language of rights as a form of technical language leads us to reject an ordinary language analysis of 'free speech' as a fruitful method of enquiry. Just as investigating what

people ordinarily mean when they use the word 'set' tells us almost nothing about set theory, so too does investigating what people ordinarily mean when they use 'free speech' tell us little about the concept that is the focus of this book. Plainly there must be *some* connexion between the concept and the words we use to describe it. We say 'freedom of *speech*' rather than 'freedom of artichokes' or 'freedom of glimp' because communicative and linguistic conduct is in some way central. But the words provide little more than this rough, pre-theoretical guide. They tell us virtually nothing about either the dimensions of the concept or the resolution of difficult issues in its application.

This does not necessarily mean that the concept of free speech can be completely described, no matter how many volumes were available to complete that description. What is to count as speech and what is to count as *free* speech may be open-ended, continually evolving as new problems come to our attention. On the other hand, it might be possible to describe the concept at a level of abstraction sufficient to cover every conceivable application. The choice between these alternatives is not before us at this stage of the enquiry. The point is only that whatever we *can* say about free speech is not said, and not very much even suggested, by the words 'free speech' themselves.[11]

Acknowledging the relative unimportance of the words 'free speech' makes it possible to avoid two specific pitfalls. The first is the erroneous assumption that the principle of free speech covers all those activities that count as 'speech' in the ordinary language sense and none that do not. What is 'speech' in ordinary usage is not necessarily what is 'speech' for purposes of the concept of free speech. There are many forms of conduct that we do not consider in everyday talk to be speech but are within the concept of free speech, such as waving a flag, wearing a black armband or a button with a political symbol, or exhibiting an oil painting. And there are activities that are speech acts in the ordinary sense, yet have nothing whatsoever to do with freedom of speech.[12] Making a contract is a good example, and so is perjury, verbal extortion, and hiring someone to commit murder for a fee. *Why* the ordinary-language meaning of 'speech' is both underinclusive and overinclusive for free speech purposes will be discussed later in this book. What matters now is that there is no necessary connexion between conduct that counts as speech in everyday talk and conduct that calls forth a principle of freedom of speech.

The second pitfall is embodied in the related fallacies of essentialism and reductionism. The language we use to paraphrase a

free speech is not cancelled merely by an appeal to interests outweighing a more general concept of liberty. If this were otherwise there would be little point in talking about freedom of speech.

SPEECH AS AN OTHER-REGARDING ACT

Implicit in the foregoing discussion is the assumption that speech has an effect on others. Speech is plainly not a self-regarding act, even assuming there be a category of acts that are self-regarding. Affecting others is most often the whole point of speaking. There are words, such as 'deceive', 'persuade', 'convince', and 'mislead', whose very logic presupposes that speech acts will affect others.

More specifically, speech clearly can and frequently does cause harm. These harms include harms to the speaker, harm to the interests and rights of individuals other than the speaker, harm to society, and harm to the governing apparatus of the state. Saying or printing something untrue (or true) about another person may damage his reputation, humiliate him, invade his privacy, offend him, or cause emotional distress. Saying something to a group of people may cause them to do something harmful to society, such as rioting or disobeying the law. Disparaging comments about my scholarship by a universally respected scholar would do me far more harm than would be done if that same person kicked me, or even broke my arm. Unfavourable reviews of a new theatrical production cause more financial damage than do most actions giving rise to legal liability.

These are examples of comparatively immediate effects of speech. There can be longer-term effects as well. What people say or publish may influence widely-held views about politics or morality. The disclosure of military secrets, or the spread of lies (or truth) about government may impair the efficiency of the machinery of state. Even 'abstract' discussion can have similar effects. There is little doubt that discussion of immigration restrictions or school segregation often produces increased racial tension and reduced racial co-operation.

These examples suggest some troublesome issues in the application of a system of free speech, but I do not present them here as hard cases. Rather, I offer the examples to demonstrate the obvious – that speech has an effect on others.[9] Whatever truth there may be to the saying, 'Sticks and stones may break my bones, but names will never hurt me', it is hardly an appropriate generalization for the entire range of communicative conduct. I bela-

bour this obvious and trivial point only because many arguments for freedom of speech are unfortunately intertwined with arguments about the extent to which the state should interfere with individual choice, or interfere with conduct arguably affecting only the actor. These arguments surround the discussion of such problems as distributing pornography, riding a motorcycle without a helmet or driving a car without a seat belt, smoking cigarettes or marijuana, drinking alcoholic beverages, and engaging in homosexual or other unconventional sexual conduct. Philosophical approaches to these issues are interesting and important, but have little relation to the analysis of freedom of speech.

Much of the surprising and unfortunate confusion between the principles of free speech and the principles of general personal liberty stems from the fact that one of the best-known defences of free speech, chapter 2 of Mill's *On Liberty*, is contained in the book also most commonly associated with the view that the only legitimate justification for coercion by the state is the prevention of harm to others.[10] Because of this, there are some who assume that the minimal state envisaged by Mill and advocated by others has no authority to regulate speech. But there is no necessary connexion between the two. Only when we discuss the regulation of pornography, but one small facet of the problem of free speech, do we find even a substantial overlap. A close reading of *On Liberty* reveals that, as between self-regarding and other-regarding acts, Mill treats speech as a member of the latter category. His chapter 2 is an attempt to demonstrate why speech is a special class of other-regarding acts immune, *for other reasons*, from state control. One can also read Mill as arguing that free and open discussion is the defined ultimate good in advanced societies, so that any adverse effect caused by discussion must be, *ex hypothesi*, smaller than the adverse effect of suppression. Under neither of these interpretations is there any suggestion that speech is necessarily ineffectual, or that it is incapable of causing unpleasant consequences.

If there is a Free Speech Principle, it protects certain conduct not because it is self-regarding, but *despite* the fact that it is other-regarding. Drawing this distinction between free speech theory and what might be called 'libertarian theory' is important for three reasons. First, it demonstrates that libertarian arguments do little to explain a Free Speech Principle that protects other-regarding conduct. For that we must look elsewhere, and that search will occupy the balance of the first part of this book. Second, the distinction between free speech theory and libertarian theory renders a Free Speech Principle immune from rejections of libertarianism.

limitations on speech are employed.[4] A Free Speech Principle, properly understood, is the paradigm case of what Robert Nozick calls a 'side constraint', although it is important to note, as Nozick does not, that side constraints need not be absolute, or even close to absolute.[5]

As a standard (or threshold) of justification, the general rule prescribes the standard for limiting an individual's freedom of action. When there is a Free Speech Principle, a limitation of speech requires a stronger justification, or establishes a higher threshold, for limitations of speech than for limitations of other forms of conduct. This is so even if the consequences of the speech are as great as the consequences of other forms of conduct. If we think of the general rule as a particular point on a scale between total state control and unlimited liberty of the individual, a Free Speech Principle relocates the point on the scale when it is speech that is to be controlled.

If speech causes a harm of particular magnitude, is the power of the state to deal with that harm any less than if a harm of the same magnitude were caused by conduct other than speech? Or if the state desires to promote a positive goal, is its power to do so less if the promotion of that goal requires a limitation of speech? This can be reduced to one question: Does the presence of an actual or potential restriction on speech occasion a different method of analysis? If not, there is no Free Speech Principle. But if the answer is 'yes', a Free Speech Principle does indeed exist.

When presented in this fashion, the thesis that there might be a Free Speech Principle seems extreme. Why, after all, should the state be disabled from acting on what are stipulated to be good reasons just because the state's action involves dealing with speech? But there is no way to make the thesis less extreme. For if the state needs no stronger justification for dealing with speech than it needs for dealing with other forms of conduct, then the principle of freedom of speech is only an illusion. Formulating a reason for treating speech in this special manner is, as we shall see, no easy task, and this may show that freedom of speech is not nearly so obvious a value as is often supposed. But I see no merit in avoiding hard questions by converting them into artificially easy ones.

Formulating the enquiry in this way allows us to discuss the Free Speech Principle independent of questions about the weight or scope of the freedom involved, and independent of the relationship between free speech and other values. Acceptance of a Free Speech Principle does not entail that speech necessarily shall be free. Nor does it mandate that speech be wholly or even substan-

tially immune from state power. And it certainly does not require that other liberties or other values be considered less important than the interests of free speech. There may be other Free . . . Principles, perhaps equal or greater in strength than the Free Speech Principle, but derived from different premises and covering different activities. My goal here is to identify *a* principle, not to identify the *only* principle, or even the most important principle. A principle that does not prevail in a particular instance is nevertheless a principle.[6] Rights need not be absolute. If we view a right as the power of the right-holder to require, for putative restrictions on the exercise of the right, a strength of justification greater than that embodied in the 'general rule', then there is nothing anomalous about the notion of a weak right. A Free Speech Principle implies only that restrictions on speech require *some* greater justification. A Free Speech Principle therefore represents a distinct restraint on government power, independent of limitations provided by other principles.

One stumbling block to clear analysis is use of the word 'freedom'. That word suggests to many people a virtually absolute immunity from restriction, yet that is not implicit in the Free Speech Principle. I would prefer to speak of 'degree of resistance to the general principles of governmental power'.[7] A Free Speech Principle would exist even if the state need only produce a *slightly* stronger justification for restricting speech than for restricting other forms of conduct not covered by a right of equivalent strength. But 'freedom of speech' is an expression too well established to be easily displaced. There will be less confusion if we rely on this explanation to distinguish the identification of the Free Speech Principle from the separate but related issue of *how much* freedom is involved. If there is a Free Speech Principle, it means that free speech is a good card to hold. It does not mean that free speech is the ace of trumps.

As a distinct limitation on government power, a Free Speech Principle is independent of, but not necessarily superior to, other limitations on state power. An independent principle of free speech survives the rejection of any other particular limitation on state authority, and survives the rejection of any broader principle of which it might coincidentally be an instance. For example, if freedom of speech is an instance of a liberty to engage in any nonviolent act, then a failure to recognize that liberty extinguishes freedom of speech *pro tanto*. But if freedom of speech is an independent principle, the rejection of a liberty that might also include freedom of speech leaves freedom of speech intact.[8] An interest in

quency with which we talk about 'freedom of speech' in isolation. If freedom of speech were not an independent principle there would be much less need to talk about it, and less occasion to give it a special place in legal systems or political argument. Perhaps this special place is unwarranted, and perhaps most of our talk of free speech is philosophically unsound. But our frequent references to free speech as particularly important at the very least warrant investigating a possible independent justification for a principle of free speech.

Imagine, for example, a society founded on the premise that government is illegitimate. Anarchy reigns supreme. In this society there would of course be freedom of speech (defined for now as freedom from government interference), but it would be almost incomprehensible to talk about freedom of speech as we currently understand it. Freedom of speech would be an instance of total freedom from government restraint, but it would not be a principle in its own right. Free speech would be a *fact*, but freedom of speech would not be a principle.

We rarely take seriously arguments for total anarchy. But we do frequently deploy principles of freedom and liberty. To the extent that these principles are accepted as relevant in determining the limits of state power, they will incorporate, as an instance, some amount of freedom of speech. Viewing freedom of speech in this way, however, is both uninteresting and unenlightening. This approach fails to explain why we so often refer to freedom of speech rather than the broader freedom of which free speech may be a component. We *believe* there is something special about free speech, for otherwise we would not refer to it as we do. We appear intuitively to accept free speech as an independent and distinct principle, rather than just an instance of a more general personal liberty. Our intuitions may be erroneous. They do suggest, however, that enquiring into the foundations of an independent principle of free speech would be fruitful. If such foundations exist, free speech will emerge as an independent principle, having the power and survivability to which I have referred. But if there are no sturdy foundations, if there is no principle of free speech independent of a more general liberty, then free speech is more a platitude than a principle. In order to keep this distinction to the fore, I will hereafter refer to the hypothesized independent principle as the Free Speech Principle.

The hypothesized Free Speech Principle is a principle of free speech independent of principles of general liberty. But, although independent of broader conceptions of liberty, it may still be a

component of a principle of rationality, of democracy, or of equality, for example. It is tempting to say that an independent Free Speech Principle is a practical impossibility. In one sense this is correct; but in a more significant sense it is misleading. Because free speech is a liberty, it is *necessarily* part of most broader conceptions of liberty.[2] But liberty to speak has less of a logical relationship to concepts other than liberty, although such other concepts may provide powerful arguments for recognizing a principle of free speech. This distinction – between free speech as part of freedom and free speech as part of anything else – justifies reference to the hypothesized Free Speech Principle as independent, even if it is not and could not be completely independent of all other political and legal principles.

THE STRUCTURE OF A FREE SPEECH PRINCIPLE

I want to suggest by the foregoing formulation of the Free Speech Principle that the analysis of freedom of speech can and should be separated from questions about the limits of governmental authority in a broader sense. A recurrent issue in political philosophy is the scope of permissible state authority over the individual. Some argue for a minimal or negative state. Others advocate government's exercising a more positive role, or asserting more authority over the individual. But any formula for the resolution of these considerations will establish some rule, or standard, specifying the degree of legitimate state interference with the individual's freedom of action and choice. For example, one rule might confine the state to dealing exclusively with those actions causing harm to others. A modification of this standard might substitute harm to the *interests* of others, or interference with the *rights* of others.[3] A different rule might permit the state to do anything in the public interest. Under these or other rules, there is some *general rule* establishing the initial or normal standard of justification for the legitimate exercise of government power. The Free Speech Principle is an exception or qualification, of no necessary size or strength, to the general rule in force under a particular political theory. When a Free Speech Principle is accepted, there is a principle according to which speech is *less* subject to regulation (within a political theory) than other forms of conduct having the same or equivalent effects. Under a Free Speech Principle, any governmental action to achieve a goal, whether that goal be positive or negative, must provide a stronger justification when the attainment of that goal requires the restriction of speech than when no

to hunting is but an *instance* of his broader objections to any killing of animals.

But there are many people who eat meat, and who wear leather shoes and gloves, yet who still object to hunting as a sport. For such people to make a reasoned argument against hunting, their argument cannot be an instance of a more general objection to killing animals. Acceptance of killing animals for food and clothing precludes resort to an undifferentiated principle opposing killing all animals. Instead these people would have to construct a narrower, more specific principle from a more specific argument that condemned hunting because of something peculiar to, or special about, hunting. In these circumstances it would be inconsistent to offer a general argument premised on the sanctity of animal life.

The most significant feature of a principle that is merely an instance of a broader principle is that acceptance of this narrower principle requires acceptance of the broader principle. If a person *A*, who opposes any killing of animals, wishes to persuade another person, *B*, to refrain from hunting rabbits for sport, *A* may argue that killing any animal is wrong, regardless of the reason for killing. But *B* may refuse to accept this argument, and therefore reject a principle of this breadth. For *B*, the proferred argument against hunting rabbits therefore has no persuasive force. Because he does not accept the broader principle, *B* will be persuaded only by an argument that says something specific about hunting. If *A* can say something specific about the evils of hunting for sport, then he has constructed an *independent argument* whose acceptance does not require acceptance of the broader principle that any killing of animals is wrong.

Principles may be described and deployed on different levels of particularity. A principle that is independent of other more comprehensive principles may still serve in other contexts as the broad principle that in turn subsumes other substances. If someone accepts the principle that killing animals for food and clothing is justifiable, but killing animals for sport is not, this principle will subsume the principle that hunting endangered species for sport is unjustifiable. But someone else may not accept the principle that hunting any animal for sport is without justification. That second person might still be persuaded that hunting endangered species is wrong, but only by use of an argument saying something *particular*, or *special*, about the necessity of preserving endangered species. This argument is narrower but at the same time more powerful. It is narrower in that it permits killing many types of

animals for various reasons. It is more powerful because its acceptance does not require acceptance of the argument that any killing of animals is wrong, nor even of the argument that any killing of animals for sport is wrong. By requiring acceptance of fewer and narrower premises, the principle has more power to *survive*. An independent principle can survive rejection of the broader principle, but a principle that is an instance perishes when the principle of which it is an instance is rejected.

As this second example suggests, independence is relative. The independence of a principle (or an argument, reason, or theory) cannot be evaluated in isolation. Something must be independent *of* or *from* something else. We say that a principle is independent when it is independent of some other principle indicated by the context of the discussion. It is not independent of *every* other principle, for that in most cases would be impossible. Thus a principle, *x*, may be independent of principle *y*, yet still be merely an instance of principle *z*. We refer to *x* as 'independent' only if the alternative is to refer to it as an instance of *y*. We do not refer to *x* as independent if we are referring to it as an instance of the broader principle *z*.

I want to use the hunting example one final time to illustrate this point. Someone may object to hunting for sport because he believes in preventing waste of bullets. This reason for opposing hunting is independent of a reason based on the sanctity of animal life. At the same time, however, it could be an instance of a broader principle proscribing, for example, non-essential use of metal or tangible commodities. If an argument or reason is an instance of principle *x* and independent of principle *y*, that argument or reason survives the rejection of *y*, but does not survive the rejection of *x*.

FREE SPEECH AS AN INDEPENDENT PRINCIPLE

Many principles in political philosophy can be justified *either* as instances of broader principles *or* as independent principles.[1] Freedom of speech is a perfect example. It can be carried into acceptance as a component of a broader principle of liberty that includes the liberty to speak; or it can be justified by independent arguments, arguments derived from distinct or special characteristics of speech that justify its particular protection.

It is not difficult to justify some freedom of speech by recourse to a broader principle of liberty of which free speech is an instance. But this approach is troubling, for it seems to clash with the fre-

CHAPTER 1

The Free Speech Principle

THE INDEPENDENCE OF POLITICAL PRINCIPLES

Principles are the currency of political philosophy. In political argument we appeal to principles such as the principle of equality, the principle of liberty, the principle of democracy, and the principle of public interest. The principle of free speech is yet another principle to which we frequently appeal, and it is the principle of free speech that is the subject of this book. But before turning specifically to the principle of free speech, we need to note an important feature relevant to all principles. We can call this the *independence* of political principles, and an understanding of it will enable us to think more clearly about the specific principle of free speech.

Much talk about principles is obfuscated by a failure to distinguish between two different types of principles in political philosophy. One type is scarcely a principle at all, but is rather an *instance* of a broader principle. The other type is an *independent*, or *distinct*, principle. The former has no justification of its own, but is instead justified by the arguments supporting the broader principle, which then *subsume* the narrower principle. Independent principles, on the other hand, have their own justification. Their acceptance does not depend on the acceptance of the argument for a broader, more inclusive principle.

We can illustrate this distinction by an example about the killing of animals. Suppose someone opposes killing animals because he believes animals have rights equivalent to those of human beings, at least in terms of rights relating to life and death. Such a person might plausibly oppose any killing of animals, except in cases of self-defence. He would object to killing animals for food, for clothing, or for sport. If we were to ask this person whether he objected to hunting as a sport, he would not need and would not use an independent argument against hunting. His comprehensive principle against killing animals *includes* hunting, and his opposition

racy to function effectively, the citizens whose decisions control its operation must be intelligent and informed. Under this theory, the quality of the public exchange of ideas promoted by the marketplace advances the quality of democratic government. Given the importance the United States has placed on democratic government, this view of the marketplace of ideas has helped the freedoms of press and speech to assume something of a preferred position within our constitutional scheme.[10]

This focus on a marketplace seeking truth and promoting an informed citizenry has had a curious impact on judicial and scholarly attitudes toward the first amendment. Courts usually articulate constitutional rights as "individual rights" that are justified because of the protection they afford to the person exercising the right. But courts that invoke the marketplace model of the first amendment justify free expression because of the aggregate benefits to society, and not because an individual speaker receives a particular benefit.[11] Courts that focus their concern on the audience rather than the speaker[12] relegate free expression to an instrumental value, a means toward some other goal, rather than a value unto itself.[13] Once free expression is viewed solely as an instrumental value, however, it is easier to allow government regulation of speech if society as a whole "benefits" from a regulated system of expression.

Scholarly critics of the marketplace model argue that the *model itself* suggests a vital need for government regulation of the market. The imagery of the marketplace of ideas is rooted in laissez-faire economics.[14] Although laissez-faire economic theory asserts that desirable economic conditions are best promoted by a free market system, today's economists widely admit that government regulation is needed to correct failures in the economic market caused by real world conditions. Similarly, real world conditions also interfere with the effective operation of the marketplace of ideas: sophisticated and expensive communication technology, monopoly control of the media, access limitations suffered by disfavored or impoverished groups, techniques of behavior manipulation, irrational responses to propaganda, and the arguable nonexistence of objective truth, all conflict with marketplace ideals.[15] Consequently, critics of the market model conclude, as have critics of laissez-faire economics, that state intervention is necessary to correct communicative market failures.[16]

This article explores these and other aspects of the marketplace theory of the first amendment, exposes the theory's fallacies, and explains its persistence. Part I develops classic marketplace theory and attempts to expose its basic assumptions.[17] Part II explores the reality of the marketplace of ideas and asserts that the model's assumptions are implausible.[18] This section further suggests that the market is

CALIF. L. REV. 422, 423 (1980); Karst, *Equality as a Central Principle of the First Amendment*, 43 U. CHI. L. REV. 20, 23 (1975).

10. *See, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); *see also* Saia v. New York, 334 U.S. 558, 562 (1947); Marsh v. Alabama, 326 U.S. 501, 509 (1945); Thomas v. Collins, 323 U.S. 516, 530 (1945); Follett v. McCormick, 321 U.S. 573, 575 (1943); Prince v. Massachusetts, 321 U.S. 158, 164 (1943); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Bridges v. California, 314 U.S. 252, 262-63 (1941); Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Schneider v. State, 308 U.S. 147, 161 (1939); Herndon v. Lowry, 301 U.S. 242, 258 (1937). Chief Justice Stone's dissent in Jones v. Opelika, 316 U.S. 584, 608 (1942), *vacated*, 319 U.S. 103 (1943), is one of the most frequently cited attempts to recognize first amendment freedoms as being in a "preferred position."

11. Mill stated this quite clearly:

> Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.

J. MILL, *supra* note 5, at 14-15.

12. "It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

13. Professor Laurence Tribe writes with great vehemence that the freedom of speech must be regarded not merely as a means to some further end, but as an end in itself. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 576 (1978). Professor Emerson also holds such an "end in itself" perspective. *See* T. EMERSON, FREEDOM OF EXPRESSION, *supra* note 1, at 6-8. *But see infra* note 67.

14. Economists have praised the laissez-faire economic model as facilitating optimal production and allocation of goods. *See, e.g.*, M. FRIEDMAN & R. FRIEDMAN, FREE TO CHOOSE 1-13 (1980); A. MARSHALL, PRINCIPLES OF ECONOMICS 63-70 (8th ed. 1950); A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS *passim* (7th ed. London 1793)(1st ed. London 1776); D. RICARDO, *Principles of Political Economy and Taxation*, in THE WORKS OF DAVID RICARDO 1 *passim* (J. McCulloch new ed. 1888); Evans & Body, *Introduction* to FREEDOM AND STABILITY IN THE WORLD ECONOMY 1-2 (D. Evans & R. Body eds. 1976); Furubotn, *Worker Alienation and the Structure of the Firm*, in GOVERNMENTAL CONTROLS AND THE FREE MARKET 195, 216-17 (S. Pejovich ed. 1976); Simon, *The Crucial Issue Is Freedom*, in DILEMMAS FACING THE NATION 1 *passim* (H. Prochnow ed. 1979).

Interestingly, Justice Holmes, whose free speech opinions are the legal origins of this laissez-faire view of the first amendment, *see, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919)(Holmes, J., dissenting), also frequently reminded the Court that laissez-faire was not a constitutionally required theory of economic life. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 75 (1905)(Holmes, J., dissenting), *overruled*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

15. *See* Baker, *supra* note 1, at 965-66.

16. *See, e.g.*, J. BARRON, FREEDOM OF THE PRESS FOR WHOM? 319-28 (1973).

17. *See infra* text accompanying notes 21-71.

18. *See infra* text accompanying notes 72-240; *cf.* Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302 *passim* (1984)(arguing that assumptions supporting use of judicial processes to protect free speech implausible).

strongly biased in favor of positions that support entrenched interests. Part III evaluates proposals offered to overcome this bias and rejects them as unworkable, dangerous, and inconsistent with the articulated purpose of the first amendment.[19] Part IV considers, in lieu of the marketplace of ideas, the more realistic functions of "freedom of expression" in our society;[20] it argues that the present marketplace simply fine-tunes differences among elites while defusing pressure for change and fostering a myth of personal autonomy essential to the continued popular acceptance of a governing system biased toward the status quo.

I. Classic Marketplace Theory

A. *A Search for Truth.*

Classic marketplace theory assumes that truth is discovered through competition with falsehood and stresses that any authoritatively imposed truth is plagued with the danger of error.[21] John Stuart Mill thus argued that repression may interfere with the market's ability to seek truth: first, if the censored opinion contains truth, its silencing will lessen the chance of our discovering that truth; secondly, if the conflicting opinions each contain part of the truth, the clash between them is the only method of discovering the contribution of each toward the whole of the truth; finally, even if the censored view is wholly false and the upheld opinion wholly true, challenging the accepted opinion must be allowed if people are to hold that accepted view as something other than dogma and prejudice; if they do not, its meaning will be lost or enfeebled.[22] Mill accordingly believed that those who considered clashes among competing views unnecessary wrongly presumed the infallibility of their own opinions.[23]

Justice Holmes also appreciated the danger of assuming infallibility. He wrote in his *Abrams* dissent:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[24]

Although Holmes wrote these words in dissent, the Supreme Court later embraced the essence of his position when it stated that "[u]nder the First Amendment there is no such thing as a false idea."[25]

The market model avoids this danger of officially sanctioned truth;[26] it permits, however, the converse danger of the spread of false doctrine by allowing expression of potential falsities.[27] Citizens must be capable of making determinations that are both sophisticated and intricately rational if they are to separate truth from falsehood.[28] On the whole, current and historical trends have not vindicated the market model's faith in the rationality of the human mind,[29] yet this faith

19. *See infra* text accompanying notes 241-350.

20. *See infra* text accompanying notes 351-418.

21. *See* J. Mill, *supra* note 5, at 13-48; *see also* J. Milton, *supra* note 4, at 548-68; J. Locke, *A Letter Concerning Toleration*, in The Second Treatise of Government (An Essay Concerning the True Original, Extent and End of Civil Government) and A Letter Concerning Toleration 125, 139-43 (J. Gough ed. 1966).

22. *See* J. Mill, *supra* note 5, at 46-47.

23. *Id.* at 15 ("All silencing of discussion is an assumption of infallibility.").

24. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

25. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974); *see also id.* ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."). For a partial listing of the decisions utilizing the marketplace model, see *supra* note 2.

26. This is another way of saying that the political state may be an especially unsuitable body to make the determination of what is true and what is false. *See* American Communications Ass'n v. Douds, 339 U.S. 382, 442-43 (1950)(Jackson, J., concurring in part and dissenting in part); J. Milton, *supra* note 4, at 559; F. Pollack, *The Theory of Persecution*, in Essays in Jurisprudence and Ethics 144, 163-64 (1882); Monro, *Liberty of Expression: Its Grounds and Limits*, 13 Inquiry 238, 253 (1970). Free speech issues can be viewed in terms of allocation of institutional competence. In strictly pragmatic terms, the history of official determination of truth has been noted especially for its errors. *See* Time, Inc. v. Hill, 385 U.S. 374, 406 (1967)(Harlan, J., concurring in part and dissenting in part)("Any nation which counts the *Scopes* trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity."). *See generally* Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 Harv. L. Rev. 755, 767-70 (1963).

27. *Cf.* Kalven, *A Commemorative Case Note:* Scopes v. State, 27 U. Chi. L. Rev. 505, 516 (1960)("classic free speech theory is really a defense of the risk of permitting a *false* doctrine to circulate").

28. The belief that people ultimately are able to determine truth is, at best, an unverifiable assumption. Mill, for example, assumed that man cannot be certain that he has found the truth. *See* J. Mill, *supra* note 5, at 17. Accordingly, the validity of the hypothesis that the public can discover truth through the workings of the marketplace is itself unprovable. More significantly, the same fallibility argument which demands that choices and evaluations be made by members of the public individually rather than by government can be made for *any* governmental action, not just those restricting speech. Recognizing this, Mill responded that "[c]omplete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action." *Id.*

29. *Cf.* Whitney v. California, 274 U.S. 357, 377 (1927)(Brandeis, J., concurring)("[T]he remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."). This unverifiable, idealistic, and perhaps naive view of the power of truth has not gone

stands as a foundation block for most recent free speech theory.[30]

B. *Self-Government and Democracy.*

Classic marketplace theory recognizes the search for truth as the primary goal of free speech. In the United States, however, constitutional theorists also view free speech as a corollary to democratic theory. For example, Professor Alexander Meiklejohn perceives freedom of speech as an outgrowth of the American consensus that public issues shall be decided by universal suffrage.[31] The only truth that self-governing individuals can rely upon is that which they themselves devise in the give and take of public discussion and decision.[32] Meiklejohn argues that

> [p]ublic discussion of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power.[33]

uncriticized. *See, e.g.*, M. LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 290 (1943); Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 187 (1956)(citing M. LERNER, *supra*). The law of defamation, for example, is based on the antithesis of Milton's position that truth always defeats falsehood. *See* J. MILTON, *supra* note 8, at 561.

It is unlikely that the dispute over the "power of truth" theory can ever be resolved. The critics of the argument generally speak in the short run—M. LERNER, *supra*, at 290, uses Nazism as an example of falsity prevailing—and the supporters say only that truth prevails in the long run. Because there is no definition of how long the long run is, however, there is no way either to verify or to disprove the thesis that truth ultimately will prevail.

30. Holmes's marketplace image does not necessarily emphasize the triumph of objective truth through rationality. The market can be viewed as a method of approaching truth that is preferable, in spite of its imperfection, to any method that relies on governmental determinations of the truth. *See* Wellington, *supra* note 1, at 1131. A slightly different view of the marketplace posits that it does not matter whether any objective truth exists. Those views accepted in the marketplace are defined as true; those rejected are by definition false. This has been called the "survival" theory of truth. *See* Auerbach, *supra* note 29, at 187 n.25. Viewed in this way, the marketplace is more egalitarian than rational. Individuals have the right to determine truth or falsity not necessarily because they are qualified to do so, but because it "is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." A. MEIKLEJOHN, FREE SPEECH, *supra* note 1, at 27.

31. A. MEIKLEJOHN, FREE SPEECH, *supra* note 1, at 27. *See generally* A. MEIKLEJOHN, POLITICAL FREEDOM (1960); Meiklejohn, *The Barenblatt Opinion*, 27 U. CHI. L. REV. 329 (1960); Meiklejohn, *supra* note 1.

32. Meiklejohn insists that in a system of self-government such a process of testing truth through the market "is not merely the 'best' test. There is no other." A. MEIKLEJOHN, POLITICAL FREEDOM 73 (1960).

33. Meiklejohn, *supra* note 1, at 257. The first amendment theory adopted by the Supreme Court frequently appears to track Meiklejohn's views. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964)(where the ability of the people to act as sovereign was perceived as the "central meaning of the First Amendment"). *See generally* BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299,

In the words of the Supreme Court, "speech concerning public affairs is more than self-expression; it is the essence of self-government."[34]

The literature on the relationship between free speech and self-government reveals two perspectives. The first, the social value perspective, emphasizes the social value of an informed citizenry.[35] The second, the individual perspective, stresses the importance of a decisionmaking process open to the entire citizenry.[36] Proponents of the social value perspective insist that the "best" decisions can only be reached in a democracy if the citizenry is fully aware of the issues involved, the options available, and the interests or values affected. Meiklejohn, a leading proponent of the social value perspective, insists that when "a free man is voting it is not enough that truth is known by someone else, by some scholar or administrator or legislator. The voters must have it, all of them."[37] Consequently, Meiklejohn argues that no opinion, no doubt, no belief or counterbelief, and no relevant information may be kept from the citizenry. A "profound national commitment"[38] to robust uninhibited debate exists because it is "essential to the welfare of the public."[39]

If, as Professor Meiklejohn and others suggest, democratic governance depends on the wisdom of the voters, all evidence bearing on public decisions must be available to the community without any intervening "preselection" by the state on the basis of truth or falsity.[40] Content based restrictions leave the public with an incomplete, and perhaps inaccurate, perception of the social and political universe. Thus, these restrictions can undermine the search for truth and distort

308-09 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26-28 (1971); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 14-20 (1965); Kalven, *The* New York Times *Case: A Note on the "Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 204-10. Although Justice Brennan did not cite Meiklejohn's works in his *New York Times* opinion, he has virtually conceded their direct influence. *See* Brennan, *supra*, *passim*.

34. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

35. *See, e.g.*, Karst, *supra* note 9, at 23.

36. *See infra* notes 44-53 and accompanying text.

37. A. MEIKLEJOHN, POLITICAL FREEDOM 75 (1960).

38. New York Times Co. v. Sullivan, 376 U.S. at 270.

39. Associated Press v. United States, 326 U.S. 1, 20 (1945).

40. Thomas Scanlon has ably developed this aspect of free speech theory; he calls it the "Principle of Limited Authority." *See* Scanlon, *Rawls' Theory of Justice*, 121 U. PA. L. REV. 1020, 1041-44 (1973); Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 222-26 (1972) [hereinafter cited as Scanlon, *Theory of Freedom of Expression*]. Scanlon's characterization follows loosely from Kant's notion of individual sovereignty. I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 50-59 (L. Beck trans. 1959); *see also* J. LOCKE, *supra* note 21, at 126-27. Jefferson referred to this as one of the "unceded portions of right." Letter from Thomas Jefferson to Noah Webster (Dec. 4, 1790), *reprinted in* 8 THE WRITINGS OF THOMAS JEFFERSON 111, 113 (Memorial ed. 1903).

the process by which citizens make critical decisions. "It is [this] mutilation of the thinking process of the community," asserts Meiklejohn, "against which the First Amendment to the Constitution is directed."[41]

The social value perspective, however, developed in a culture where the mechanisms of the pamphleteer and the town meeting epitomized free expression. Consequently, all who wished to speak had access to a marketplace where their beliefs could be publicly disseminated. Right conclusions were "to be gathered out of a multitude of tongues, [rather] than through any kind of authoritative selection."[42] From this perspective the assumption developed that a free market mechanism for ideas exists in the absence of government intervention. Thus, proponents of the social value perspective believe that if only government can be kept away from "ideas," the self-operating force of "[f]ull and free discussion" will promote ideas that are "true to our genius" and keep us from "embracing what is cheap and false."[43]

The second perspective in the literature on the relationship between free speech and self-government stresses the importance of a decisionmaking process open to the entire citizenry.[44] Proponents of this "individual perspective" assert that each person's ideas have the same inherent worth[45] and, thus, each citizen has an equal right to participate in governmental decisionmaking.[46] Therefore, "government must afford all points of view an equal opportunity to be heard."[47]

41. A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1960)(emphasis omitted). If free speech is to protect "the thinking process of the community" from interference by governmental agents, then there arguably should be no objection when the community determines through the marketplace the "true" or "preferable" position and outlaws from discussion that which is "false" and "non-preferable." In this scheme the public, as sovereign, has chosen which of the multitude of tongues spoke the wisest. For further discussion of this point, see *infra* note 98.

42. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)(L. Hand, J.), *aff'd*, 326 U.S. 1 (1945). Representative of this perspective is Justice Douglas's eloquent dissent in Dennis v. United States, 341 U.S. 494 (1951):

> When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.
>
> Full and free discussion has indeed been the first article of our faith.

Id. at 584 (Douglas, J., dissenting).

43. *Dennis*, 341 U.S. at 584 (Douglas, J., dissenting).

44. *See, e.g.*, T. EMERSON, FREEDOM OF EXPRESSION, *supra* note 1, at 6-7.

45. This perspective closely parallels the Jacksonian model of democracy. *See* L. LEWIS, DEMOCRACY AND THE LAW 199-201 (1963). *But see infra* text accompanying notes 343-53 (discussing whether these ideals serve merely as a myth to legitimate status quo views).

46. In the United States, all citizens are "peers" and are equally noble. In British culture, a peer is a member of a select nobility, distinct from the common people. Our Constitution, *see* U.S. CONST. art. I, § 9, cl. 8, and our language have rejected the view that some individuals are of more intrinsic worth than are others.

Proponents of the individual perspective reject the elitist's argument that only experts are fit to decide specific areas of social policy,[48] and accordingly would deny to elites control over communications. This egalitarian argument may be based on either concerns of political policy or political principle.[49] The political policy justification is essentially consequentialist: popular decisions are preferable to elitist decisions because they will lead to more good consequences and fewer bad ones. Meiklejohn is predominantly a consequentialist. Thomas Scanlon, on the other hand, is representative of those who believe that egalitarianism is based on political principle rather than political policy.[50] Scanlon does not defend freedom of speech because it will lead to better decisions; instead, he contends that government must recognize the political principle of equal individual worth if it is to legitimately command the allegiance and obedience of its citizens. To be legitimate a government must allow its citizens to recognize governmental authority "while still regarding themselves as equal, autonomous, rational agents."[51]

Dean Harry Wellington developed this relationship between personal autonomy and governmental legitimacy more fully, asserting that "in a secular, democratic society there is no legitimate way in which the mature, legally competent individual can be required to surrender to others responsibility for his moral views."[52] An autonomous person, in Wellington's view, cannot blindly accept the judgment of others. He may rely on the other's judgment, but he must also be able to give independent reasons for believing that opinion to be correct. Thus, a legitimate government, according to both Wellington and Scanlon, must respect this individual autonomy. A legitimate government must recognize the right of each individual to participate in and influence governmental decisionmaking not because decisions reached this way necessarily are best, but because only decisions so derived deserve obedience.[53] Although Meiklejohn, Scanlon, and Wellington all accept the essential role of the marketplace of ideas in a democratic process, they

48. *See, e.g.*, B. SKINNER, WALDEN TWO 54-55 (1948).

49. For a detailed attempt to distinguish between legal decisions based on policy and those based on principle, see Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

50. For a list of some of Scanlon's writings, see *supra* note 40.

51. Scanlon, *Theory of Freedom of Expression*, *supra* note 40, at 214.

52. Wellington, *supra* note 1, at 1135.

53. Professor Baker best made this point:

> Obligation exists only in relationships of respect . . . . To justify legal obligation, the community must respect individuals as equal, rational and autonomous moral beings.

approach their positions from different perspectives: Meiklejohn's concern is that the decisions ultimately made must benefit society; Scanlon and Wellington insist that the process by which these decisions are reached must be popularly perceived as legitimate.[54]

C. *The Impact of Differing Marketplace Perspectives.*

Constitutional theorists who believe that the only function of free speech is to further self-government can justify restrictions on free speech in a democracy; theorists who believe that free speech furthers a quest for truth cannot justify such restrictions.[55] If free speech is merely a correlate of democracy then it need extend only to communication pertinent to democratic decisionmaking. A distinction between protected public speech and unprotected private speech might then be justified. A right founded upon the deliberative role of citizens in a democratic political order need not apply to all forms of expression; debates over artistic merit, the best style of personal life, or the quality of Mrs. Smith's pies would probably not qualify for protection.[56] From this perspective, the concerns of the first amendment only extend to the " 'discovery and spread of political truth.' "[57]

Some Supreme Court decisions,[58] and other scholarly opinions,[59] seem to accept this bifurcated view of speech; however, the Court has

For the community legitimately to expect individuals to respect collective decisions, i.e., legal rules, the community must respect the dignity and equal worth of its members. Baker, *supra* note 1, at 991.

54. *But see infra* text accompanying notes 351-441 (suggesting that the function of alleged marketplace of ideas is unrelated to respect of individual autonomy).

55. In one sense, theorists who correlate freedom of speech with democracy grant a broader freedom to expression than do those theorists who focus upon the quest for truth. Proponents of the self-government perspective concede that there may be no truth or that, if it exists, it is unverifiable. For these proponents, arguments in the marketplace need only be concerned with preference, suitability, and practicality, and not with discovery of ultimate truths.

56. Indeed, Professor Meiklejohn viewed the first amendment as an absolute restriction on governmental interference but thought this absolute rule protected only speech pertinent to democratic government. *See* A. MEIKLEJOHN, FREE SPEECH, *supra* note 1, at 24-25. In later years, however, Professor Meiklejohn found the distinction between public and private speech difficult to maintain. He was finally compelled to conclude that "novels and dramas and paintings and poems" also bear upon public issues, and are within the ambit of the first amendment. Meiklejohn, *supra* note 1, at 263.

57. Bork, *supra* note 33, at 31 (quoting Whitney v. California, 274 U.S. 357, 375 (1927)(Brandeis, J., concurring)).

58. *See* Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 166 n.8, 166-67 (1979)(plaintiff did not thrust himself into public spotlight because there was no public controversy, and his refusal to testify before grand jury investigating Soviet espionage did not make him public figure); Hutchinson v. Proxmire, 443 U.S. 111, 134-35 (1979)(first amendment designed to protect debate on public issues; no public issue because plaintiff only became public figure through the alleged defamation); Young v. American Mini Theaters, Inc., 427 U.S. 50, 61 (1976)(there is "surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography [illegible] free dissemination of ideas of social and political significance")(Detroit ordinance dispersing "adult" theatres and bookstores upheld); Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976)(requiring actual malice for defamation unjustified where case involving reporting on judicial proceedings "would add almost nothing toward advancing the uninhibited debate on public issues," and where plaintiff neither a public figure nor placed herself in public arena); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-43, 347 (1974)(standards of first amendment protection for communications about public figures different than those about private figures); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 40-44 (1971)("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern"); Cohen v. California, 403 U.S. 15, 24 (1971)("free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion"); Rosenblatt v. Baer, 383 U.S. 75, 85 (1966)("[c]riticism of government is at the very center of constitutionally protected area of free discussion"); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)("freedom of expression upon public questions is secured by the First Amendment," and it " 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes' ")(quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

59. *See generally* BeVier, *supra* note 33, at 308-09; Bork, *supra* note 33, at 26-28; Kalven, *supra* note 33, at 204-10.

60. 431 U.S. 209 (1977).

61. *Id.* at 231 (quoting concurring opinion of Powell, J., 431 U.S. at 259)(footnote omitted). Even "prurient, patently offensive depiction or description of sexual conduct" has been held deserving of first amendment protection if shown to "have serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 26 (1973).

62. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974)("Under the First Amendment there is no such thing as a false idea."); NAACP v. Button, 371 U.S. 415, 445 (1963); United States v. Ballard, 322 U.S. 78, 86 (1944); *id.* at 92-95 (Jackson, J., dissenting); *see also* Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940); *cf.* International Bhd. of Elec. Workers, Local 501 v. NLRB, 181 F.2d 34, 40 (2d Cir. 1950)(L. Hand, C.J.)(opinion of United States Court of Appeals for the Second Circuit), *aff'd*, 341 U.S. 694 (1951).

The Court's policy against inquiring into the truth of a belief at issue under the first amendment reflects the Court's dislike for content regulation. *See* Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209-12 (1975); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972). *See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Karst, *supra* note 9, at 26-35, 65-67.

carefully avoided committing itself to such a view. In *Abood v. Detroit Board of Education*,[60] the Court recognized:

> It is no doubt true that a central purpose of the First Amendment " 'was to protect the free discussion of governmental affairs.' " . . . But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.[61]

Nonetheless, the Supreme Court has made other distinctions based on the self-government justification for free speech in order to find certain statements outside the protection of the first amendment. For instance, although the Court historically regarded the truth or falsity of a belief to be of no legal significance,[62] it found that the democratic principles justifying the first amendment's protection of opinions does not extend

to statements of fact.[63] Despite Mill's exhortation as to the value of falsehood,[64] the Court has concluded that all ideas, but only *accurate* statements of fact, further self-government.[65] Under this view, false statements of fact have no constitutional value. The Court accordingly has protected those who spread false information only when it believed the truth would too often be suppressed by chilling the speech of those unsure of their information's accuracy.[66] In short, if the first amendment is viewed as based upon the value of free speech to the democratic process, then the ambit of protected speech encompasses only communications that the courts determine relevant to this concern.[67]

63. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). Philosophers have long debated whether fact can be distinguished from opinion. *See, e.g.*, F. COOPER, LIVING THE LAW 6 (1958)(observing that facts announced in court opinions are not objectively determined, but are rather the result of subjective judgment and inference); W. BISHIN & C. STONE, LAW, LANGUAGE, AND ETHICS 151, 151-52 (1972)(reprinting S. LANGER, PHILOSOPHY IN A NEW KEY 89-91 (3d ed. 1957)(describing human tendency to abstract forms from sensory experiences as viewed in the light of the past)); W. BISHIN & C. STONE, *supra*, at 146-48 (reprinting B. RUSSELL, THE PROBLEMS OF PHILOSOPHY 7-12 (1959)(enumerating the difficulties encountered in differentiating between appearance and reality)). The courts, however, seem to believe that fact can be distinguished from opinion on something of an "I know it when I see it" basis.

64. *See supra* text accompanying notes 21-22.

65. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340-41 (1974); *see also* Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 301 (1971)(White, J., concurring); Time, Inc. v. Hill, 385 U.S. 374, 405 n.2 (1967)(Harlan, J., concurring in part and dissenting in part). *See generally* Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 949-52 (1968).

66. *See* Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 301 (1971).

67. Commentators have offered explanations not based on a marketplace theory to justify the preferential treatment free expression has received from both the courts and scholars. Professor Emerson, for example, has argued that the first amendment embodies Western aspirations for individual self-fulfillment and full intellectual development. *See* T. EMERSON, FIRST AMENDMENT, *supra* note 1, at 4-7. His theory proposes that an individual can develop ideas and affirm his conceptions of his "self" only if he can speak freely. *Id.* at 6-7. It echoes Justice Brandeis's statement that the "final end of the State [is] to make men free to develop their faculties." Whitney v. California, 274 U.S. 357, 375 (1927)(Brandeis, J., concurring).

This does not, however, distinguish speech from any other human activity. "An individual may develop his faculties . . . by trading on the stock market, following his profession as a river port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors." Bork, *supra* note 33, at 25; *see* Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 911-12 (1979). He may communicate his self-view as much by the kind of car he drives—a Pinto or a Mercedes—or the clothes he wears—jeans or three-piece suits—as he does by communication through language. Consequently, Emerson cannot tenably distinguish thought and communication from action by claiming that the former, but not the latter, is "the fountainhead of all expression of the individual personality." T. EMERSON, FREEDOM OF EXPRESSION, *supra* note 1, at 9. Indeed, behavior may communicate an individual's personality more fully and accurately than any verbal communication—i.e., "a picture is worth a thousand words." Expression, however, must not be defined so broadly as to include all behavior. The argument supporting special protection for expression simply is unconvincing unless the rationale of the first amendment can be legitimately narrowed so as not to include and justify an unlimited freedom of behavior. The marketplace theory provides precisely such a narrowing rationale. The self-fulfillment function of the first amendment, therefore, is only a beneficial by-product of market theory and is not an independent justification for the amendment.

D. *The Implicit Assumptions of the Marketplace.*

As the previous sections demonstrate, the economic metaphor of the marketplace emphasizes the uniqueness of each market participant. Furthermore, before there can be any assurance that the ultimate good will triumph in the marketplace, it is apparent that these individuals must fairly and equally consider all ideas through a process of rational evaluation. The existence of this process is based on several implicit assumptions.[68]

First, if truth is to defeat falsity through robust debate in the marketplace, truth must be discoverable and susceptible of substantiation. If truth is not ascertainable or cannot be substantiated, the victory of truth in the marketplace is but an unprovable axiom.[69] In order to be discoverable, however, truth must be an objective rather than a subjective, chosen concept.[70] Consequently, socioeconomic status, experience, psychological propensities, and societal roles should not influence an individual's concept of truth. If such factors do influence a listener's perception of truth, the inevitable differences in these perspectives caused by the vastly differing experiences among individuals make resolution of disagreement through simple discussion highly unlikely. And if the possibility of rational discourse and discovery is negated by these entrenched and irreconcilable perceptions of truth, the dominant "truth" discovered by the marketplace can result only from the triumph of power, rather than the triumph of reason.[71]

The second necessary assumption of the marketplace model's emphasis on the power of rationality is that individuals can separate the form in which competing positions are presented from their substance. Individuals must not be influenced by an idea's packaging, no matter how pleasing or offensive it may be to their individual taste; otherwise, the marketplace would favor the most attractively packaged ideas rather than those with the "best" substance.

68. These assumptions have been recognized and critiqued by other scholars. *See, e.g.*, F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15-34 (1982); Baker, *supra* note 1, at 974-76; Kendall, *The "Open Society" and Its Fallacies*, 54 AM. POL. SCI. REV. 972, 977-79 (1960); Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 81-82 (1974).

69. In such a case, continued reliance on the marketplace of ideas can be justified only if the market somehow produces the best, if not the true, result, or if the market employs, at least, a preferred method for choosing among potential results. *See* Baker, *supra* note 1, at 967.

70. *Cf.* James, *Pragmatism—A New Name for Some Old Ways of Thinking*, in READINGS IN JURISPRUDENCE 227, 228 (J. Hall ed. 1938)("Truth *happens* to an idea. It *becomes* true, is *made* true by events.")(emphasis in original).

71. For further consideration of this prospect, see *infra* text accompanying notes 127-31.

Despite past doctrinal developments, the Court conceivably could develop a constitutional safe-harbor for divergent groups by developing a fresh approach to the right of association and free exercise. Judicial and scholarly effort should be pressed into service to develop an area of freedom of conduct rather than reiterating the importance of a nearly impotent freedom of expression. Such a freedom of conduct might allow the diversity of perspective necessary for the marketplace of ideas in fact to approach its myth.

Although the Court should focus on developing a freedom of conduct, it should exercise caution in so doing. The same factors that have created an impotent marketplace of ideas may influence an individual's exercise of a right to choose a lifestyle under a freedom of action. If society's indoctrination and socialization process molds an individual's perspectives and values, what then would motivate one to join or create a group offering real, rather than merely costume differences in roles and relationships?[439] Perhaps the myth of individual autonomy is the most for which we can strive given our highly complex society with sophisticated communication technology and unequal distribution of resources.

Nevertheless, we must pierce the myth of the neutral marketplace of ideas and expose the flawed market model assumptions of objective truth and the power of rationality. A system of freedom focused exclusively on expression fosters only incremental change within a community agenda of alternatives reflective of the dominant culture.[440] Other than assuring dominance of national perspectives, the marketplace encourages only fine-tuning among established groups. To a much greater extent than it nourishes criticism and change, a system of freedom of expression adds an aura of legitimacy to the governing system by protecting the appearance of individual autonomy. Individual disenchantment is defused by preserving the facade both of open and effective channels of communication and of a system that ensures individual self-determination.

The second point which counsels that the Court did not mean to extend *Yoder* beyond its facts is the Court's emphasis that the Amish lifestyle posed no threat to the maintenance of order and social control. 406 U.S. at 222. Perhaps the Court merely was swayed by a belief that the Amish posed no challenge to traditional values and norms. *See* Baker, *supra* note 1, at 1037.

439. Further, if the titillation of rebellion—tweaking the nose of the establishment—encourages individuals to create or join dissident groups, tolerance of diversity might reduce that titillation and lead to greater conformity. This, however, is a convenient argument which established groups can use to justify their dominance, and it should be discounted accordingly.

440. Although those who prefer the dominant culture may find desirable a system that only allows incremental change, such a system is inconsistent with the often-proclaimed goals of seeking truth, democratic government, and individual freedom and dignity.

Although I hope to have shed some light on the functioning of the first amendment and the marketplace of ideas, the costs of such analysis must be acknowledged. Periods of enlightenment can weaken the mysticism that bestows legitimacy upon institutions, such as the law, which are, at least partially, based on faith.[441] But skepticism is, at times, a healthy perspective. A jurist no more radical than Judge Learned Hand once mused:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[442]

Possibly, as Hand suggests, we have expected too much of the first amendment's freedom of speech; we may have done too little to free the hearts of men and women so that we can *live* in an open society, and not merely talk of it.

441. A friend and teacher once posed the question whether "the saying of the Mass in the vernacular [forbode] the beginning, or the end, of the relevance of that sacrament to the lives of the believers?" Deutsch, *supra* note 149, at 261. The question remains relevant for much of recent legal scholarship. *Cf.* Nagel, *supra* note 18, at 305 (describing the judiciary's ambitious role in free speech as being based "in large measure" on faith).

442. THE SPIRIT OF LIBERTY, PAPERS AND ADDRESSES OF LEARNED HAND 189-90 (I. Dilliard ed. 1960).

1

SCHENCK V. UNITED STATES
249 U.S. 47 (1919)

Charles Schenck, the general secretary of the Socialist Party, mailed circulars to 15,000 potential draftees urging them to "assert their rights" in opposition to the Great War and to sign an anti-draft petition. Schenck was prosecuted under the Espionage Act of 1917, which prohibited attempts to obstruct military recruitment. Appealing his conviction, Schenck argued that the statute was at odds with the First Amendment's free speech clause because the clause guarantees "absolutely unlimited discussion" of public affairs, even that which condemns the government of the United States. A unanimous Supreme Court declined this invitation to strike down an act of Congress.

In *Schenck* the Court for the first time reviewed a free speech challenge to a federal statute, and it used the occasion to articulate its first significant interpretation of the free speech clause. Before *Schenck,* both federal and state courts had employed the "bad tendency test" in analyzing free speech and free press claims. Derived from the common law, this test assumed that the purpose of the First Amendment (like that of all other constitutional provisions) was to promote the public good, and it measured the legality of speech by the tendency of its effects. Speech tending to cause good effects enjoyed constitutional protection; but speech tending to cause bad effects—those that threatened the order or morality of a community, or the security of society—did not, and thus was subject to legislative regulation. In the typical case before *Schenck,* a law affecting speech was presumed constitutional and did not require more exacting scrutiny than other legislation. The bad-tendency test did not, one might say, tend to support free speech claims.

Nor did the Court in *Schenck* support the free speech claim before it. But the opinion, written by Justice Holmes, seemed to suggest a new and more stringent test for measuring the legality of speech. Called the "clear and present danger test," it came from this passage: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Holmes, who had used the bad-tendency test in previous cases, concluded that the circulars mailed to the potential draftees had created the kind of clear and present danger that Congress constitutionally could punish. Left for another day was development of the clear-and-present-danger test and its employment to invalidate legislation affecting speech.

In two 1919 cases decided soon after *Schenck—Frohwerk* v. *United States* and *Debs* v. *United States*—the Court, with Holmes writing the opinions in both, unanimously upheld convictions under the Espionage Act that had been challenged on free speech grounds. The Court did not refer in these cases to "clear and present danger" but regarded the speech of the defendants as having a bad tendency.

Opinion of the Court: **Holmes**, White, McKenna, Day, Van Devanter, Pitney, McReynolds, Brandeis, Clarke.

Schenck v. *United States* was decided on March 3, 1919.

OPINION

JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT . . .

The document in question upon its first printed side . . . said that the idea embodied in [the Thirteenth Amendment, i.e., that slavery and involuntary servitude are forbidden except as a punishment for crime] was violated by the conscription act and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said, "Do not submit to intimidation," but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that anyone violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on, "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, . . . winding up, "You must do your share to maintain, support, and uphold the rights of the people of this country." Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that was the tendency of this circular, it is protected by the First Amendment to the Constitution. . . . It may well be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose. . . . We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . The question in every case is whether

the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in times of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting services were proved, liability for words that produced that effect might be enforced. The statute of 1917 . . . punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking, or circulating a paper), its tendency, and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. . . .

[JUDGMENT] AFFIRMED.

RESPONSE

FROM THE *HARVARD LAW REVIEW*, JUNE 1919, ZECHARIAH CHAFEE, JR. "FREEDOM OF SPEECH IN WAR TIME" (GREATLY ABRIDGED, NOTES OMITTED)

. . . The real issue in every free-speech controversy is this—whether the state can punish all words which have some tendency, however remote, to bring about acts in violation of law, or only words which directly incite to acts in violation of law.

If words do not become criminal until they have an immediate tendency to produce a breach of the peace, there is no need for a law of sedition, since the ordinary standards of criminal solicitation and attempt apply. Under those standards the words must bring the speaker's unlawful intention reasonably near to success. Such a limited power to punish utterances rarely satisfies the zealous in times of excitement like a war. They realize that all condemnation of the war or of conscription may conceivably lead to active resistance or insubordination. Is it not better to kill the serpent in the egg? All writings that have a tendency to hinder the war must be suppressed.

Such has always been the argument of the opponents of free speech. And the most powerful weapon in their hand, since the abolition of the censorship, is this doctrine of indirect causation, under which words can be punished for a supposed bad tendency long before there is any probability that they will break out into unlawful acts. Closely related to it is the doctrine of constructive intent, which regards the intent of the defendant to cause violence as immaterial so long as he intended to write the words, or else presumes the violent intent from the bad tendency of the words on the ground that a man is presumed to intend the consequences of his acts. When rulers are allowed to possess these weapons, they can by the imposition of severe sentences create an *ex post facto* censorship of the press. The transference of that censorship from the judge to the jury is indeed important when the attack on the government which is prosecuted expresses a widespread popular sentiment, but the right to jury trial is of much less value in times of war or threatened disorder when the herd instinct runs strong, if the opinion of the defendant is highly objectionable to the majority of the population, or even to the particular class of men from whom or by whom the jury are drawn. . . .

Although the free-speech clauses were directed primarily against the sedition prosecutions of the immediate past, it must not be thought that they would permit unlimited previous restraint. They must also be interpreted in light of more remote history. The framers of those clauses did not invent the conception of freedom of speech as a result of their own experience of the last few years. The idea had been gradually molded in men's minds by centuries of conflict. It was the product of a people of whom the framers were merely the mouthpiece. Its significance was not fixed by their personality, but was the endless expression of a civilization. It was formed out of past resentment against the royal control of the press under the Tudors, against the Star Chamber and the pillory, against the Parliamentary censorship which Milton condemned in his *Areopagitica*, by recollections of heavy newspaper taxation, by hatred of the suppression of thought which went on vigorously on the Continent during the eighteenth century. Blackstone's views also had undoubted influence to bar out previous restraint. The censor is the most dangerous of all the enemies of liberty of the press, and cannot exist in this country unless made necessary by extraordinary perils.

Moreover, the meaning of the First Amendment did not crystallize in 1791. The framers would probably have been horrified at the thought of protecting books by Darwin or Bernard Shaw, but "liberty of speech" is no more confined to the speech they thought permissible than "commerce" in another clause is limited to the sailing vessels and horse-drawn vehicles of 1787. Into the making of the constitutional conception of free speech have gone, not only men's bitter experience of the censorship and sedition prosecutions before 1791, but also the subsequent development of the law of fair comment in civil defamation, and the philosophical speculations of John Stuart Mill. Justice Holmes phrases the thought with even more than his habitual felicity. "The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil."

It is now clear that the First Amendment fixes limits upon the power of Congress to restrict speech either by a censorship or by a criminal statute, and if the Espionage Act exceeds those limits it is unconstitutional. It is sometimes argued that the Constitution gives Congress the power to declare war, raise armies, and support a navy, that one provision of the Constitution cannot be used to break down another provision, and consequently freedom of speech cannot be invoked to break down the war power. I would reply that the First Amendment is just as much a part of the Constitution as the war clauses, and that it is equally accurate to say that the war clauses cannot be invoked to break down freedom of speech. The truth is that all provisions of the Constitution must be construed together so as to limit each other. In war as in peace, this process of mutual adjustment must include the Bill of Rights. . . .

. . . If the First Amendment is to mean anything, it must restrict the powers which are expressly granted by the Constitution to Congress, since Congress has no other powers. It must apply to those activities of government which are most liable to interfere with free discussion, namely, the postal service and the conduct of war.

The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for . . . once force is thrown into the argument, it becomes a matter of chance whether it is thrown in on the false side or the true, and truth loses all its natural advantage in the contest. Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of

speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom. . . .

. . . To find the boundary line of any right, we must get behind rules of law to human facts. In our problem, we must regard the desires and needs of the individual human being who wants to speak and those of the great group of human beings among whom he speaks. That is, in technical language, there are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right. . . .

The First Amendment protects two kinds of interests in free speech. There is an individual interest, the need of many men to express their opinion on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way. This social interest is especially important in war time. Even after war has been declared there is bound to be a confused mixture of good and bad arguments in its support, and a wide difference of opinion as to its objects. Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined, so that the fundamental issues of the struggle may be clearly defined, and the war may not be diverted to improper ends, or prolonged after its just purposes are accomplished. . . .

The great trouble with most judicial constructions of the Espionage Act is that this social interest has been ignored and free speech has been regarded as merely an individual interest, which must readily give way like other personal desires the moment it interferes with the social interest in national safety. The judge [Justice Holmes] who has done most to bring social interests into legal interests said years ago, "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate and often unconscious." The failure of the courts in the past to formulate any principle for drawing a boundary line around the right of free speech has not only thrown the judges into the difficult questions of the Espionage Act without any well-considered standard of criminality, but has allowed some of them to impose standards of their own and fix the line at a point which makes all opposition to this or any future war impossible. . . .

The true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth. Every reasonable attempt should be made to maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be slightly affected. In war time, therefore, speech should be unrestricted by the censorship or by punishment, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war. . . .

The United States Supreme Court did not have the opportunity to consider the Espionage Act until 1919, after the armistice was signed and almost all the District Court cases had been tried. Several appeals from conviction had resulted in a confession of error by the government, but at last four cases were heard and decided against the accused. Of these three were clear cases of incitement to resist the draft, so that no real question of free speech arose. Nev-

ertheless the defense of constitutionality was raised, and denied by Justice Holmes. His fullest discussion is in *Schenck* v. *United States*:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . *The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.* It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right [italics added].

This portion of the opinion, especially the italicized sentence, substantially agrees with the conclusion reached by . . . investigation of the history and political purpose of the First Amendment. It is unfortunate that "the substantive evils" are not more specifically defined, but if they mean overt acts of interference with the war, then Justice Holmes draws the boundary line very close to the test of incitement at common law and clearly makes the punishment of words for their bad tendency impossible. . . .

If the Supreme Court had applied this same standard of "clear and present danger" to the utterances of Eugene V. Debs, . . . it is hard to see how he could have been held guilty. . . .

Justice Holmes seems to discuss the constitutionality of the Espionage Act of 1917 rather than its construction. There can be little doubt that it is constitutional under any test if construed naturally, but it has been interpreted in such a way as to violate the free-speech clause and the plain words of the statute, to say nothing of the principle that criminal statutes should be construed strictly. If the Supreme Court test had been laid down in the summer of 1917 and followed in charges by the District Courts, the most casual perusal of the utterances prosecuted makes it sure that there would have been many more acquittals. Instead, bad tendency has been the test of criminality, a test which this article has endeavored to prove wholly inconsistent with freedom of speech, or any genuine discussion of public affairs.

Furthermore, it is regrettable that Justice Holmes did nothing to emphasize the social interest behind free speech, and show the need of balancing even in war time. The last sentence of the passage quoted from the *Schenck* case seems to mean that the Supreme Court will sanction any restriction of speech that has military force behind it, and reminds us that the Justice used to say when he was young "that truth was the majority vote of that nation that could lick all others." His liberalism seems held in abeyance by his belief in the relativity of values. It is not by giving way to force and the majority that truth has been won. Hard it may be for a court to protect those who oppose the cause for which men are dying in France, but others have died in the past for freedom of speech.

2

Abrams v. United States
250 U.S. 616 (1919)

Jacob Abrams and four other Russian immigrants distributed in New York City two leaflets, one in English and the other in Yiddish, condemning the United States for sending troops to Russia. The Yiddish leaflet also urged a strike by munitions workers to protest the government's intervention in Russia. Abrams and his comrades were prosecuted under the Sedition Act of 1918, which punished speech critical of the government and subversive of the war effort. Sentenced to prison terms of fifteen to twenty years, the defendants appealed on grounds that their free speech rights had been violated. The Supreme Court sustained their convictions. For the first time in a seditious speech case, however, the Court split, with Justice Holmes, joined by Justice Brandeis, in dissent.

Writing for the majority, Justice Clarke held that the leaflets indeed created a clear and present danger. Holmes, who had set forth the clear-and-present-danger test eight months earlier in *Schenck* v. *United States*, replied in his dissent that they did not. Holmes (and Brandeis) obviously understood the test to mean more than the majority did. "It is only the present danger of immediate evil or an intent to bring it about," Holmes wrote, adding to what he had said in *Schenck*, "that warrants Congress in setting a limit to the expression of opinion." Holmes observed that "the surreptitious publishing of a silly leaflet by an unknown man [Abrams]" hardly presented any such immediate danger, and that Abrams lacked the necessary intent, since his leaflet sought only to stop U.S. intervention in Russia.

Holmes sought to ground his clear-and-present-danger doctrine in the Constitution. Its "theory," he wrote in a famous passage, is that the public interest is best served by "free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Because this marketplace is the best means for discovering truth, government should not suppress speech unless it imminently or intentionally threatens harm.

In subsequent free speech cases, Holmes and Brandeis continued to argue for a more rigorous clear-and-present-danger test. Not until 1937, in *Herndon* v. *Lowry*, did the Court actually use the test in sustaining a free speech claim.

Opinion of the Court: **Clarke**, White, Van Devanter, Pitney, McReynolds, Day, McKenna. Dissenting opinion: **Holmes**, Brandeis.

Abrams v. *United States* was decided on November 10, 1919.

OPINIONS

JUSTICE CLARKE DELIVERED THE OPINION OF THE COURT . . .

It will not do to say . . . that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid government loans and not to work in ammunition factories, where their work would produce "bullets, bayonets, cannon" and other munitions of war, the use of which would cause the "murder" of Germans and Russians. . . .

This is not an attempt to bring about a change of administration by candid discussion, for no matter what may have incited the outbreak on the part of the defendant anarchists, the manifest purpose of such a publication was to create an attempt to defeat the war plans of the government of the United States, by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war. . . .

That the interpretation we have put upon these articles, circulated in the greatest port of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas, is not only the fair interpretation of them, but that it is the meaning which their authors consciously intended should be conveyed by them to others is further shown by the additional writings found in the meeting place of the defendant group and on the person of one of them. . . .

. . . [W]hile the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the government in Europe. . . . [T]he language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war, . . . and the defendants . . . plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war. . . . Thus it is clear not only that some evidence but that much persuasive evidence was before the jury tending to prove that the defendants were guilty as charged . . . and . . . the judgment of the District Court must be

AFFIRMED.

JUSTICE HOLMES, DISSENTING . . .

I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck* [1919], *Frohwerk* [1919], and *Debs* [1919] were rightly decided.

I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged . . . might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. An actual intent in the sense that I have explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime. . . . It is necessary where the success of the attempt depends upon others because if that intent is not present the actor's aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged.

I do not see how anyone can find the intent required by the statute in any of the defendant's words. The second leaflet is the only one that affords even a foundation for the charge, and there, without invoking the hatred of German militarism expressed in the former one, it is evident from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government—not to impede the United States in the war that it was carrying on. . . .

In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. . . .

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared a circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate in-

terference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 . . . by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

RESPONSE

FROM *THE NEW REPUBLIC*, NOVEMBER 26, 1919, "THE CALL TO TOLERATION"

At the present time American public opinion in relation to freedom of speech, as expressed by the Supreme Court itself, is in danger of sacrificing the benefits of liberty to a headstrong impulse to cure its abuses. We are seeking a remedy not in a temper of mind which is too self-possessed to be stampeded and which is willing to stand or fall by the facts, but in repression and in impatient denunciation. Administrative officers and the courts, instead of patiently estimating whether or not the expression of an opinion which as patriotic Americans they may loathe is or is not an imminent and actual source of danger to social order, prefer to repress all suspicious utterances and to inflict savage punishments on their perpetrators. We are acting on the supposition that every utterance which expresses hostility to the social establishment and which may possess a tendency or be prompted by a purpose to undermine it, is actually accomplishing all that it may tend or purpose to accomplish. The patriotic American seems to have lost all his former imperturbability, all his confidence in the stability of the American political and social fabric. He is panic-stricken lest a few hundred agitators can rend it to pieces by repeating the phrases of the Communist manifesto—phrases which the less tolerant and less stable governments of Europe have rarely considered it necessary to suppress, even when accompanied by direct provocation to acts of violence. . . .

If we in America ever suffer the awful affliction of a class revolution, it will come about not because of the indirect appeals to violence on the part of an insignificant minority of revolutionists, but as a consequence of the intolerance, the inflammation of spirit, the stupidity, and the faith in force rather than in the justice of the existing majority of educated and well-to-do Americans. They are adopting a course which, if pursued to the end, will do far more to provoke revolutionary violence than vague and empty appeals to the proletarians for union and rebellion. Educated and responsible Americans are allowing irresponsible agitators to mold their psychology and their ethics. The suicidal error of the Bolshevists consists in their attempt to force on society by means of a class military dictatorship what they believe to be a program of economic and social liberation for the workers. The suicidal error of American

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WHITNEY V. CALIFORNIA
274 U.S. 357 (1927)

Between 1917 and 1920 some twenty states, including California, passed "criminal syndicalism" laws that made it a crime to defend, advocate, or establish an organization committed to violent means of effecting change in government or in industrial ownership or control. These statutes took aim at a radical labor organization called the Industrial Workers of the World.

California passed its syndicalism act in 1919. Late that year, Charlotte Anita Whitney attended a convention of the Communist Labor Party of California. The CLP endorsed many IWW objectives, and though by the time of her arrest after the convention she had resigned from the party, Whitney had, at least for a short while, been a member of the CLP. That, essentially, was the case against her, and the jury returned a guilty verdict. Whitney ultimately appealed to the Supreme Court, but no justice voted to overturn her conviction.

Whitney's significance lies in the concurring opinion filed by Justice Brandeis, joined by Justice Holmes. Following *Gitlow* v. *New York* (1925) in presuming the constitutionality of the challenged law, the majority opinion by Justice Sanford concluded that California's decision to criminalize "the combining of others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods" did not "unwarrantably" infringe "any right of free speech, assembly, or association." Brandeis said he was "unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment." But he felt he could not dissent from the result in the case because there were other grounds on which Whitney's conviction could have been based. He wrote separately to endorse the relevance of the clear-and-present-danger test, which had not been raised by Whitney in her challenge to the law. Brandeis restated and added to the test: Not only must the danger be imminent and substantive, but there must also be "the probability of serious danger to the state."

The governor of California later pardoned Whitney, for reasons similar to those advanced by Brandeis in his dissent. And in 1969, the Court explicitly overruled *Whitney* in *Brandenburg* v. *Ohio*.

Opinion of the Court: **Sanford**, Taft, Butler, Sutherland, Stone, McReynolds, Van Devanter. Concurring opinion: **Brandeis**, Holmes.

Whitney v. *California* was decided on May 26, 1927.

OPINIONS

JUSTICE SANFORD DELIVERED THE OPINION OF THE COURT . . .

. . . [T]he Syndicalism Act . . . [is not] repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association.

That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. . . .

By enacting the provisions of the Syndicalism Act the State has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach, or aid and abet the commission of crimes or unlawful acts of force, violence, or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute . . . ; and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest. . . .

The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. . . . That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly, or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State. . . .

. . . [T]he . . . judgment of the Court of Appeal [is]

AFFIRMED.

JUSTICE BRANDEIS, CONCURRING . . .

. . . The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights. . . . These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic, or moral. That the necessity which is essential to a valid restriction does not exist unless the speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state

constitutionally may seek to prevent has been settled. See *Schenck* v. *United States* [1919]. It is said to be the function of the Legislature to determine whether at a particular time and under the particular circumstances the formation of, or assembly with, a society organized to advocate criminal syndicalism constitutes a clear and present danger of substantive evil; and that by enacting the law here in question the Legislature of California determined that question in the affirmative. . . . The Legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity. Prohibitory legislation has repeatedly been held invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business. The powers of the courts to strike down an offending law are no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly.

This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a state is, ordinarily, denied the power to prohibit dissemination of social, economic, and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence. Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to [be] the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . .

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground that the evil to be prevented is a serious one. Every denunciation of existing law tends to in some measure increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated. Those who won our independence by revolution were not cowards. They did

not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Moreover, even imminent danger cannot justify resort to prohibitions of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means of averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a state might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly. . . .

Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed . . . that the statute as applied to her violated the federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. I am unable to assent to the suggestion in the opinion of the court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the [Industrial] Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgement of the State court cannot be disturbed. . . .

counter-Bolshevism consists in its attempts to protect the safety of a free democracy by a feverish outbreak of moral and physical violence which will in the long run destroy the moral self-control and the intellectual candor and integrity which the operation of democratic institutions requires. Democracy is capable of curing the ills it generates by means of peaceful discussion and unhesitating acquiescence in the verdict of honestly conducted elections, but its self-curative properties are not unconditional. They are the creation of a body of public opinion which has access to the facts, which can estimate their credibility and significance, and which is in effective measure open to conviction. The most articulate public opinion in America is temporarily indifferent to the facts and impervious to conviction. Its fear of revolutionary agitation betrays it into an impotent and feverish devotion to symbols and phrases which do not permit the candid consideration of social evils and abuses and the adoption of thoroughgoing remedies. American educators and lawyers no longer act as if the government and Constitution of the United States is, as Justice Holmes says, an experiment which needs for its own safety an agency of self-adjustment and which seeks it in the utmost possible freedom of opinion. They act as good Catholics formerly acted in relation to the government and creed of the Catholic church—as if the government and Constitution were the embodiment of ultimate political and social truth, which is to be perpetuated by persecuting and exterminating its enemies rather than by vindicating its own qualifications to carry on under new conditions the difficult job of supplying political salvation to mankind. If they begin by sacrificing freedom of speech to what is supposed to be the safety of constitutional government they will end by sacrificing constitutional government to the dictatorship of one class.

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BRANDENBURG V. OHIO

395 U.S. 444 (1969)

Clarence Brandenburg, a Ku Klux Klan leader in Ohio, organized a Klan rally in Hamilton County. There Brandenburg gave a speech in which he said, in part: "We're not a revengent [*sic*] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." Brandenburg also offered his opinion that "the nigger should be returned to Africa, the Jew returned to Israel."

There was television coverage of the rally, and Brandenburg's remarks drew the interest of state authorities, who proceeded to prosecute him for advocating racial strife in violation of the Ohio Criminal Syndicalism Statute. Enacted in 1919, this law was similar to other state syndicalism laws of that era. Indeed, it was virtually identical to the California law that the Court had sustained in *Whitney* v. *California* (1927). Brandenburg appealed his conviction, contending that the Ohio law abridged his First Amendment right to free speech. He lost in the Ohio courts but won in the Supreme Court.

In *Brandenburg* the Court explicitly overruled *Whitney* and elaborated a new test for judging the constitutionality of speech advocating illegal action. Under the "clear and present danger" test, originally formulated for use in a case like *Brandenburg* but unmentioned in the Court's decision, subversive speech could be punished if it had a "tendency" to promote lawlessness (*Schenck* v. *United States*, 1919) or if it was part of a broader, dangerous movement like the Communist Party (*Dennis* v. *United States*, 1951). Under *Brandenburg*, such speech may be punished only if it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg*'s "direct incitement" test promised greater First Amendment protection for political speech previously subject to punishment. The opinion was rendered *per curiam*, "by the court," and therefore not attributed to any justice. Such opinions may be rendered by the whole Court or a majority. Here the entire Court was in agreement.

Opinion of the Court (*per curiam*): Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas, Marshall. Concurring opinions: **Black**; **Douglas**, Black.

Brandenburg v. *Ohio* was decided on June 9, 1969.

OPINIONS

PER CURIAM . . .

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by twenty states and two territories. . . . In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, . . . the text of which is quite similar to that of the laws of Ohio. *Whitney* v. *California* [1927]. The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. . . . But *Whitney* has been thoroughly discredited by later decisions. See *Dennis* v. *United States* [1951]. These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. . . .

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney* v. *California* cannot be supported, and that decision is therefore . . .

REVERSED.

JUSTICE DOUGLAS, CONCURRING . . .

While I join the opinion of the court, I desire to enter a caveat. . . . I see no place in the regime of the First Amendment for any "clear and present danger" test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it.

When one reads the opinions closely and sees when and how the "clear and present danger" test has been applied, great misgivings are aroused. First, the threats were often loud but

always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in *Dennis* as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.

Action is often a method of expression and within the protection of the First Amendment. . . .

. . . I think that all matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by investigating committees were notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearing which, since 1947 when President Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known.

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulations is the line between ideas and overt acts.

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theater.

That is, however, a classic case where speech is brigaded with action. . . . They are indeed inseparable and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas . . . and advocacy of political action. . . . The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience.

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"marketplace of ideas" characterization,[1] embodied most famously in Holmes's dissent in *Abrams v. United States*,[2] identifies the relationship between governmental non-intervention and the identification of truth. Indeed, this is perhaps the earliest basis for a defense of freedom of speech and freedom of the press, as Milton's *Areopagitica* makes clear ("let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter? "), and it is likely also the most enduring, with Mill's variant in *On Liberty* continuing to occupy a dominant position in free speech thought. More recently, works such as Karl Popper's *The Open Society and Its Enemies*[3] and much of popular discourse about speech and press freedom has perpetuated the view that truth will most easily be located and falsehood or error most easily rejected if only the non-intervention of the state ensures that human rationality will not be constrained by governmental self-interest.

However prevalent the metaphor and the theory, however, the principle of the marketplace of ideas is not without its detractors. If the principle is one that *defines* truth in terms of success in the market, then, Schauer argues, it seems at odds with our ordinary epistemological assumptions. But if instead the principle is taken to support the empirical proposition that the marketplace of ideas is the mechanism most likely to locate an independently defined truth, then empirical inquiry rather than simple assumption seems required. Here the inquiry is likely to note the non-metaphorical qualities of the marketplace of ideas, with the marketplace of ideas being a market in a more literal sense. Ronald Coase sees this as justification for extending outside the free speech arena the same marketplace assumptions that free speech doctrine applies within, but first Catharine MacKinnon and then Owen Fiss reach the opposite conclusion from the same initial insight. They ask why the skepticism applied by liberals to the economic market is not applied as well to the market in ideas. If the same market distortions based on wealth, class, power, race, and gender are applicable to the marketplace of ideas as to the marketplace of goods and services, then free speech theory is in need of a major overhaul.

JOHN STUART MILL, ON LIBERTY

Chapter 2 ("Of the Liberty of Thought and Discussion") (1859).

If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of

1. See Abrams v. United States, 250 U.S. 616 (1919).

2. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").

3. (5th ed. 1966).

it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

It is necessary to consider separately these two hypotheses, each of which has a distinct branch of the argument corresponding to it. We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still.

First: the opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility. Its condemnation may be allowed to rest on this common argument, not the worse for being common.

Unfortunately for the good sense of mankind, the fact of their fallibility is far from carrying the weight in their practical judgment which is always allowed to it in theory; for while every one well knows himself to be fallible, few think it necessary to take any precautions against their own fallibility, or admit the supposition that any opinion, of which they feel very certain, may be one of the examples of the error to which they acknowledge themselves to be liable. Absolute princes, or others who are accustomed to unlimited deference, usually feel this complete confidence in their own opinions on nearly all subjects. People more happily situated, who sometimes hear their opinions disputed, and are not wholly unused to be set right when they are wrong, place the same unbounded reliance only on such of their opinions as are shared by all who surround them, or to whom they habitually defer; for in proportion to a man's want of confidence in his own solitary judgment, does he usually repose, with implicit trust, on the infallibility of "the world" in general. And the world, to each individual, means the part of it with which he comes in contact; his party, his sect, his church, his class of society; the man may be called, by comparison, almost liberal and large-minded to whom it means anything so comprehensive as his own country or his own age. Nor is his faith in this collective authority at all shaken by his being aware that other ages, countries, sects, churches, classes, and parties have thought, and even now think, the exact reverse. He devolves upon his own world the responsibility of being in the right against the dissentient worlds of other people; and it never troubles him that mere accident has decided which of these numerous worlds is the object of his

reliance, and that the same causes which make him a Churchman in London, would have made him a Buddhist or a Confucian in Pekin. Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.

The objection likely to be made to this argument would probably take some such form as the following. There is no greater assumption of infallibility in forbidding the propagation of error, than in any other thing which is done by public authority on its own judgment and responsibility. Judgment is given to men that they may use it. Because it may be used erroneously, are men to be told that they ought not to use it at all? To prohibit what they think pernicious, is not claiming exemption from error, but fulfilling the duty incumbent on them, although fallible, of acting on their conscientious conviction. If we were never to act on our opinions, because those opinions may be wrong, we should leave all our interests uncared for, and all our duties unperformed. An objection which applies to all conduct can be no valid objection to any conduct in particular. It is the duty of governments, and of individuals, to form the truest opinions they can; to form carefully, and never impose them upon others unless they are quite sure of being right. But when they are sure (such reasoners may say), it is not conscientiousness but cowardice to shrink from acting on their opinions, and allow doctrines which they honestly think dangerous to the welfare of mankind, either in this life or in another, to be scattered abroad without restraint, because other people, in less enlightened times, have persecuted opinions now believed to be true. Let us take care, it may be said, not to make the same mistake: but governments and nations have made mistakes in other things, which are not denied to be fit subjects for the exercise of authority: they have laid on bad taxes, made unjust wars. Ought we therefore to lay on no taxes, and, under whatever provocation, make no wars? Men and governments, must act to the best of their ability. There is no such thing as absolute certainty, but there is assurance sufficient for the purposes of human life. We may, and must, assume our opinion to be true for the guidance of our own conduct: and it is assuming no more when we forbid bad men to pervert society by the propagation of opinions which we regard as false and pernicious.

I answer, that it is assuming very much more. There is the greatest difference between presuming an opinion to be true, because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation. Complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right.

When we consider either the history of opinion, or the ordinary conduct of human life, to what is it to be ascribed that the one and the other are no worse than they are? Not certainly to the inherent force of the human understanding; for, on any matter not self-evident, there are ninety-nine persons totally incapable of judging of it for one who is capable; and the capacity of the hundredth person is only comparative; for the majority of the eminent men of every past generation held many opinions now known to be erroneous, and did or approved numerous things which no one will now justify. Why is it, then, that there is on the whole a preponderance among mankind of rational opinions and rational conduct? If there really is this preponderance—which there must be unless human affairs are, and have always been, in an almost desperate state—it is owing to a quality of the human mind, the source of everything respectable in man either as an intellectual or as a moral being, namely, that his errors are corrigible. He is capable of rectifying his mistakes, by discussion and experience. Not by experience alone. There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument; but facts and arguments, to produce any effect on the mind, must be brought before it. Very few facts are able to tell their own story, without comments to bring out their meaning. The whole strength and value, then, of human judgment, depending on the one property, that it can be set right when it is wrong, reliance can be placed on it only when the means of setting it right are kept constantly at hand. In the case of any person whose judgment is really deserving of confidence, how has it become so? Because he has kept his mind open to criticism on his opinions and conduct. Because it has been his practice to listen to all that could be said against him; to profit by as much of it as was just, and expound to himself, and upon occasion to others, the fallacy of what was fallacious. Because he has felt, that the only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this; nor is it in the nature of human intellect to become wise in any other manner. The steady habit of correcting and completing his own opinion by collating it with those of others, so far from causing doubt and hesitation in carrying it into practice, is the only stable foundation for a just reliance on it: for, being cognisant of all that can, at least obviously, be said against him, and having taken up his position against all gainsayers—knowing that he has sought for objections and difficulties, instead of avoiding them, and has shut out no light which can be thrown upon the subject from any quarter—he has a right to think his judgment better than that of any person, or any multitude, who have not gone through a similar process.

It is not too much to require that what the wisest of mankind, those who are best entitled to trust their own judgment, find necessary

to warrant their relying on it, should be submitted to by that miscellaneous collection of a few wise and many foolish individuals, called the public. The most intolerant of churches, the Roman Catholic Church, even at the canonisation of a saint, admits, and listens patiently to, a "devil's advocate." The holiest of men, it appears, cannot be admitted to posthumous honours, until all that the devil could say against him is known and weighed. If even the Newtonian philosophy were not permitted to be questioned, mankind could not feel as complete assurance of its truth as they now do. The beliefs which we have most warrant for have no safeguard to rest on, but a standing invitation to the whole world to prove them unfounded. If the challenge is not accepted, or is accepted and the attempt fails, we are far enough from certainty still; but we have done the best that the existing state of human reason admits of; we have neglected nothing that could give the truth a chance of reaching us: if the lists are kept open, we may hope that if there be a better truth, it will be found when the human mind is capable of receiving it; and in the meantime we may rely on having attained such approach to truth as is possible in our own day. This is the amount of certainty attainable by a fallible being, and this the sole way of attaining it.

* * *

Let us now pass to the second division of the argument, and dismissing the supposition that any of the received opinions may be false, let us assume them to be true, and examine into the worth of the manner in which they are likely to be held, when their truth is not freely and openly canvassed. However unwillingly a person who has a strong opinion may admit the possibility that his opinion may be false, he ought to be moved by the consideration that, however true it may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth.

There is a class of persons (happily not quite so numerous as formerly) who think it enough if a person assents undoubtingly to what they think true, though he has no knowledge whatever of the grounds of the opinion, and could not make a tenable defence of it against the most superficial objections. Such persons, if they can once get their creed taught from authority, naturally think that no good, and some harm, comes of its being allowed to be questioned. Where their influence prevails, they make it nearly impossible for the received opinion to be rejected wisely and considerately, though it may still be rejected rashly and ignorantly; for to shut out discussion entirely is seldom possible, and when it once gets in, beliefs not grounded on conviction are apt to give way before the slightest semblance of an argument. Waiving, however, this possibility—assuming that the true opinion abides in the mind, but abides as a prejudice, a belief independent of, and proof against, argument—this is not the way in which truth ought to be held by a rational being. This is not knowing the truth. Truth, thus held, is but one superstition the more, accidentally clinging to the words which enunciate a truth.

If the intellect and judgment of mankind ought to be cultivated, a thing which Protestants at least do not deny, on what can these faculties be more appropriately exercised by any one, than on the things which concern him so much that it is considered necessary for him to hold opinions on them? If the cultivation of the understanding consists in one thing more than in another, it is surely in learning the grounds of one's own opinions. Whatever people believe, on subjects on which it is of the first importance to believe rightly, they ought to be able to defend against at least the common objections. But, some one may say, "Let them be *taught* the grounds of their opinions. It does not follow that opinions must be merely parroted because they are never heard controverted. Persons who learn geometry do not simply commit the theorems to memory, but understand and learn likewise the demonstrations; and it would be absurd to say that they remain ignorant of the grounds of geometrical truths, because they never hear any one deny, and attempt to disprove them." Undoubtedly: and such teaching suffices on a subject like mathematics, where there is nothing at all to be said on the wrong side of the question. The peculiarity of the evidence of mathematical truths is that all the argument is on one side. There are no objections, and no answers to objections. But on every subject on which difference of opinion is possible, the truth depends on a balance to be struck between two sets of conflicting reasons. Even in natural philosophy, there is always some other explanation possible of the same facts; some geocentric theory instead of heliocentric, some phlogiston instead of oxygen; and it has to be shown why that other theory cannot be the true one: and until this is shown, and until we know how it is shown, we do not understand the grounds of our opinion. But when we turn to subjects infinitely more complicated, to morals, religion, politics, social relations, and the business of life, three-fourths of the arguments for every disputed opinion consist in dispelling the appearances which favour some opinion different from it. The greatest orator, save one, of antiquity, has left it on record that he always studied his adversary's case with as great, if not still greater, intensity than even his own. What Cicero practised as the means of forensic success requires to be imitated by all who study any subject in order to arrive at the truth. He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion. The rational position for him would be suspension of judgment, and unless he contents himself with that, he is either led by authority, or adopts, like the generality of the world, the side to which he feels most inclination. Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for

them. He must know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never really possess himself of the portion of truth which meets and removes that difficulty. Ninety-nine in a hundred of what are called educated men are in this condition; even of those who can argue fluently for their opinions. Their conclusion may be true, but it might be false for anything they know: they have never thrown themselves into the mental position of those who think differently from them, and considered what such persons may have to say; and consequently they do not, in any proper sense of the word, know the doctrine which they themselves profess. They do not know those parts of it which explain and justify the remainder; the considerations which show that a fact which seemingly conflicts with another is reconcilable with it, or that, of two apparently strong reasons, one and not the other ought to be preferred. All that part of the truth which turns the scale, and decides the judgment of a completely informed mind, they are strangers to; nor is it ever really known, but to those who have attended equally and impartially to both sides, and endeavoured to see the reasons of both in the strongest light. So essential is this discipline to a real understanding of moral and human subjects, that if opponents of all important truths do not exist, it is indispensable to imagine them, and supply them with the strongest arguments which the most skilful devil's advocate can conjure up.

* * *

It still remains to speak of one of the principal causes which make diversity of opinion advantageous, and will continue to do so until mankind shall have entered a stage of intellectual advancement which at present seems at an incalculable distance. We have hitherto considered only two possibilities: that the received opinion may be false, and some other opinion, consequently, true; or that, the received opinion being true, a conflict with the opposite error is essential to a clear apprehension and deep feeling of its truth. But there is a commoner case than either of these; when the conflicting doctrines, instead of being one true and the other false, share the truth between them; and the nonconforming opinion is needed to supply the remainder of the truth, of which the received doctrine embodies only a part. Popular opinions, on subjects not palpable to sense, are often true, but seldom or never the whole truth. They are a part of the truth; sometimes a greater, sometimes a smaller part, but exaggerated, distorted, and disjointed from the truths by which they ought to be accompanied and limited. Heretical opinions, on the other hand, are generally some of these suppressed and neglected truths, bursting the bonds which kept them down, and either seeking reconciliation with the truth contained in the common opinion, or fronting it as enemies, and setting themselves up, with similar exclusiveness, as the whole truth. The latter case is hitherto the most frequent, as, in the human mind, one-sidedness has always been the rule, and many-sidedness the

exception. Hence, even in revolutions of opinion, one part of the truth usually sets while another rises. Even progress, which ought to superadd, for the most part only substitutes, one partial and incomplete truth for another; improvement consisting chiefly in this, that the new fragment of truth is more wanted, more adapted to the needs of the time, than that which it displaces. Such being the partial character of prevailing opinions, even when resting on a true foundation, every opinion which embodies somewhat of the portion of truth which the common opinion omits, ought to be considered precious, with whatever amount of error and confusion that truth may be blended. No sober judge of human affairs will feel bound to be indignant because those who force on our notice truths which we should otherwise have overlooked, overlook some of those which we see. Rather, he will think that so long as popular truth is one-sided, it is more desirable than otherwise that unpopular truth should have one-sided assertors too; such being usually the most energetic, and the most likely to compel reluctant attention to the fragment of wisdom which they proclaim as if it were the whole.

* * *

We have now recognised the necessity to the mental well-being of mankind (on which all their other well-being depends) of freedom of opinion, and freedom of the expression of opinion, on four distinct grounds; which we will now briefly recapitulate.

First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.

Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.

Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct; the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.

FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY

Chapter 2 ("The Argument From Truth"), 19–29 (1982).

Stipulating that increased knowledge is a valuable end does not help to answer the central question—does granting a special liberty of

The DUKE LAW JOURNAL (ISSN 0012-7086) is published six times a year, in February, April, June, September, November, and December, at Duke University School of Law, Durham, North Carolina 27706. Printed at Joe Christensen, Inc., Lincoln, Nebraska 68521. Second-class postage paid at Durham, North Carolina and at additional mailing offices.

Current subscription price: $24.00 per volume domestic; $27.00 per volume foreign. If subscription is to be discontinued at the end of a volume year, notice to that effect should be sent to the DUKE LAW JOURNAL; otherwise subscription will be renewed automatically. Send change of address to the JOURNAL at least 30 days before the date of the issue for which it is to take effect.

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Duke Law Journal

VOLUME 1984 FEBRUARY NUMBER 1

THE MARKETPLACE OF IDEAS: A LEGITIMIZING MYTH

STANLEY INGBER*

Theorists have often heralded the first amendment as creating a neutral marketplace of ideas. Proponents of this model view the market as essential to our society's efforts to discover truth and foster effective popular participation in government. Professor Ingber asserts that the theoretical underpinnings of this model are based on assumptions of rational decisionmaking that are implausible in modern society. He insists that, in reality, the market is severely skewed in favor of an entrenched power structure and ideology. Professor Ingber explores efforts to reform and correct this market defect and finds them equally flawed. He concludes that the marketplace may fulfill its alleged functions only if we explore a theory of freedom of conduct; the market as it exists today simply fine-tunes differences among elites, while diffusing pressure for change by preserving a myth of personal autonomy needed to legitimate a governing system strongly biased toward the status quo.

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Scholars[1] and jurists[2] frequently have used the image of a "marketplace of ideas" to explain and justify the first amendment freedoms

1. *See, e.g.*, T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 7-8 (1966) [hereinafter cited as T. EMERSON, FIRST AMENDMENT]; A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 82-89 (1948) [hereinafter cited as A. MEIKLEJOHN, FREE SPEECH]; A. MEIKLEJOHN, POLITICAL FREEDOM 73-75 (1960); Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 964-90 (1978); Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 3-10 (1964); Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785, 792-94 (1979); Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 255-63; Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159, 1161-62 (1982); Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 583-84 (1980); Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1129-31 (1979). *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970) [hereinafter cited as T. EMERSON, FREEDOM OF EXPRESSION].

2. The marketplace of ideas permeates the Supreme Court's first amendment jurisprudence. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 866 (1982); Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537, 538 (1980); FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 760 (1975); Bigelow v. Virginia, 421 U.S. 809, 826 (1975); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 248 (1974); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Time, Inc. v. Hill, 385 U.S. 374, 382 (1966).

The Court's opinions similarly reflect an image of robust debate. *See, e.g.*, Brown v. Hartlage, [illegible] (1982); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); Miller v. California, 413 U.S. 15, 34 (1973); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971); *Red Lion*, 395 U.S. at 392 n.18; New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

The Court also has often referred to the marketplace in terms of the competition of ideas that it fosters. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14-15 (1976); Williams v. Rhodes, 393 U.S. 23, 32 (1968); *cf. Virginia State Bd. of Pharmacy*, 425 U.S. at 762 ("society also may have a strong interest in the free flow of commercial information").

3. The freedoms of speech and press have often been referred to jointly as the freedom of expression. *E.g.*, T. EMERSON, FREEDOM OF EXPRESSION, *supra* note 1, at 3.

4. *See* J. MILTON, AREOPAGITICA (London 1644), in 2 COMPLETE PROSE WORKS OF JOHN MILTON 486 *passim* (E. Sirluck ed. 1959).

5. *See* J. MILL, *On Liberty*, in ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 1, 13-48 (R. McCallum ed. 1948).

6. 250 U.S. 616 (1919).

7. *Id.* at 630 (Holmes, J., dissenting).

8. *See* Corwin, *Bowing Out "Clear and Present Danger"*, 27 NOTRE DAME LAW. 325, 332-34 (1951). See, for example, Justice Holmes's dissent in Gitlow v. New York, 268 U.S. 652, 673 (1925)("If in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted . . . the only meaning of free speech is that they should be given their chance and have their way.").

> As early as 1644, John Milton similarly argued in an address to the Parliament of England:
> [T]hough all the windes of doctrin were let loose to play upon earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter.

J. MILTON, *supra* note 4, at 561 (footnotes omitted); *see* Dennis v. United States, 341 U.S. 494, 584-85 (1951)(Douglas, J., dissenting); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); T. JEFFERSON, First Inaugural Address (Mar. 4, 1801), *reprinted in* THE COMPLETE JEFFERSON 384, 384-85 (S. Padover ed. 1943); *see also* International Bhd. Elec. Workers, Local 501 v. NLRB, 181 F.2d 34, 40 (2d Cir. 1950); W. BAGEHOT, *The Metaphysical Basis of Toleration*, in 2 LITERARY STUDIES 422, 425 (R. Hutton ed. 1879).

9. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 269-72 (1964); Thornhill v. Alabama, 310 U.S. 88, 102 (1940); Emerson, *First Amendment Doctrine and the Burger Court*, 68

of speech and press.[3] Although this classic image of competing ideas and robust debate dates back to English philosophers John Milton[4] and John Stuart Mill,[5] Justice Holmes first introduced the concept into American jurisprudence in his 1919 dissent to *Abrams v. United States*:[6] "the best test of truth is the power of thought to get itself accepted in the competition of the market."[7] This theory assumes that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems. A properly functioning marketplace of ideas, in Holmes's perspective, ultimately assures the proper evolution of society, wherever that evolution might lead.[8]

The marketplace doctrine, however, once rooted in American jurisprudence, grew a new shoot that benefitted its new environment. In addition to its usefulness in the search for truth and knowledge, the marketplace came to be perceived by courts and scholars as essential to effective popular participation in government.[9] In order for a democ-

For the marketplace to accomplish the goals attributed to it, both of these assumptions must hold. Part II, however, demonstrates that experience in the real marketplace fails to confirm these optimistic assumptions.

II. Market Reality—Flaw or Status Quo Bias

A free economic market, arguably, values goods and services and allocates resources in a manner that maximizes utility.[72] If the competitive nature of the market is eliminated, however, or if the market's rationality is corrupted through socialization or propaganda, then the marketplace can no longer be trusted to properly value a particular good or service. In fact, just such real world conditions often have prevented "free" competitive economic markets from optimally allocating and producing goods and services. The recognized ability of private economic power to skew and manipulate the economic market[73] has led to popular acceptance of active government involvement in this market.[74]

Although laissez-faire economic theory has diminished in stature, it is curious that those who applaud its demise seem committed to retaining the symbols of a laissez-faire communicative market.[75] Yet, the

72. *See, e.g.*, K. George & J. Shorey, The Allocation of Resources 31 (1978); F. Knight, The Economic Organization 32-35 (1951); P. Samuelson, Economics 38-42 (11th ed. 1980); H. Simons, Economic Policy for A Free Society 46-47 (1948).

73. Many first amendment critics insist that the market of ideas has also been skewed and manipulated:

> With the development of private restraints on free expression, the idea of a free marketplace where ideas can compete on their merits has become just as unrealistic in the twentieth century as the economic theory of perfect competition. The world in which an essentially rationalist philosophy of the first amendment was born has vanished and what was rationalism is now romance.

Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1678 (1967).

74. Antitrust limitations, minimum wages, maximum hours, truth-in-lending, prohibition of misleading or fraudulent advertising and unconscionable consumer contracts, and support of farm product prices are intrusions on a laissez-faire system. Yet even the most conservative of our citizens have apparently accepted, in principle, these intrusions. Debate on these issues has instead focused on the extent, degree, and scope of these governmental intrusions into the economic market.

75. *See, e.g.*, Emerson, *The Affirmative Side of the First Amendment*, 15 Ga. L. Rev. 795, 796 (1981). One explanation why the philosophy of Adam Smith has been rejected while the beliefs of John Stuart Mill have been praised, if not implemented, is that the two philosophies are directed toward different social classes. Laissez-faire economics assumes that the individual is in the best position to determine his or her own needs and to make decisions accordingly. Government intrusion into the economic market assumes that certain individuals are incapable of ascertaining or effectuating their own good. The breakdown in laissez-faire economics has therefore led to legislation "protecting" blue-collar workers and those with limited education. *See* examples noted *supra* note 74. Legal paternalism in the market of speech and ideas, on the other hand, might impose upon the process of deliberation of those who most identify themselves with such a process: white-collar and educated classes.

marketplace of ideas is as flawed as the economic market. Due to developed legal doctrine and the inevitable effects of socialization processes, mass communication technology, and unequal allocations of resources, ideas that support an entrenched power structure or ideology are most likely to gain acceptance within our current market. Conversely, those ideas that threaten such structures or ideologies are largely ignored in the marketplace. The following review of how legal doctrine and marketplace realities affect each of the assumptions of the market model illustrates this status quo bias.

A. *The Assumption of Discoverable Truth and An Open Society.*

1. *The Status Quo Orientation of Legal Doctrine.* A brief review of two prominent first amendment doctrines illustrates both their dependence on the marketplace imagery of an open society searching for truth and their contrasting tendency to support the beliefs of the status quo.

a. *Clear and present danger.* The clear and present danger test[76] is firmly rooted in marketplace doctrine that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[77] Under this test, government cannot regulate speech solely on the grounds of the *intrinsic* danger of the ideas being conveyed. Government justifiably can suppress, limit, or forbid speech only when it is delivered in circumstances that prevent the audience involved from reasonably considering the message before it. In such an emergency setting the marketplace is likely to malfunction because opposing speakers cannot fairly and adequately present their ideas and the public cannot give them a fair and intelligent hearing. As Justice Brandeis indicated, the danger must be "clear" to prevent suppression based on irrational fear,[78] and it must be "present" for

Classic liberals, such as Mill and Bentham, were well-bred gentlemen of the upper crust. They attempted to maximize human happiness by minimizing external interference with individual choice. Perhaps such liberals saw individual liberty as the best arbiter of happiness because they were at the apex of British society and needed nothing to make them happy other than removal of the governmental and moral strictures they found inconvenient. That lawyers would similarly be more solicitous of views opposing paternalism in expression than in economics should not be surprising once it is remembered that they are purveyors of ideas and stand as elites in our culture's public decisionmaking processes. *See generally* Ingber, *The Interface of Myth and Practice in Law*, 34 Vand. L. Rev. 309, 310, 325-31 (1981)(discussing role of lawyer as decisionmaker).

76. Speech is not constitutionally protected when, in Justice Holmes's words, it creates a "clear and present danger that [the speech] will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919).

77. Whitney v. California, 274 U.S. 357, 375 (1927)(Brandeis, J., concurring).

78. *Id.* at 376.

"if there be time to expose through discussion the falsehood and fallacies . . . the remedy to be applied is more speech, not enforced silence."[79]

The clear and present danger test presupposes that market imperfections sometimes give speakers an unacceptable level of advantage in influencing others. Because information opposing the speaker's viewpoint cannot be transmitted instantaneously to all market participants, the real market substantially departs from the theoretical one.[80] Therefore, emergency situations are exempted from first amendment coverage. As long as sufficient time remains for the marketplace's process of deliberation to persist, however, and as long as lawless action is not imminent, no emergency exists and all speech must be protected.

Yet the goal of free speech is not merely to have citizens enjoy participating in an effete truth-seeking process. Instead, citizens seek truth through free speech precisely to influence choice and behavior. Recognizing that beliefs are important primarily because those who hold them are likely to act accordingly, Holmes conceded that "every idea is an incitement."[81] Ironically, however, Holmes's "clear and present danger" formula allows government officials to prohibit expression precisely when such speech threatens to incite action.[82] An interpretation of the first amendment that permits the state to cut off expression as soon as it comes close to being effective essentially limits the amendment's protection to encompass only abstract or innocuous communication.[83] Consequently, speech is constitutionally protected under the clear and present danger test as long as it is either ineffective[84] or insignificant.[85] In either instance the test creates an establishment bias.

79. *Id.* at 377.

80. *See generally* A. LEIJONHUFVUD, KEYNES AND THE CLASSICS (1969).

81. Gitlow v. New York, 268 U.S. 652, 673 (1925)(Holmes, J., dissenting)(An idea "offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth.").

82. Holmes's description in *Abrams* of the materials that would be protected by his test is apt—the "silly pamphlet [published] by an unknown man," 250 U.S. at 628, and the "poor and puny anonymities" too insignificant "to turn the color of legal litmus paper," *id.* at 629.

83. Meiklejohn observed the danger that the Holmes/Brandeis test might guarantee freedom only "to engage in mere academic and harmless discussion." A. MEIKLEJOHN, FREE SPEECH, *supra* note 1, at 44.

84. For example, a speech counselling against participating in the military draft made before an unsympathetic chapter of the Veterans of Foreign Wars would not be perceived by courts as posing a clear and present danger, although the same speech given before a group of college students of draftable age might well be so viewed. If the speech before the students can be prohibited or criminalized, expression would be cut off precisely at the point when it was likely to be most meaningful. For decisions suggesting that the clear and present danger test might not even allow discussion in the first, less threatening, context above, see, for example, Debs v. United States, 249 U.S. 211, 216-17 (1919); Frohwerk v. United States, 249 U.S. 204, 210 (1919), where expressions delivered to audiences with no special proclivity to be supportive still subjected the speakers to criminal prosecutions.

Other factors peculiar to the clear and present danger test accentuate this bias. The test is both ad hoc and vague. Speakers receive no warning whether their contemplated speech extends beyond the parameters of constitutional protection. The test is totally contextual, giving little guidance to either the speaker or the official censor who must predict the impact of the expression.[86] For the speaker, this lack of notice fosters continuous uncertainty and thus may chill a risk-averse speaker who desires to minimize his personal legal peril.[87] Such a person may censor himself by intentionally avoiding those messages he perceives as approaching the fringe of official acceptability. The official, in turn, must decide when the expression is *clearly dangerous* and when *insufficient* time exists for a full and fair hearing of responsive expression that would allow good counsel to defeat bad.[88] The censor's evaluation involves a two-tiered decision. First, the official must evaluate the speech ideologically to determine whether it is good or evil, because if the speech is good the lack of sufficient time for response is irrelevant.[89] But under the market model, only the marketplace can accurately separate good from evil; therefore, no criteria can exist to determine whether speech is sufficiently evil to warrant exclusion from the market. Second, the official must calculate the seriousness of the speech's evil, because the market requires greater response time for more serious evils. This requirement forces the official to differentiate without any

85. This conclusion should be contrasted with claims that the United States is an open society engaging in a quest for truth. A society cannot claim to be seeking truth wherever it may lead, however, if it tolerates only an appreciation of minor deviations from the established norm. The test of the market process must be "whether it permits criticism of the fundamental beliefs and practices of the society" and allows such criticism the opportunity to spawn genuine change. T. EMERSON, FIRST AMENDMENT, *supra* note 1, at 16; *see also* J. MILL, *supra* note 5, at 19 ("unless the reasons [for free discussion] are good for an extreme case, they are not good for any case").

86. Ironically, in another context, Holmes himself realized language's dependence on context. *See* Towne v. Eisner, 245 U.S. 418, 425 (1918)("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used.").

87. For an excellent discussion of the government's ability to chill free speech, see Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. REV. 685 (1978).

88. *Cf.* Dennis v. United States, 341 U.S. 494, 510 (1951)("In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.")(quoting the opinion below, United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)(L. Hand, J.)).

89. In such cases courts are likely to refer to the role of free speech in "invit[ing] dispute," "bring[ing] about a condition of unrest," or "stir[ring] the public to anger." Terminiello v. Chicago, 337 U.S. 1, 4 (1949). When such language is used, the lack of "cooling off time" to allow reflection is not considered.

delines between evil counsel that is about to lead an insufficiently icated public astray, and good counsel that merely has convinced an equately informed public of its "rightness." Under a test with such sticity, speakers who proclaim any radical political doctrine may ex- ct to receive little or no protection because they will always appear as hreat to the nation and, thus, embody the most serious of all possible ls.[90] The establishment bias is again obvious.

The clear and present danger test also encourages prolonging de- te indefinitely. According to Brandeis, expression may not be pro- bited so long as debate remains ongoing.[91] Thus, only the process of ith-seeking is fully protected; decisions and actions predicated upon iths once discovered are protected not at all.[92] Brandeis's approach the marketplace of ideas accordingly encourages prolonged discus- on and, therefore, the delay of decisions that might lead to actions ontrary to society's generally accepted "truths." There is, however, ttle value in the discovery of truth that cannot be used as a basis of hoice and behavior.

Brandeis's focus on procedural aspects of the market rather than n the substantive actions it triggers also fosters delay in implementing ny ideas that challenge the status quo perspective. Disputes over the best solutions for societal problems are converted into disputes over proper marketplace processes. For example, rather than focusing on whether the military draft should be reinstated, the debate may well center on whether antidraft groups should be allowed to stage a mas- sive demonstration in a business district. Such procedural concerns di- vert attention from the substantive issue so that the status quo is more easily preserved.

Through this process of transforming substantive conflicts into procedural debates, challengers to the status quo may be placated with a procedural victory while their overt threat is defused.[93] This shift in focus helps to insulate society from the trauma of having to reconsider its accepted values while at the same time it allows the protesting indi- vidual and his supporters to believe that they have a fair opportunity to

90. *See* M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 65 (1966).

91. *See* Whitney v. California, 274 U.S. 357, 377 (1927)(Brandeis, J., concurring).

92. *Cf. id.* at 373 ("That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil . . . has been settled.").

93. *Cf.* T. ARNOLD, THE SYMBOLS OF GOVERNMENT 34 (1935) ("the function of law is not so much to guide society, as to comfort it").

win popular support for their position.[94] If freedom of expression only gives protection as long as decisions are not yet made, actions are not yet taken, and debate is still in progress, then there is little threat to established norms.

The establishment bias of the clear and present danger test is also apparent when government officials allow speech to enter the market precisely because they presume it will be ignored. For example, when the American Nazi Party fought to march through Skokie, Illinois,[95] that city's Jewish community questioned why the arguments of an- tisemitism and genocide should be given an opportunity to succeed in the marketplace.[96] Many media representatives, however, suggested that Skokie's attempt to prevent the march aided the Nazi Party by giving it national publicity in a context in which the Party was likely to gain sympathy as the underdog. If the Skokie residents had allowed the Nazi Party to march, the media argued, few would know, fewer would care, and still fewer would critically evaluate Party views.[97] Thus, the risk of the Nazi Party's success could be discounted because its position would be publicly ignored.[98] In a case like *Skokie*, then, the marketplace does not function to foster reconsideration of societal norms. The Nazi's expression is allowed precisely because officials an-

94. For a more detailed discussion of how established norms are protected by transforming substantive claims into procedural disputes, see Ingber, *Procedure, Ceremony and Rhetoric: The Minimization of Ideological Conflict in Deviance Control*, 56 B.U.L. REV. 266, 268-73 (1976).

95. *See* National Socialist Party of Am. v. Village of Skokie, 434 U.S. 1327 (Stevens, Circuit Justice, 1977)(denying stay); National Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977)(per curiam); Collin v. Smith, 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953, *cert. de- nied*, 439 U.S. 916 (1978). *See generally* Goldberger, *Skokie: The First Amendment Under Attack by its Friends*, 29 MERCER L. REV. 761 (1978).

96. Holmes had argued that all views, even those we detest, need to be given the opportunity to *succeed* in the marketplace. *See* Gitlow v. New York, 268 U.S. 652, 673 (1925)(Holmes, J., dissenting).

97. *See, e.g.*, Editorial, *Nazis, Skokie, and the A.C.L.U.*, N.Y. Times, Jan. 1, 1978, § IV, at 10, col. 1 ("The Nazis selected Skokie because they knew that the ensuing protests would give public- ity to their miniscule movement."). Even the Nazis admitted that the sole purpose of their march through Skokie was to draw attention when they otherwise would be ignored by most people. *See* Wilson, *Nazi Freedom of Speech Challenged*, L.A. Times, Oct. 16, 1977, § I, at 6, col. 1 ("If village officials had let us march last April, all of this would be over and forgotten.").

98. Arguably, the public previously *had* considered the views of the Nazi Party and had rejected them. *Skokie* thus may be viewed as a debate about how much more an idea should be tolerated in the marketplace once it has been soundly rejected. There is, however, also danger that the market will assume its infallibility, *see supra* text accompanying notes 22-26, and allow one generation to decide issues for future generations. *Cf.* Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 737 (1964)(even a majority of voters in a statewide referendum may not authorize denial of the individual's right to an equally weighted vote).

ticipate that the marketplace will reject it out of hand.[99] In contrast, if government officials had perceived the Nazi march as seriously threatening to influence decisions and behavior, they might well have forbidden the march. In precisely those instances when expression threatens to disrupt established power structures and norms, courts have abandoned the market imagery and the clear and present danger test[100] and have banned the communication. The Supreme Court's regulation of obscenity exemplifies this tendency.

b. *Obscenity.* In a society allegedly seeking the true or best style of living, all pertinent ideas deserve due consideration. "All ideas having even the slightest redeeming social importance . . . have . . . full protection . . . ."[101] The Supreme Court, however, in the 1957 decision in *Roth v. United States*,[102] viewed obscenity as not deserving societal attention because the Court considered obscenity to be "utterly without redeeming social importance."[103] Consequently, according to *Roth*, the government does not engage in content discrimination if it bans obscene material because obscenity is outside the Constitution's protection.[104]

Yet the "redeeming social value" standard is inherently problematic. To whom must the communication be "redeeming"?[105] Surely the obscene material has social value to people who willingly pay money to obtain it.[106] The Court can discount this tautology only by insisting that literature has social value within the marketplace of ideas if it *advocates* a way of life, and not if it merely entertains those already committed to such a life style.[107] In essence, the Court believes that equating the free exchange of political ideas "with commercial exploitation of obscene material demeans the grand conception of the First Amendment."[108]

The Supreme Court's opinion in *Paris Adult Theatre I v. Slaton*[109] exposed the flaws in this distinction. In *Paris Adult Theatre*, the Court held that material could be obscene even though it is exhibited only to consenting adults. The interests the state protects through this prohibition include "the quality of life, . . . the tone of commerce . . . and, possibly, the public safety itself."[110] States accordingly have the "power to make a morally neutral judgment" that public exhibition of obscene materials, or commerce in the obscene, tends to "injure the community as a whole" by polluting the "public environment."[111] The Court stressed most vehemently that to grant access to obscene material "*is to affect the world about the rest of us*."[112]

Thus, although the Court has often said that speech is protected precisely because of its role in "the bringing about of political and social changes,"[113] it refused to protect obscene material in *Paris Adult Theatre* predominantly because such material advocates a kind of society the Court finds objectionable. The Court's defense of government regulation of obscenity is based simply on "unprovable assumptions"

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99. Perhaps the Nazi's speech should be rejected summarily, *see generally* Solzhenitsyn, *The Exhausted West*, HARV. MAG., July-Aug., 1978, at 21 *passim*, but certainly this attitude contradicts the marketplace's aspirational search for truth.

100. The Court has revised and reinterpreted the Holmes/Brandeis "clear and present danger" test since its adoption. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)(The state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). More recently, however, the Court has specifically used the language of "clear and present danger" to reverse a court order restraining reporters from publishing allegedly prejudicial pretrial material. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562-63 (1976)(citing United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)(L. Hand, J.), *aff'd*, 341 U.S. 494 (1951)); *cf. Nebraska Press Ass'n*, 427 U.S. at 569 (probability that pretrial publicity would work evil was not shown with sufficient degree of certainty to permit prior restraint).

101. Roth v. United States, 354 U.S. 476, 484 (1957).

102. 354 U.S. 476 (1957).

103. *Id.* at 484.

104. Consequently, Justice Brennan was correct when, in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), he suggested that to replace the test of "utterly" without social value with one demanding only a lack of "*serious* literary, artistic, political, or scientific value," Miller v. California, 413 U.S. 15, 24 (1973)(emphasis added), is inconsistent with the analytic underpinnings of *Roth*. *Paris Adult Theatre I*, 413 U.S. at 96 (Brennan, J., dissenting); *see* Schauer, *supra* note 67, at 929. Under the *Miller* standard government can no longer claim indifference to content, but must instead evaluate the worth of the speech and the "seriousness" of the ideas presented. *See* Baker, *supra* note 1, at 972.

105. *See* Ginzburg v. United States, 383 U.S. 463, 489-90 (1966)(Douglas, J., dissenting).

106. Richards, *supra* note 68, at 79-82.

107. *See* Baker, *supra* note 1, at 971.

108. Miller v. California, 413 U.S. 15, 24 (1973).

109. 413 U.S. 49 (1973).

110. *Id.* at 58.

111. *Id.* at 68-69.

112. *Id.* at 59 (quoting Bickel, in *On Pornography: II—Dissenting and concurring opinions*, 22 PUB. INTEREST 25, 26 (1971)(untitled essay))(emphasis added by the Court).

113. Roth v. United States, 354 U.S. 476, 484 (1957). The obscenity cases, however, may demonstrate that speech may not be permitted to bring about changes that affront upper class propensities. It has been thoughtfully observed that the

> journey from "Ulysses" to Hustler involved more than a move from literature to smut, from words to images. It involves the transition from the preoccupation of an educated minority to the everyday fantasies of the blue-collar majority. . . .
>
> Once upon a time, obscenity was confined to expensive leather-bound editions available only to gentlemen. . . . One of the questions asked by the crown prosecutor [in the trial of the publishers of *Lady Chatterly's Lover*] . . . was: "Would you let your servant read this book?"
>
> . . . .
>
> Hustler is the servant's revenge.

Neville, *Has the First Amendment Met Its Match?*, N.Y. Times, Mar. 6, 1977, § 6, pt. 1 (Magazine), at 18, col. 2.

about what is good for the people.[114] The Court justifies relying on such unprovable assumptions by comparing them to the assumptions routinely made regarding "good" materials. The Court suggests that because society accepts on faith alone the uplifting quality of good literature and other art forms, so too, states may accept the corresponding assumption that obscenity corrupts and debases.[115] But the Court's comparison is misplaced, for the state does not and could not compel its adult citizens to read, watch, or listen to such good works.[116] Official determination of what social change is unacceptable and should not be contemplated is just as antithetical to an open search for truth as is official determination of truth itself.

Pornography may be beyond constitutional protection, while the Skokie march is not,[117] precisely because judges believe that pornography is more likely than Nazi rhetoric to influence community views.[118] As Professor Laurence Tribe has recognized, current obscenity law seems incompatible with the marketplace premise that awareness of alternative views can never be deemed harmful in itself.[119] Pornography, however, threatens to make us aware of something about ourselves that some would prefer not to know. "It threatens to explode our uneasy accommodation between sexual impulse and social custom," insists Tribe, and

> to destroy the carefully-spun social web holding sexuality in its place. One need not "sound the alarm of repression" in order to argue that the desire to preserve that web by shutting out the thoughts and impressions that challenge it cannot be squared with a constitutional commitment to openness of mind.[120]

c. *Summary.* Although both the clear and present danger and obscenity standards are rooted in market imagery of an open society searching for truth, they both allow the banning of expression at the point where expression threatens established values. A society that em-

114. *Paris Adult Theatre I*, 413 U.S. at 62.

115. *Id.* at 63.

116. *See* L. TRIBE, *supra* note 13, § 12-16, at 668. In addition, the state cannot compel children to read officially determined "good books" if their parents do not cooperate. *Cf.* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925)(state statute compelling public as opposed to private education of school children held to interfere unreasonably with parents' liberty to "direct the upbringing and education of [their] children").

117. *See supra* notes 95-100 and accompanying text.

118. In fact, the views of those who wished to march in Skokie may have been patently unacceptable more because of the marchers' self-professed "Nazism," and all that term symbolizes, than because of their antisemitic views. For a discussion of the importance of packaging, see *infra* text accompanying notes 228-33.

119. *See* L. TRIBE, *supra* note 13, § 12-16, at 669-70.

120. *Id.* (footnotes omitted).

braces such legal doctrines cannot claim to be open-minded in its search for truth. The following section considers whether these repressive doctrines are produced by a biased system gone amuck or whether the marketplace itself is inherently flawed.

2. *Truth As Socialization.* Although the assumption of the existence of objective truth is crucial to classic marketplace theory, almost no one believes in objective truth today.[121] Historians, for example, first determine what type of historical data to seek and then determine the relevance of the data they find. Thus, history is founded on the selective perception of historians rather than on any objective historical truth.[122] The same can be said for the pursuit of truth in any academic, scientific, or professional discipline.[123] The "truth" of a theory depends on its ability to explain a phenomenon to the judging individual's satisfaction and on its aesthetic appeal to that individual.[124] Today's truth, consequently, may become tomorrow's superstition.[125]

That the marketplace reveals truth, or even the best solutions, is further belied by the lack of any consensus in this country on what is true or best. If the marketplace actually revealed truth, diversity and conflict presumably would diminish rather than increase.[126] But, because people's perceptions are based on their varying interests and ex-

121. *Cf.* Baker, *supra* note 1, at 974 ("Truth is not objective."). "Platonic forms" are no longer credibly sought. *See id.* (the "moderns appear unwilling to believe in platonic forms"). Their deficiency as a value source is that their content or accuracy cannot be tested. In addition, those people who attempt to build a value system upon universals are trapped in a dilemma: either the alleged universal ends are too few and abstract to aid in deciding specific conflicts, or they are too numerous and concrete to be truly universal. *See* R. UNGER, KNOWLEDGE & POLITICS 254-56 (1975).

122. *See* R. BERKHOFER, A BEHAVIORAL APPROACH TO HISTORICAL ANALYSIS 23-26 (1969). American accounts in high school textbooks of the 'Revolutionary War' need only be compared to their English counterparts' discussion of the 'War with the Colonies' to demonstrate how two cultures can have a significantly differing understanding of the same event.

123. *See* Baker, *supra* note 1, at 974; *see also* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS *passim* (2d ed. 1970).

124. *See* Baker, *supra* note 1, at 974. For a discussion of the role of models, see Ingber, *A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law*, 28 RUTGERS L. REV. 861, 861-62 (1975); Ingber, *supra* note 75, at 328-29.

125. Consider the response given to Nicolaus Copernicus, Galileo Galilei, and Giordano Bruno for challenging the Aristotilean/Ptolemaic vision of the universe. *See* 6 ENCYCLOPEDIA BRITANNICA 463 (1971)(Copernicus withheld publication of his work until shortly before his death); 9 *id.* at 1089-90 (Galileo placed under house arrest until his death and forced to recant the Copernican system); 4 *id.* at 308 (Bruno burned at the stake for his challenges to Aristotilean physics and astronomy). Their beliefs, contrary to the "relevant" evidence and circumstances of the time, questioned the very core of their cultures. Astronomers and humanists alike, however, now view that era's truth as crude superstitution.

126. *See* Baker, *supra* note 1, at 967.

periences,[127] their perceptions are not likely to be socially homogenized. Consequently, as long as people have differing experiences, there is little guarantee that any society can agree on what is "true,"[128] and diversity and conflict will likely persist.[129]

People seldom want to read or hear that which is contrary to their convictions. Nor are they usually open to criticisms of groups to which they belong. To the contrary, it is difficult for a person to reject ideas, opinions, and positions as being false when they coincide with his own interests or when they appeal to his half-submerged prejudices.[130] Consequently, if people's perspectives are not homogeneous, a person will perceive the marketplace as leading to the best result only if it favors those who, in that specific individual's view, *should* be favored. In short, if the preconceived perspectives of individuals are inherently heterogeneous, then their decisions on the proper outcome of the market competition actually are made prior to that purported competition. Consequently, the very market process reputed as the only way to determine which perspective *should* win merely reflects the preexisting

127. Even language and syntax are forces that structure, direct, and limit individual perception. For years ethnologists studying the relation of language to culture have insisted that any change in language influences both perception and conception. *See, e.g.*, R. BROWN, I. COPI, D. DULANEY, W. FRANKENA, P. HENKLE & C. STEVENSON, LANGUAGE, THOUGHT & CULTURE 1-25 (1958); E. SAPIR, *Language*, in CULTURE, LANGUAGE, AND PERSONALITY 7 *passim* (1949); Whorf, *The Relation of Habitual Thought and Behavior to Language*, in LANGUAGE, CULTURE AND PERSONALITY: ESSAYS IN MEMORY OF EDWARD SAPIR 75 (L. Spier, A. Hallowell & S. Newman eds. 1941). Edward Sapir, an early leader in ethnology, has written that

> [t]he relation between language and experience is often misunderstood. Language is not merely a more or less systematic inventory of the various items of experience which seem relevant to the individual, as is so often naïvely assumed, but is also a self-contained, creative symbolic organization, which not only refers to experience largely acquired without its help but actually defines experience for us by reason of its formal completeness and because of our unconscious projection of its implicit expectation into the field of experience.

Sapir, *Conceptual Categories in Primitive Languages*, in LANGUAGE IN CULTURE AND SOCIETY 128, 128 (D. Hymes ed. 1964).

128. Furthermore, dialogue cannot end divergences in perspective if people have differing experiences and conflicting interests. Both logic and reason lack perspective; thus, they cannot alone justify value choices. Although logic and reason may help to indicate consistency within a chosen value system, *see* Ingber, *supra* note 75, at 320; Weyrauch, Book Review, 25 STAN. L. REV. 782, 800 (1973), the selection of the values to be pursued must precede the effective use of rationality. Reason standing alone is either an empty source for the determination of values or a camouflage to conceal flagrantly elitist value preferences. *See* Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 33-39 (1978); *cf.* Tushnet, "*. . . And Only Wealth Will Buy You Justice*"*—Some Notes on the Supreme Court. 1972 Term*, 1974 WIS. L. REV. 177, 177 ("the Court found constitutional flaws in legislation that it disapproved on policy grounds, while it found no flaws in legislation that it approved").

129. Social life has great diversity and conflict in individual needs, interests, and experiences, which may explain why there are more, and more conflicting, paradigms for social relations than is the case for "scientific" phenomena. Baker, *supra* note 1, at 974.

130. *See* Wellington, *supra* note 1, at 1130.

perspectives of the market participants.[131] The marketplace process in fact changes little.

Conflicts in the marketplace, therefore, are not likely to lead to conclusive agreement on what is "true" or "best." Rather, the marketplace serves as a forum where cultural groups with differing needs, interests, and experiences battle to defend or establish their disparate senses of what is "true" or "best." Official adoption and support of one group's position, allegedly due to its success in the marketplace, merely enhances through legal mechanisms the stature of that group's subculture; it does not represent a universal acceptance of that group's perspective.

Accordingly, it is difficult to treat free speech as uniquely essential to the discovery of truth or to the encouragement of informed choice. Experience more likely provides the information needed to confront life's exigencies than does speech. Rather than being fostered by mere expression, societal change depends more on the growth of new interests, needs, and experiences which are used to view sensory data differently so as to gain new perspectives from which status quo conditions may be challenged. Such growth requires a governmental and social system that nurtures new experiences and interests and, consequently divergent notions of truth. In such a system, expression would be important only if it helped to create differing environments suited to the self-fulfillment of people with contrasting perspectives.

In the United States today, however, most behavior, experiences and life-style choices are fully subject to governmental influence and restriction. Neither our federal nor local governments are under any obligation to encourage the diversity of experiences necessary for a society open to change. On the contrary, both levels of government promote conformity and consensus by controlling the development of "proper" perspectives. Through its authority over economic, political, educational, and social conditions, and its superior position in data gathering and dissemination, our government actively participates in the *socialization* of the citizenry. Contrary to the marketplace image of independent citizens freely choosing among competing ideas,[132] the

131. *See supra* text accompanying notes 26-29.

132. Even Mill himself, in discussing liberty, saw the limits of his philosophy:

> It is, perhaps, hardly necessary to say that this doctrine is meant to apply to human beings in the maturity of their facilities. We are not speaking of children, or of young persons below the age which the law may fix [for majority]. . . . Those who are still in a state to require being taken care of by others, must be protected against their own actions . . . .

J. MILL, *supra* note 5, at 9. Little remains of freedom of choice, however, if a public education system socializes the great majority of our children for 12 years and has a self-admitted role in forming "good citizens." Mill stated, but did not recognize, the conflict in his theory:

government strongly encourages the public to favor or disfavor certain views.

Through processes of socialization, government predisposes the individual to accept some perspectives rather than others. Government inculcates ideas that tend to protect existing interests, prevailing values, and current attitudes.[133] In short, the government strongly encourages the public to choose those ideas within the market that preserve the status quo. The public school system, combined with compulsory education, is one of many effective mechanisms for governmental socialization and indoctrination.

As far back as *Brown v. Board of Education*,[134] the Court acknowledged that state sponsored education was a major force in the socialization of children.[135] Public schools, scholars have noted,[136] provide a potent forum for state indoctrination: first, the audience's attendance is compulsory, and the listeners do not yet have the independent knowledge or psychological sophistication necessary for critical evaluation of what their teachers tell them;[137] second, public schools package their

> Society has had absolute power over [its members] during all the early portion of their existence: it has had the whole period of childhood and nonage in which to try whether it could make them capable of rational conduct in life. The existing generation is master both of the training and the entire circumstances of the generation to come . . . .

Id. at 73.

The educational system may thus indoctrinate a value-set precisely to skew later normative judgments. This social indoctrination, however, may be essential to give a person the frame of reference necessary to actively participate in governmental and social decisions; without some normative structure, a person would be no more than a passive receptor of sensory impulses. It is, in any case, too simplistic to view this process of socialization as being controlled by devious, manipulating educators. *See* Ingber, *supra* note 124, at 870.

133. *See* T. EMERSON, FREEDOM OF EXPRESSION, *supra* note 1, at 289; *cf.* Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1104 (1979)(proposing that first amendment be interpreted to include prohibition against political establishment in order to alleviate government's power to indoctrinate citizens).

134. 347 U.S. 483 (1954).

135. *Id.* at 493 ("Today [public education] is a principal instrument in awakening the child to cultural values . . . .").

136. *See* Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 875 (1979); *see also* Kamenshine, *supra* note 133, at 1134.

137. A comparison of Abington School Dist. v. Schempp, 374 U.S. 203, 224-25 (1963), with West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943), adds some insight. In *Schempp* the Court held unconstitutional state laws and practices requiring the recitation of a prayer in the public schools. 374 U.S. at 205. The fact that individual students could request to be excused from the exercises furnished no defense. *Id.* at 224-25. The Court recognized that the school child's age and immaturity likely would make it difficult for him to publicly express his wish to act differently from his classmates; a subtle but strong pressure would exist for the child to conform. *See id.* at 289-90 & n.69 (Brennan, J., concurring). In *Barnette* the Court held unconstitutional a school practice *requiring* students to pledge allegiance to the United States flag even if the child did not wish to do so. But, the Court required only that the school permit the students to excuse themselves. *Barnette*, 319 U.S. at 630. Unlike its decision in *Schempp*, the *Barnette* Court

message as highly valued education rather than as less trustworthy advertisement;[138] third, the children are likely to be impressed by the adult teacher's authority and seemingly vast fund of knowledge;[139] and, finally, teachers mete out rewards and punishments to those who do or do not appropriately learn the lesson of the day.[140]

A less jaded view of the "indoctrination" that takes place in our educational institutions emphasizes the necessity of "selectivity" in any school system. In his dissent in *Board of Education v. Pico*,[141] a decision that imposed first amendment limits on a local school board's discretion to remove books from junior and senior high school libraries, Justice Rehnquist stressed that,

> of necessity, elementary and secondary education must separate the relevant from the irrelevant, the appropriate from the inappropriate. Determining what information *not* to present to the students is often as important as identifying relevant material. This winnowing process . . . is fundamentally inconsistent with any constitutionally required eclecticism in public education.[142]

Although Justice Brennan's plurality opinion in *Pico* limited the school board's ability to remove library books, it also readily approved the indoctrination role of educational institutions:

> We are . . . in full agreement . . . that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political."[143]

permitted the ritual to continue although the pressure to conform certainly would be as great. Regardless of Justice Jackson's admirable language in the *Barnette* decision, 319 U.S. at 641-42, the Constitution apparently allows subtle political indoctrination even if such religious indoctrination is prohibited. A state may even refuse to certify teachers not trusted to socialize youngsters to a particular set of norms. *See* Ambach v. Norwich, 441 U.S. 68, 78-80 (1979)(New York law upheld which denied certification of alien teachers in public schools if alien eligible for U.S. citizenship but declines to seek it).

138. That allegedly educational communication can also be intended to propagandize is most obvious in the legislation of some states requiring courses contrasting the "good" democratic form of government with the "bad" communist regimes. In Florida, for example, instructors must emphasize the American economy as producing "higher wages, higher standards of living, greater personal freedom and liberty than any other system of economics on earth," FLA. STAT. § 233.064(4) (1981), while focusing upon the "dangers of Communism, the ways to fight Communism, the evils of Communism, the fallacies of Communism, and the false doctrines of Communism." FLA. STAT. § 233.064(5) (1981). Consider also the recent furor over the rapidly growing and controversial nuclear education movement in American schools. *See Nuclear War Becomes Hot Topic in Schools*, Wall St. J., May 24, 1983, at 1, col. 1.

139. I am reminded of the vehemence with which my 15-year-old son will defend an erroneous factual statement made by one of his teachers.

140. *See* Yudof, *supra* note 136, at 875.

141. Board of Educ. v. Pico, 457 U.S. 853, 904 (1982)(Rehnquist, J., dissenting).

142. *Id.* at 914 (emphasis in original); *see* Nagel, *supra* note 18, at 333.

143. Board of Educ. v. Pico, 457 U.S. 853, 864 (1982)(quoting Brief for Petitioners at 10).

Although the Court distinguished removing books from refusing to acquire them in the first place, the loss of perspectives contained in the books is just as damaging under the market model whether the school removes books or initially rejects them. Surely the Court would deem a school board's decision not to purchase books written from a Black or Republican perspective unconstitutional. Yet refusal to acquire books suggesting a Jewish infiltration of our government likely would not raise a judicial eyebrow. The difference clearly seems to be the cultural acceptance of one perspective and rejection of the other. Consequently, public schools shape children's attitudes through such selective exposure and thereby predispose children to accept certain established perspectives as adults.[144]

Thus, as the educational indoctrination process demonstrates, socialization mechanisms can subtly influence people to separate "fashionable" trends of thought from the "unfashionable" without any signs of formal censorship.[145] No expression need be forbidden overtly, no matter how challenging it may be to the existing order, for socialization processes will prevent it from effectively penetrating the mass consciousness of the citizenry.[146]

Members of the judiciary, responsible for upholding the values protected by the first amendment, are not immune from the same processes of socialization and indoctrination that predispose the general public to certain perspectives. The members of the courts are, after all, as much creatures of their culture as are we all.[147] Given this inevitable socialization of the judiciary, marketplace ideals become unrealistic and serve only as a legitimizing myth for a system that encourages the presentation of a limited range of preselected ideas rather than the open-minded evaluation it purports to foster.[148] Speech outside the range of acceptable norms[149] has, not surprisingly, been frequently curtailed with judicial approval.[150] Jurists, like other citizens, are likely to hear and take seriously only those opinions that do not too openly contradict their own.[151]

144. Of course, if a child's parents disapprove of the public school system and can afford to finance the alternative, they can opt out and place their child in a private educational institution. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). Exercise of this constitutional privilege, however, may be not only expensive, but beyond the means of many parents. Economic reality, combined with compulsory education, may force those who are not well off, and therefore have the least objective reasons to be committed to established values, to leave their children in educational institutions that promote establishment values.

145. Alexander Solzhenitsyn suggested this perspective on American culture in a speech given before the Harvard commencement in 1978. *See* Solzhenitsyn, *supra* note 99, at 23 ("Nothing is forbidden, but what is not fashionable will hardly ever find its way into periodicals or books or be heard in colleges. Legally, your researchers are free, but they are conditioned by the fashion of the day.").

146. *See* Goodwin, *The Shape of American Politics*, COMMENTARY, June 1967, at 25, 32 ("Ours is one of the most ideological nations of all. The very absence of serious and widespread public debate proves how successfully ideas have been woven into our national life.").

147. *See* Desmond, *The Federal Courts and the Nature and Quality of State Law*, in THE FUTURE OF FEDERALISM 87, 89 (S. Shuman ed. 1968)(" 'the great tides of currents which engulf the rest of men do not turn aside in their course and pass the judges by' ")(quoting Benjamin Cardozo). Judges are normally affected by the normative culture surrounding government officials; indeed, judges tend to be drawn from roughly the same rank as legislators. *See* J. ELY, DEMOCRACY AND DISTRUST 57 (1980). If, due to their positions, judges are socialized differently than legislators, such differences may be problematic. *See* Nagel, *supra* note 18, at 334:

> It is at best unclear why the normally sedate and highly controlled atmosphere of a courtroom is thought to be a good training ground for appreciating the dynamics of vigorous public debate. In contrast, political involvement and accountability provide much of the experience that one might expect would lead to a useful understanding of the requirements of a system of free speech.

148. This theme will be more fully developed *infra* in Part IV.

149. Polsby labeled this range the "community agenda of alternatives" in 1963. N. POLSBY, COMMUNITY POWER AND POLITICAL THEORY 135 (2d ed. 1980); *see id.* at 133-35; *see also* Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 254 (1968); Ingber, *supra* note 75, at 344. The "community agenda of alternatives" is the universe of alternative decisions that the dominant cultures in society accept as possible outcomes from the marketplace debate; within this range there are of course both preferred and unpreferred alternatives. Although the legal system may not support alternatives outside that agenda without a severe loss of legitimacy, it may symbolically support an unpreferred alternative within the agenda without engendering such dangers. For a fuller discussion of this concept, see *infra* text accompanying notes 361-63.

150. For decisions in which the Court upheld convictions under statutes limiting controversial speech as not inconsistent with the first amendment, see, for example, Dennis v. United States, 341 U.S. 494, 516 (1951); Debs v. United States, 249 U.S. 211, 215 (1919). *See also* New York v. Ferber, 458 U.S. 747, 774 (1982)(upholding a state law outlawing child pornography).

151. Acculturation or socialization may partially explain some of the obscenity decisions in which the Supreme Court imposed its own "enlightened" position of selective tolerance for the tastefully salacious coupled with contempt for the coarsely vulgar. Indeed, the distinction between Stanley v. Georgia, 394 U.S. 557, 568 (1969)(protecting exhibition of obscene films in the home), and Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973)(forbidding public display of obscene films), coincides with a distinction between polite society and the hoi polloi. To protect the showing of a privately produced movie on a privately owned projector while prosecuting the exhibition of an identical film in a public theatre smacks of economic and cultural discrimination. For further discussion of the impact of the Justices' socioeconomic background upon their receptivity to various styles of speech, see Justice Brennan's dissent in FCC v. Pacifica Found., 438 U.S. 726, 776-77 (1978)(Brennan, J., dissenting).

B. *The Assumption of Rationality.*

Once one recognizes that the marketplace assumption of objective truth is implausible and that truth and understanding are actually no more than preconditioned choice, one is prompted to reevaluate other marketplace assumptions in order to comprehend the marketplace theory's persistence. Foremost among these assumptions is that people can distinguish rationally between a message's substance and the distortion caused by its form and focus. Although the implausibility of the public's ability to separate the form of a message from its substance

will be demonstrated below,[152] some legal doctrine has, nevertheless, developed that attempts to limit irrational responses to communications by controlling the form in which such messages are presented.

1. *A Problem of Form.* In *Chaplinsky v. New Hampshire*,[153] the Court denied first amendment protection to ideas packaged in a patently insulting manner. In upholding the conviction of a Jehovah's Witness who had gotten into a fight on a sidewalk with the city marshal after calling him "a God damned racketeer" and "a damned Fascist,"[154] Justice Murphy, writing for a unanimous Court, commented:

> There are certain well-defined and narrowly limited classes of speech, the prosecution and punishment of which have never been thought to raise any constitutional problems. These include the lewd and obscene, the profane, the libelous and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[155]

During the decades since *Chaplinsky*'s attempt to distinguish between protected and unprotected classes of speech, substantial first amendment problems have arisen under the categories of the "profane" and the "libelous."[156] The "fighting words" category, in contrast, consistently has remained beyond the constitutional pale.[157] One set of authors finds the regulation of "fighting words" consistent with free speech theory because such words trigger an automatic reaction rather than cognitive reflection.[158] Consequently, removal of such speech from the marketplace, according to these authors, only eliminates thoughtless and irrational responses;[159] little of value is lost, and public order is preserved.

152 *See infra* text accompanying notes 178-232.

153. 315 U.S. 568 (1942). In *Chaplinsky*, the state court had interpreted the state statute to ban "face-to-face words plainly likely to cause a breach of the peace by the addressee." *Id.* at 573. Because the addressee here was a Marshal, surely the court could have insisted that a state law enforcement officer be stringently required to refrain from responding to such speech through a breach of the peace.

154. *Id.* at 569.

155. *Id.* at 571-72.

156. For the Court's present view on "profanity," see Lewis v. City of New Orleans, 415 U.S. 130, 134 (1973)(municipal ordinance prohibiting cursing, reveling or use of obscene language struck down as overbroad); Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952)(unconstitutional censorship of an allegedly "sacrilegious" movie). The modern view of libel is illustrated by New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Garrison v. Louisiana, 379 U.S. 64 (1964). *But see* Beauharnais v. Illinois, 343 U.S. 250, 266 (1952)(suggesting libel outside scope of first amendment)(as recently as 1978, Justice Blackmun cited *Beauharnais* as good law in an opinion joined by Justice Rehnquist, *see* Smith v. Collin, 436 U.S. 953 (1978)(mem.)(Blackmun, J., dissenting), *denying stay of*, 578 F.2d 1197 (7th Cir. 1978)).

157. *See* Lewis v. City of New Orleans, 415 U.S. 130, 133 (1974); Gooding v. Wilson, 405 U.S. 518, 522 (1972).

158. 1 Nowak, R. Rotunda & J. Young, Constitutional Law 789 (1978).

The Supreme Court's "provocative speaker/hostile audience" doctrine is closely related to the fighting words doctrine. In *Feiner v. New York*,[160] the Court, recognizing the state's ability to suppress a provocative speaker likely to rouse spectator violence against himself and his supporters, affirmed the disorderly conduct conviction of a soap box orator who ignored a police command to cease speaking to a racially mixed crowd.[161] The orator had given the impression that he was "endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights."[162] The two policemen on the scene confronted a crowd of about eighty people. At least one individual threatened violence if the police did not act to stop the speaker.[163] Although the threat of violence came from a spectator opposed to the speaker, Chief Justice Vinson insisted that when a speaker "passes the bounds of argument or persuasion and undertakes incitement to riot, [the police must not be] . . . powerless to prevent a breach of the peace."[164] Again the explanation for suppression was that the speech did not encourage rational discourse, but rather had passed the "bounds of persuasion."

Despite the Court's attempts to explain the "fighting word" and "provocative speaker/hostile audience" doctrines in terms of protecting the rationality of the marketplace, these doctrines are inconsistent with the Court's other articulations of the marketplace model. For instance, as early as 1949 the Court insisted in *Terminiello v. Chicago*[165] that

> a function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudice and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. . . . [T]he alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[166]

But what distinguishes suppressible fighting words from protected provocative words that stir opponents to anger? Socially valuable dissent often is phrased in unconventional terms and frequently offends polite

160. 340 U.S. 315 (1951).

161. *See id.* at 316-18, 321.

162. *Id.* at 317. Feiner also had described the President as a "bum," the mayor of Syracuse as a "champagne-sipping bum," and the American Legion as a "Nazi Gestapo." *Id.* at 330 (Douglas, J., dissenting).

163. *Id.* at 317.

164. *Id.* at 321.

165. 337 U.S. 1 (1949).

166. *Id.* at 4.

standards of discourse. The distinction merely seems, at times, to forbid "low" styled speech from a "low" statured speaker. This "class" focus only further entrenches a bias for established norms and respectable proponents.[167]

Yet the focus on form is an inevitable outgrowth of *Chaplinsky*'s attempt to separate protected from unprotected speech. *Chaplinsky* suggests that the essence of a communication can survive a governmental purge of the disturbing form in which the communication is presented for public consideration,[168] but many critics have rejected the assumption that the content and form of speech somehow are separable.[169] Yet the marketplace model makes this very assumption. It

167. The civil rights movement of the 1960's demonstrated the danger of the *Feiner* doctrine because opposing spectators attempted to use the doctrine to suppress civil rights demonstrations by claiming that bystanders' emotions would be uncontrollably aroused. The marches and speeches of Dr. Martin Luther King and others through certain southern communities surely were as likely to lead to violence from hostile audiences as were the acts of Feiner. The civil rights movement, however, had the support of established groups throughout much of the country outside of the southern states. It is therefore unsurprising that the Supreme Court has consistently distinguished *Feiner* on its facts, although the Court has never technically overruled it. *E.g.*, Gregory v. City of Chicago, 394 U.S. 111, 112 (1969)(civil rights demonstration); *see also* Bachellar v. Maryland, 397 U.S. 564, 567 (1970)(antiwar demonstration); Cox v. Louisiana, 379 U.S. 536, 551 (1965)(citing *Feiner* but distinguishing it as a " 'far cry' " from the civil rights demonstration involved in the instant case); Edwards v. South Carolina, 372 U.S. 229, 236 (1963)(civil rights demonstration; a "far cry from the situation" in *Feiner*). Upon comparing these cases it becomes obvious that when a speaker has greater stature and his cause commands greater support from established groups, courts will less likely suppress his speech as solicitous of the irrational; instead, in these cases the courts interpret the first amendment to "include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

168. *See Chaplinsky*, 315 U.S. at 571-72 (some utterances are "no essential part of any exposition of ideas"). This is the basic postulate behind the Court's opinion in FCC v. Pacifica Found., 438 U.S. 726 (1978)(FCC may regulate radio broadcasts that use indecent but not obscene language). The Court insisted that a "requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Id.* at 743 n.18.

169. *See, e.g.*, L. TRIBE, *supra* note 13, § 12-8, at 606. Justice Brennan stressed this point in his *Pacifica* dissent:

> The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image.

FCC v. Pacifica Found., 438 U.S. 726, 773 (1978)(Brennan, J., dissenting).

Strangely enough, only seven years earlier in Cohen v. California, 403 U.S. 15 (1971), the Court had precisely recognized the importance of an expression's packaging to its emotive force. In holding that the first amendment protects the wearing of a jacket bearing the words "Fuck the Draft" in a courthouse corridor, Justice Harlan acknowledged that

> much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, *may often be the more important element of the overall message sought to be communicated*.

Id. at 26 (emphasis added).

A comparison of *Cohen* and *Pacifica* illustrates the judicial ambivalence toward the irrational. In upholding Cohen's right to wear his jacket in a courthouse, Justice Harlan's opinion recognized that many people would find offensive much valuable speech that awakens the public to outrages to which it had been blind. Yet in *Pacifica*, the Court approved the FCC's ban of satiric humorist George Carlin's 12 minute monologue, called "Filthy Words," from daytime radio. The Justices were unable to appreciate that there are those "who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities." *Pacifica*, 438 U.S. at 775 (Brennan, J., dissenting).

The Court's attempt to distinguish *Pacifica* from *Cohen* is unconvincing. *See Pacifica*, 438 U.S. at 747 n.25. Although the seven "filthy words" broadcast could enter the privacy of one's home, such "invasion" would only happen if an individual decided to listen to the broadcast; radios have both an on-off switch and a number of frequencies from which to choose. Notwithstanding the fact that children could have listened to the broadcast without parental knowledge or permission, if Carlin's monologue would have been protected had it been made on a public street in the presence of children, it should not have been any less protected when delivered over radio waves. Although the Court's language focuses on the broadcast's timing and form rather than its substance, the Court's divergent analyses in *Cohen* and *Pacifica* suggest that substantive considerations were relevant. Apparently, in 1968 during a heated public debate about the Vietnam War and the military draft, when credible and recognized public leaders were divided over the issues, one could signal one's position with passionate and emotively colorful language. It would therefore appear that when the substance of a communication has the approval of powerful social forces, as in *Cohen*, the Court may give more flexibility to the form the message takes than it would if established groups disapprove the message, as in *Pacifica*.

170. *See, e.g.*, K. MANNHEIM, IDEOLOGY AND UTOPIA *passim* (1954); C. MILL, *The Structure of Power in American Society*, in POWER, POLITICS AND PEOPLE 23, 23 (I. Horowitz ed. 1963); C. MILL, *The Cultural Apparatus*, in *id.* at 405, 405-06; C. MILL, *On Knowledge and Power*, in *id.* at 599, 609-11; Baker, *supra* note 1, at 976-78.

171. Baker, *supra* note 1, at 976.

172. *See generally infra* note 429 and accompanying text (discussion of cognitive dissonance).

173. *See* Baker, *supra* note 1, at 977.

presumes people can use reason to focus on the substance of a message and to distinguish and reject the emotional and irrational appeals of its packaging. Evidence from the social sciences has established and emphasized the irrational elements of persuasion[170] and, thus, seriously challenges this marketplace assumption. As Professor C. Edwin Baker has recognized, emotional appeals, whether rational or not, are highly potent: " 'subconscious' repressions, phobias, or desires influence people's assimilation of messages; and, most obviously, stimulus-response mechanisms and selective attention and retention processes influence understanding or perspectives."[171] These processes, coupled with the phenomenon of cognitive dissonance,[172] insulate individuals from messages inconsistent with those perspectives that further their perceived self-interests.[173] Marketplace outcomes therefore are determined more by the packaging of the message and the psychological

predispositions of the listeners than by any rational process.[174] Consequently, the market model's reliance on public rationality is, at best, misplaced.[175]

Other scholars also have perceived the marketplace model's questionable reliance on rationality. They stress, however, that the marketplace's fairness, rather than its ultimate wisdom, justifies its continued acceptance.[176] A fairness justification, nevertheless, fails because establishment groups dominate the market. These groups have greater access to the marketplace's most effective mechanisms for information dissemination, and also possess the power to legally curtail behavior that might result in new ideas and perspectives threatening to their interests.[177]

2. *A Problem of Access and Style.* The first amendment developed in a society where the major forms of public debate were handprinted leaflets, hand-set newspapers, and speeches in town meetings[178] and public parks. With roughly equal decibels and tongues, people competed for attention and approval using their wit, persistence, and eloquence. Because of this comparative equal access, the most powerful threat to free speech and a free press came from government censorship or suppression.[179] Brandeis's statement about good counsel counteracting bad[180] assumes the continued existence of equal access and the correspondingly limited role of the first amendment. Historically this assumption may have been accurate; today, however, it is indefensible.

The expansion of governmental powers and the creation of a bureaucracy possessing vast quantities of information and expertise have made the government, rather than individual citizens, the most pervasive participant in the marketplace.[181] Most of the information and views available for consideration within the marketplace come from government itself. Aided by increasingly subtle means of social control,[182] the government's power to overwhelm or block alternative views from the market[183] threatens the theoretical basis of consensual government.[184]

Theoretically, however, two methods exist for communicating nonsanctioned views to the public: the mass communication media for those with access, and the public forum[185] for those without such media access. This section examines whether either of these mechanisms effectively conveys perspectives other than those of dominant societal groups.

174. Because there is no assurance that the individual with the "true" or "best" perspective will be the superior rhetorician, this point is particularly crucial. The decisionmaker who frankly conveys the limitations and uncertainty of his position may find that others are more willing to follow the demagogue who professes to offer certainty and truth. *See, e.g.*, W. GOLDING, LORD OF THE FLIES 134-92 (1954). For a discussion of the skill of persuasion—or the importance of the packaging of a message delivered by a lawyer, see Ingber, *supra* note 75, at 329-30.

175. Consider, for example, the constitutional protection of commercial speech as a feature of the marketplace model. *See generally* Bates v. State Bar, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). In Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 97 (1977), for example, the Court struck down a township ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs. The ordinance was designed to stem the flight of white homeowners from a racially integrated community. *Id.* at 86. The Court assumed that homeowners who were wavering whether to sell their houses would act rationally when, in fact, real estate agents may have been banking on emotive responses. *Id.* at 95-96. By recognizing the consumers' and homeowners' right to receive messages from advertisers, *id.* at 92, the Court upheld the advertiser's right to psychologically manipulate the baser traits of such individuals.

176. *See, e.g.*, A. BICKEL, THE MORALITY OF CONSENT 62 (1975)("The social interest that the First Amendment vindicates is . . . the successful operation of the political process, so that the country may better be able to adopt the course of action that conforms to the wishes of the greatest number, whether or not it is wise or is founded in truth.").

177. *See* Baker, *supra* note 1, at 978. *See generally* Baker, *Counting Preferences in Collective Choice Situations*, 25 UCLA L. REV. 381 (1978).

178. *See* A. MEIKLEJOHN, POLITICAL FREEDOM 24 (1960). Meiklejohn's concept of democracy requires that *every voter*, not just administrators or legislators, be given "the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal." *Id.* at 75. His image is more akin to participatory democracy, such as the town meeting, than to representative democracy.

179. *Cf.* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972)("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

180. Whitney v. California, 274 U.S. 357, 375 (1927)(Brandeis, J., concurring).

181. *See generally* Emerson, *supra* note 75.

182. *See supra* notes 133-51 and accompanying text.

183. Government need not even allow the press or the public access to many state facilities. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978)(reversing lower court injunction ordering prison officials to grant the press access to certain prison facilities). Such a ruling can easily frustrate many attempts to gain information or understanding unskewed by governmental selection or interpretation.

184. *See* Yudof, *supra* note 136, at 865. To be fair, government speech may also provide a necessary check on the ability of large corporations to dominate the communications networks. *See id.* at 866.

185. Professor Harry Kalven, Jr. first developed the concept of the public forum. *See* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1. Much writing has followed in his wake. *See, e.g.*, Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931; Kamin, *Residential Picketing and the First Amendment*, 61 NW. U.L. REV. 177, 207-16 (1966); Nahmod, *Beyond* Tinker*: The High School as an Educational Public Forum*, 5 HARV. C.R.-C.L. L. REV. 278 (1970); Stephenson, *A Seat on the Sidelines: The Georgia Appellate Judiciary and the Public Forum*, 3 GA. L. REV. 80 (1968); Stephenson, *State Appellate Courts and the Political Process: Florida and the Public Forum*, 23 U. MIAMI L. REV. 182 (1968); Wexler, *Dissent, the Streets and Permits: Chicago as Microcosm*, 2 URB. LAW. 350 (1970); Zillman & Imwinkelried, *The Legacy of* Greer v. Spock*: The Public Forum Doctrine and the Principle of the Military's Political Neutrality*, 65 GEO. L.J. 773 (1977); Comment, *The Public Forum from* Marsh *to* Lloyd, 24 AM. U.L. REV. 159 (1974).

a. *The mass media.* No one today seriously would argue that picketing and leafleting are as effective communication devices as newspapers and broadcasting.[186] Access to the mass media is crucial to anyone wishing to disseminate his views widely. Nevertheless, monopolistic practices,[187] economies of scale, and an unequal distribution of resources have made it difficult for new ventures to enter the business of mass communications.[188] Restriction of entry to the economically advantaged quells voices today that might have been heard in the time of the town meeting and the pamphleteer.[189] The media consequently carry great power to suggest and shape articulated thought.[190] Media owners and managers, rather than the individuals wishing to speak,

186. *See* Barron, *supra* note 73, at 1647. A 1974 survey of 490 prominent educators, labor leaders, bankers, business people, members of Congress, government officials, and clergy rated television the most powerful institution in the country. The White House was second and the Supreme Court third. *Who Runs America? A National Survey*, U.S. NEWS & WORLD REP., Apr. 22, 1974, at 30. *But cf.* Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 769-71, 787 (1972)("The implication that the people of this country . . . are mere unthinking automatons manipulated by the media, without interests, conflicts or prejudices is an assumption which I find quite maddening.").

187. As early as the middle 1950's, 94.3% of the daily newspapers in the United States did not face competition from rival daily publications. *See* Nixon, *Who Will Own the Press in 1975?*, 32 JOURNALISM Q. 10, 13 (1955), *cited in* F. THAYER, LEGAL CONTROL OF THE PRESS § 22, at 130 (4th ed. 1962). The Supreme Court has recognized the FCC's legitimate concern in limiting this concentration of power in the broadcast media. *See* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 799 (1978).

188. *Cf.* F. THAYER, *supra* note 187, at 128:

> When large metropolitan newspapers are valued at figures running into millions of dollars and when even a nonmetropolitan daily in a city of less than 25,000 population may represent a valuation of $350,000 to $1,250,000, it is not easy to establish a new newspaper in such a community or to buy an already established daily.

189. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court acknowledged this restrictive image of the marketplace:

> The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible.

Id. at 251 (footnote omitted).

190. Television exercises this power to shape thought to a greater extent than does the print media because of marked differences in the audiences of the two media forms. First, those who often read tend to be more educated than those who do not. This is true not only for patrons of books and relatively sophisticated periodicals, but also for readers of pictorial and general interest magazines. Yet, those with less education tend to watch more television news. Robinson, *American Political Legitimacy in an Era of Electronic Journalism: Reflections on the Evening News*, in TELEVISION AS A SOCIAL FORCE: NEW APPROACHES TO TELEVISION CRITICISM 105, 107 (D. Cater & R. Adler eds. 1975). Second, television viewers do not tend to supplement one medium with another. Generally, the more time readers spend with newspapers, the more time they will spend with magazines and books. Television viewers, however, tend to use other media less as they watch television more. *Id.* at 108-09. In other words, public reliance on the print media has been mitigated by the readers' education and their exposure to a variety of published information. Because these factors do not affect television viewers, as television becomes more dominant in supplying the public with news and information, the diversity and wealth of the marketplace decreases precipitously.

thus determine which persons, facts, and ideas shall reach the public.[191] Accordingly, those facts, ideas, and perspectives most likely to gain media access and, consequently, large scale public exposure, are those appealing to the self-interest of those individuals and groups who own and manage the media, to the mass audience whose patronage provides the economic and political basis for advertising,[192] and to economic organizations whose commercial payments directly provide funds for the media.[193] Because all these groups tend to embrace established values and traditional perspectives,[194] media managers are unlikely to disseminate frequently those ideas most challenging to conventional wisdom and the established power structure.[195] The granting of media access accordingly is fraught with status quo biases.

191. In 1969, then Vice-President Spiro Agnew announced that "the American people should be made aware of the trend toward the monopolization of the great public information vehicles and the concentration of more and more power [over public opinion] in fewer and fewer hands." N.Y. Times, Nov. 21, 1969, at 22, col. 2-3. Ironically, given Agnew's conservative political affiliation, the "New Left" was making the same argument when it insisted that the system of freedom of expression favored the status quo, particularly through establishment control of the mass media. *Cf.* T. EMERSON, FREEDOM OF EXPRESSION, *supra* note 1, at 726 (noting several New Left lines of attack upon freedom of expression). *See generally* Marcuse, *Repressive Tolerance*, in R. WOLFF, B. MOORE & H. MARCUSE, A CRITIQUE OF PURE TOLERANCE 81 *passim* (1965).

192. Television, for example, with its overt commercial interest in pursuing the largest audience, is inevitably pressured to shut out ideas displeasing to some and substitute the bland least common denominators antagonizing to no one. *See* J. BARRON, *supra* note 16, at 84. Like other content restrictions, this television marketing strategy may distort the market and leave the public with incomplete and perhaps inaccurate perceptions of the social and political universe.

The media's fear of libel suits also causes content restrictions that encourage mediocrity. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974), the Supreme Court limited first amendment protection in many types of defamation suits. The *Gertz* decision intensified the media's incentive to confine its coverage to "safe" issues by giving maximum protection only to publishers or broadcasters whose sense of news does not extend beyond a combination of officialdom and matters relating to "public figures," that is, persons who already have attracted media attention. *Id.* at 344-47. Reporters that stray farthest from "mainstream issues" accordingly feel the threat of libel suits most acutely.

193. *See* MEDIA AND THE FIRST AMENDMENT IN A FREE SOCIETY 79-80 (Georgetown Law Journal ed. 1972); Baker, *supra* note 1, at 979-80.

194. *Cf.* Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 187 (1973) (Brennan, J., dissenting)("in the commercial world of mass communications, it is simply 'bad business' to espouse—or even to allow others to espouse—the heterodox or the controversial"); Baker, *supra* note 1, at 980 (media owners, advertisers, and the mass audience all support the status quo); Canby, *The First Amendment Right to Persuade: Access to Radio and Television*, 19 UCLA L. REV. 723, 727 (1972)(fairness doctrine tends to encourage "bland mixture of views on each station"); Jaffe, *supra* note 186, at 773 n.26 (media editors avoid controversial stands which would trigger FCC "equal time" requirements).

195. Those groups powerful enough to control the media probably attained that position in the community only by conforming to the values of the community. The media, therefore, is not likely to support and articulate criticism of the fundamental beliefs and practices of society. Robert Wolff, in critiquing American life and politics, observed that "we find a strange mixture of the greatest tolerance for what we might call established groups and an equally great intolerance for

Protection against governmental interference with the press, therefore, does not guarantee, as it did in the past, that an individual with something to say will have effective access to an audience. Private interests can thwart the free exchange of ideas allegedly protected by the first amendment as easily as can the government.[196] In short, even if the first amendment erected a wall between the government and the marketplace, the mere existence of mass media controlled largely by interests committed to established values and traditional perspectives limits the forums available for challenges to existing power structures.

Furthermore, the media's actual impact on the consuming public also reinforces rather than challenges traditional notions. Although it popularly is believed that the media significantly can alter and shape people's attitudes and behavior, social science research largely dispels this myth. Such research instead demonstrates that press and broadcast media are most effective when they reinforce established perspectives.[197] They effectively create new opinions only when the audience has no conflicting preexisting belief to defend through selective perception.[198] To be successful, however, status quo critics must alter people's preexisting beliefs. In this endeavor, use of the mass media is least effective.[199] Thus, even if the problems of unequal access were eliminated, a status quo bias would be promoted by the skewed impact of the mass media. Because government communications dominate the marketplace and mass media cannot or will not effectively disseminate dissident views, challengers to established status quo perspectives are left only with resort to public forums.

b. *The public forum.* For over forty years the courts have recognized the public's right to use public forums—streets, parks, and open places—for meetings, parades, demonstrations, and canvassing.[200]

the deviant individual." Wolff, *Beyond Tolerance*, in R. WOLFF, B. MOORE, & H. MARCUSE, *supra* note 191, at 3, 37.

196. *See* Associated Press v. United States, 326 U.S. 1, 20 (1945)("Freedom of the press from governmental interference . . . does not sanction repression of that freedom by private interest."); *cf.* Marsh v. Alabama, 326 U.S. 501, 509 (1946)(holding that states could not, under the first and fourteenth amendments, permit "a corporation to govern a community of citizens so as to restrict their fundamental liberties").

197. *See* Canby, *supra* note 194, at 739-41, and authorities cited therein.

198. *See* Klapper, *Communication, Mass: Effects*, in 3 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 81, 82-85 (D. Sills ed. 1968).

199. Professor Baker's discussion of modern social science research supports the conclusion that the mass media often fails to persuade people to change preexisting beliefs. *See* Baker, *supra* note 1, at 979.

200. *See* Hague v. CIO, 307 U.S. 496, 515-16 (1939).

These alternative forums for public communication enable dissenting or low status individuals and groups to disseminate their views even when they cannot gain access to mass media. The mass public demonstration, for example, conveys an image of power to bystanders and participants alike, reinforces the group's commitment to its cause, allows participants to register publicly their opinion, and appears to circumvent the elite's power to control mass communication.[201] Furthermore, public demonstrations have a different impact on the audience than do newspapers or broadcasts. The audience's experience in a face-to-face encounter is more imposing than when it passively reads about or listens to a viewpoint. The interchange is more flexible, more of the senses are engaged, and the audience's response, whether negative or positive, is likely to be more pronounced. As Professor Emerson has written, "the public assembly has a dynamic quality achieved by no other form of communication."[202]

The Supreme Court, however, consistently has viewed the right to use a public forum as relative, rather than absolute; the right must be exercised "in subordination to the general comfort and convenience, and in consonance with peace and good order."[203] The mass demonstration, as well as effectively disseminating ideas, often has an unsettling impact upon a community. Conflicts arise over the use of space and the rights of nonsympathizers to avoid contact with demonstrators. The emotional feedback generated by face-to-face contact designed to evoke or increase support also may build antagonisms and lead to violence.[204] Not surprisingly, the Court consistently has held that such activities as the use of loud sound trucks, mass demonstrations controlling limited space, or parades disrupting traffic flow are subject to regulation. According to the Court, however, only the conduct incidental to the communication, the "speech-plus," can be regulated; the content of the communication itself cannot be the target of the regulation.[205] In

201. Whether mass demonstrations in fact accomplish this result is arguable. *See infra* text accompanying notes 205-27, 394-96.

202. See T. EMERSON, FREEDOM OF EXPRESSION, *supra* note 1, at 286.

203. Hague v. CIO, 307 U.S. 496, 516 (1939).

204. "Freedom of expression implies controversy," insists Professor Emerson,

> and in [the public demonstration] the controversy takes place in the public arena. It often involves large masses of people, hostile forces opposing each other face to face, high emotions, and unforeseeable consequences. Street meetings, demonstrations, and other public assemblies are not always guided by the canons of middle-class politeness; they may be rough, aggressive and turbulent.

T. EMERSON, FREEDOM OF EXPRESSION, *supra* note 1, at 288.

205. Justice Goldberg, writing for the majority in Cox v. Louisiana, 379 U.S. 536 (1965), emphatically rejected the notion "that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching or picketing on streets and highways, as these amendments afford to those who communicate ideas by

general, the state may place reasonable time, place, or manner restrictions on speech in a public forum,[206] but officials must implement these regulations without regard to the content of the speech.[207] The Court has justified such restrictions because they allegedly are content neutral. In effect, however, they are not.

The Court's distinction between fully protected "pure speech" and "speech-plus," which is subject to reasonable regulation, significantly affects the type of ideas conveyed, the nature of the speaker, and the intensity with which views may be communicated. For example, because dissidents and the economically disadvantaged rely more heavily than do status quo supporters on street demonstrations for public expression of their views, regulation of such demonstrations, although facially content neutral, restricts the public's access to views challenging the status quo.[208] Therefore, the regulation of public forums further biases the marketplace in favor of establishment views by restricting the primary method dissidents use to communicate their criticisms.[209]

The recent case of *Heffron v. International Society for Krishna Consciousness*[210] exemplifies the disparate impact of time, place, and manner restrictions on nonestablishment groups. In *Heffron* the Supreme Court upheld a state's restriction of the distribution and sale of literature, and the solicitation of donations at a Minnesota state fair to assigned booths within the fairgrounds. The fair sponsor rented space to all applicants on a first-come, first-served basis.[211] The rule applied equally to nonprofit, religious, charitable, and commercial enterprises. The Court found the regulation justified as a means of maintaining orderly crowd movement.[212]

Although the regulation was content neutral on its face, it effectively limited dissemination of ideas to those that fairgoers affirmatively sought by approaching a booth. Fairgoers, however, are much more likely to seek information from dominant and established groups about which they are knowledgable and with which they identify.[213] Such groups tend to confirm rather than challenge the fairgoers' perspectives. Consequently, the marketplace of ideas at the fairground was structured to reduce the impact of dissenting views and increase the market force of dominant status quo perspectives.[214]

Nevertheless, the Supreme Court has suggested that the equal access doctrine eliminates any marketplace bias in the public forum:[215]

pure speech." *Id.* at 555; *see also* Adderley v. Florida, 385 U.S. 39, 48 (1966)(rejecting the premise that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please").

206. Not all places are public forums. No matter how convenient, symbolically significant, or necessary for effective communication a place may be, it may not be a public forum if it is privately owned and used for purposes other than public debate and discussion, *e.g.*, Hudgens v. NLRB, 424 U.S. 507, 519-20 (1976), if it is publicly owned but not dedicated to public discussion, *e.g.*, Greer v. Spock, 424 U.S. 828, 838 (1976); Adderley v. Florida, 385 U.S. 39, 47, (1966), or if, while dedicated to discussion, it is limited to a certain method of communication, *e.g.*, United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114, 128-29 (1981)(access to mailboxes may be limited to communications that have traveled through the federal mails). *But see* Grayned v. Rockford, 408 U.S. 104, 118-21 (1972)(public school grounds); Brown v. Louisiana, 383 U.S. 131, 142-43 (1966)(plurality opinion dictum)(branch public library). For a discussion of whether government can limit public debate merely by restricting certain areas and thus determining that they are *not* public forums, see *infra* text accompanying notes 215-19.

207. *See* United States v. Grace, 103 S. Ct. 1703, 1707 (1983); Perry Educ. Assn. v. Perry Local Educators' Assn., 103 S. Ct. 948, 955 (1983); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1981).

208. Critics of the Vietnam War, for instance, depended much more on mass rallies to convey their perspective than did the war's supporters; the supporters included many public officials who had ample access to the mass media.

209. For example, restricting the use of sound trucks in residential areas because of noise or in commercial districts because of obstruction may mean that those living and working in these areas will never hear the dissident's message.

210. 452 U.S. 640 (1981).

211. The fair's sponsor charged a rental fee based on the size and location of the booth. *Id.* at 644. The propriety of the fee was not argued before the Court, but such a fee could lead to the physical segregation of poor groups at less frequented fairground locations.

212. *Id.* at 654.

213. The Court has acknowledged implicitly that it is unlikely that individuals will affirmatively seek out views that question those they already hold. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 513 (1969)("Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.").

214. Dissenting in Adderley v. Florida, 385 U.S. 39 (1966), Justice Douglas argued that

> [t]hose who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as [they] are peaceable.

Id. at 50-51 (Douglas, J., dissenting).

In spite of Justice Douglas's advice and the disproportionate impact of the Minnesota regulation upon groups and views deviating from the norm, the *Heffron* Court refused to compel the state to consider other less restrictive means to protect the flow of fairgoer movement, such as penalizing disorderly or disruptive conduct, limiting the number of solicitors, or placing more narrowly drawn restrictions on the location or movement of the representatives of various groups. The Court was willing to accept, untested, the assumption that the proposed alternatives would be less effective. *See Heffron*, 452 U.S. at 654. In addition, the Court was not concerned that certain communication would be less effective under the state regulation. *Id.* at 654-55. Apparently the Court viewed *any* legitimate state interest as a higher priority than the communicative interests of the Krisnnas and other such groups.

215. Although a total ban on channels of communication involving "speech-plus" would clearly have a content specific impact, the case law is ambiguous as to whether such a total ban would be valid or whether the Constitution mandates some "minimum access" to the marketplace. An "equal access" approach does not require courts to compel communities to dedicate any particular space to public discourse and assume all the attendant dangers and costs. A "minimum access" theory would require such judicial action. "Equal access" merely accepts the decisions of the community as to the time, place, and manner of public discourse to be allowed and applies those decisions even-handedly to unpopular as well as popular groups and viewpoints. The many

once a public forum is open for one viewpoint or subject, opposing views and alternative subjects must be granted equal access for comparable uses.[216] Given the professed purposes and importance of the first amendment, the Court's focus on "equal access" should be a matter of some concern. If the Court emphasizes the equal access doctrine, it may invite government to "equalize" access by totally *banning* the use of specific forums to all speakers rather than by lifting the restrictions from some.[217] Indeed, a total ban on a specific public forum is conceivable if the forum is not essential to dissemination of established viewpoints and the increased cost of alternative communication for such viewpoints is outweighed, in the minds of their supporters, by the damage done to dissidents who cannot easily afford or gain access to other communication channels. Consequently, although the equal access doctrine superficially protects against marketplace bias in public forums, the doctrine could restrict a dissident's access to the public and, thereby, further bias the entire marketplace in favor of the establishment. Thus, rather than preventing marketplace bias, equal access to public forums only dispels the appearance of a skewed and manipulated marketplace. As demonstrated above,[218] however, government regulations need not discriminate overtly against specific viewpoints to assure that those having meaningful access to the marketplace of ideas will espouse traditional values.[219] Consequently, the Court's reliance on the equal access doctrine to preserve self-government, "truth" discovering, and individual development, simply is misplaced.

c. *Symbolic conduct.* Individuals or groups lacking access to the print and the electronic media may attempt to gain media attention by staging a "media event." If a large group holds a mass demonstration it may gain media coverage. Unfortunately, many individuals with

public forum decisions that focus on vagueness and overbreadth, *e.g.*, Carey v. Brown, 447 U.S. 455, 470-71 (1980); Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976); Lovell v. City of Griffin, 303 U.S. 444, 451-52 (1938), suggest an "equal access" theory. These decisions concentrate on governmental discretion and censorship in distributing access rather than on problems of lack of access.

216. Some authors have assumed that equal access would unite the interests of the politically powerful with those of minority or dissident groups and thus significantly protect all viewpoints from interference. Dean John Hart Ely has characterized this approach as one of "virtual representation." J. ELY, *supra* note 147, at 84; *see* Kalven, *supra* note 185, at 30; *see also* Emerson, *supra* note 75, at 802-03 (discussion of equal protection). *See generally* Karst, *supra* note 9, at 20 (discussion of equal access through equal protection).

217. *See* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1492-97 (1970); *cf.* Palmer v. Thompson, 403 U.S. 217, 226 (1971)(closure of public swimming pools after desegregation order not violation of equal protection).

218. *See supra* notes 186-217 and accompanying text.

219. *See supra* text accompanying notes 132-51.

views they wish to share simply cannot organize a *mass* demonstrati A speaker can broaden support for his views through a mass dem stration only if a large number of persons already share his opinic Without prior and meaningful access to the marketplace, howe such a following is difficult to obtain.

Individuals with perspectives not popular enough to suppor mass demonstration may still gain media attention through symb acts. For example, during the Vietnam War many young men pressed their objection to the war effort and the draft by burning th draft cards in violation of federal laws.[220] They argued that their d matic behavior was necessary to compensate for lack of media acce These young men insisted, therefore, that their acts were communi tions[221] protected by the first amendment.[222]

When the Supreme Court confronted the issue in *United States O'Brien*,[223] however, Chief Justice Warren rejected the view "that apparently limitless variety of conduct can be labeled 'speech' whe ever the person engaging in the conduct intends thereby to express idea."[224] Instead, Warren insisted that when "speech" and "no speech" elements are combined in a single course of conduct, "a suf ciently important governmental interest in regulating the nonspee

220. For an account of the draft-card burnings and the background of the federal laws pas in 1965 outlawing them, see Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burn Case*, 1968 SUP. CT. REV. 1. The relevant provisions of the Selective Service Act, which have been substantially amended since 1965, are in 50 U.S.C. app. § 462(b)(3) (1976)(penalizing a person "who . . . knowingly destroys, knowingly mutilates, or in any manner changes any s certificate"); the corresponding Selective Service regulations are in 32 C.F.R. §§ 1617.1, 162 (1967)(current relevant regulations, which do not provide for issuance of certificates to registrar codified at 32 C.F.R. §§ 1615.1-.9, 1621.1-.2 (1983)).

221. Both the Court and some court critics have tried at times to draw a line between protect speech and unprotected conduct. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376 (196 T. EMERSON, FREEDOM OF EXPRESSSION, *supra* note 1, at 9. As Professor Tribe has argued, ho ever, the difficulty with the distinction is that it does not exist:

> All communication except perhaps that of the extrasensory variety involves conduct. Moreover, if the expression involves talk, it may be noisy; if written, it may become litter. So too, much conduct is expressive . . . . Expression and conduct, message and medium, are thus inextricably tied together in all communicative behavior; expressive behavior is "100% action and 100% expression."

L. TRIBE, *supra* note 13, § 12-7, at 599-600 (footnotes omitted).

222. Peter Kiger, for example, burned his draft card and then pleaded a first amendment d fense to the court. Kiger contended that his act was newsworthy only because it was a crimin act. United States v. Kiger, 297 F. Supp. 339 (S.D.N.Y. 1969), *aff'd*, 421 F.2d 1396 (2d Cir.), *ce denied*, 398 U.S. 904 (1970); *see* J. BARRON, *supra* note 16, at 120-22. Kiger argued that televisi newsworthiness is determined by potential dramatic impact. *See id.*. In Kiger's case, WCBS-T gave him instant access to the airwaves for burning his card, access which was not otherwi available because CBS had refused to sell spot advertisements for social or political opinions. *I* at 121.

223. 391 U.S. 367 (1968).

224. *Id.* at 376.

element can justify incidental limitations on First Amendment freedoms."[225] The Court then upheld the anti-draft-card-burning legislation, finding that it furthered many of the goals and purposes of the selective service system.[226]

Under the *O'Brien* Court's analysis of symbolic conduct, as long as the government does not *directly* suppress the "communicative element," it may prohibit or control all other aspects of such "expression."[227] But, if the protesting individual has no meaningful method of communication other than the prohibited symbolic conduct, his view effectively is silenced while the government's apparent neutrality is perpetuated. Consequently, the legal doctrine surrounding "symbolic conduct," like the legal doctrine supporting "speech-plus," scarcely is neutral in the contest between stability and change. Furthermore, when these doctrines are coupled with dissidents' restricted access to mass media and the regulation of public forums, it becomes evident that the first amendment does not give a public voice to those advocating unpopular positions.

d. *Dissidence and unconventionality.* Dominant viewpoints of established groups need little protection given our constitutional scheme. Electoral accountability ensures that almost all persons who regularly disassociate themselves or interfere with expression of these dominant views cannot obtain or hold public office. The disadvantaged outsiders who lack the power or stature necessary to gain political influence through conventional methods of organization communication also are those who typically test the limits of free pression. The first amendment protections are most crucial to s outsiders.[228]

Yet an anomaly exists in our system of free expression. Altho the rhetoric surrounding the first amendment purports to protect expression,[229] our laws are, at best, essentially indifferent to creat opportunities for expression.[230] Telling an unpopular speaker that will incur no criminal penalty for his expression is of little value if has no effective means of disseminating his views. A right that can be meaningfully exercised is, after all, no right at all.[231] Because marketplace has severely restricted those inputs most challenging to status quo,[232] the resulting outputs similarly are skewed to favor est lished views.

Because dissidents' access to the public is effectively constrair through both legal doctrines and private control of mass communi tion, dissident groups that wish to question the fundamental beliefs a practices of society must often use unconventional means and terms

225. *Id.* at 376-77.

226. *O'Brien*, 391 U.S. at 376-77. Justice Harlan, concurring separately, stressed that O'Brien did not show that alternative, equally effective, ways of expressing his message were unavailable. *Id.* at 389 (Harlan, J., concurring). Given this society's alleged commitment to the marketplace of ideas, one wonders why Justice Harlan did not place the burden on the state to show that O'Brien had realistic alternatives. Furthermore, the Court's decision did not even compel the state to demonstrate the lack of a less restrictive means of fulfilling its stated purposes. At most, the state showed that the "communicative element" of O'Brien's conduct had not been gratuitously inhibited. *See* Ely, *supra* note 62, at 1484-85 ("gratuitous inhibition" is the term Dean Ely adopted to express the Court's requirement that the restriction must further a legitimate governmental interest).

227. In *O'Brien*, the Court created a four-part test to determine whether government regulation of symbolic speech was justified:

> [1] if it is within the constitutional power of government; [2] if it furthers an important or substantial government interest; [3] if the government interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377. If the government interest *is* related to the communicative content of the conduct, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and not *O'Brien*, is the controlling decision. *E.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 510, 511 (1969)(school authorities may not forbid students from wearing black armbands symbolizing opposition to the Vietnam War while allowing the wearing of other symbols of political or controversial significance). For a comparison of *O'Brien* and *Tinker*, see generally Ely, *supra* note 62, at 1491.

228. Yet, the courts "have certainly not decided to shape and use the law to protect th weaker groups and weaker critics who cannot rely on wealth or power over public opinion as tl safeguard." Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 Col L. Rev. 1282, 1310-11 (1942).

229. *But see supra* notes 25-53 and accompanying text (discussion of communications outs first amendment such as obscenity). The rhetoric rarely acknowledges the exception for obscen which is perceived by the Court as being outside the ambit of the first amendment. *See* Rotl United States, 354 U.S. 476, 485 (1957).

230. Consequently, Herbert Marcuse could argue that,

> with the concentration of economic and political power and the integration of opposites [e.g., government and press] in a society which uses technology as an instrument of domination, effective dissent is blocked where it could freely emerge: in the formation of opinion, in information and communication . . . . Under the rule of monopolistic media—themselves the mere instruments of economic and political power—a mentality is created for which right and wrong, true and false are predefined wherever they affect the vital interests of the society.

Marcuse, *Repressive Tolerance*, in R. Wolff, B. Moore, & H. Marcuse, *supra* note 191, at

231. This perspective has been accepted by the Supreme Court in other areas of law. F example, the Court has sought to guarantee that all classes of citizens may exercise their right counsel. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963)(sixth amendment requi states to provide indigent felony defendants competent legal counsel). Justice Harlan warned th decisions of this nature tend "to read into the Constitution a philosophy of leveling that would foreign to many of our basic concepts of the proper relation between government and society Douglas v. California, 372 U.S. 353, 362 (1963)(Harlan, J., dissenting). In a society fearful of th sort of leveling, however, the rights of the poor may be theoretical at best. *Cf.* Deutsch, *supra* no 149, at 190 n.78 (discussing whether or not constitutional right to attend private schools depends practical sense on ability to bear such financial burden).

232. *See* Z. Chafee, Free Speech in the United States 559 (1941). Any attempt to bypa the media and enter the market through mass demonstrations, soundtrucks, and the like fac increased governmental control through regulation of "speech-plus" and "symbolic conduct." *S supra* notes 200-27 and accompanying text.

reach the public's awareness. It is therefore easier to understand, if no easier to sympathize with, those who must resort to disruptive, even violent, conduct to make their grievance known in the marketplace. Such has been the history of all major social and political movements in this country.[233] Yet, the public must evaluate the content of the dissident's message while remaining impervious to any associated disruptive conduct if the market is to remain rational.

As noted above,[234] the public's ability to separate a message's packaging from its substance is, at best, doubtful. The public tends to focus more on the dissenting message's packaging than on its content precisely because of the dissident's unconventional personality, method of communication, and terminology. In fact, the public hostility and anxiety created by unconventional and disruptive presentations compound the difficulty the audience has in understanding, or even perceiving, the intended message. In contrast, orthodox positions generally are heard from respected "responsible" individuals in "responsible" contexts, thereby increasing their acceptability to the public. In order to gain acceptance by the public, the dissident must thus overcome both a socialization system that predisposes the public against unconventional perspectives, as well as a negative response to his message's packaging. The marketplace is, therefore, skewed to afford status quo views greater opportunity for public exposure and acceptance. It is hardly likely that the public will give dissident views a "rational" evaluation in this marketplace.

C. *The Marketplace as a Self-Fulfilling Prophecy.*

The marketplace of ideas is more myth than reality.[235] In practice, communications flowing into the market largely reflect conventional political, economic, and social points of view. Many would-be speakers gain only severely restricted access to the market, and diversity of perspective is largely nonexistent. In reality, the marketplace is hardly the laissez-faire type of free market the model suggests. Some critics, explaining its continuing viability, have noted that the marketplace functions as a self-fulfilling prophecy.[236]

233. For example, recall the "Black Revolution" of the 1960's and the Boston Tea Party.

234. *See supra* notes 169-227 and accompanying text.

235. The myth that the marketplace is open to ideas of social criticism and change has supplied the courts with a justification to approve the outlawing of behavior perceived as dangerous to norms and values embraced by dominant groups. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 501 (1951)("Whatever theoretical merit there may be to the argument that there is a 'right' to rebellion against dictatorial governments is without force where the existing structure of government provides for peaceful and orderly change.").

236. Baker, *supra* note 1, at 980.

Despite the aforementioned flaws, to those who accept traditiona values and conventional wisdom the market seems to be functionin successfully. Because dominant groups espousing established perspec tives have relatively complete access to the market and find their view largely adopted by the public, they, unlike dissidents, do not perceiv marketplace outcomes as predetermined, or as strongly influenced b socialization, access, or packaging. Because the perspectives that domi nant groups think "best" are quite likely adopted, to those who adher to dominant beliefs the marketplace does seem to reach the best resul Therefore, the marketplace model provides a dominant group with basis for its self-serving belief that the dominance of its perspectives i justified.[237] This byproduct of the market model might in turn explai the marketplace theory's persistence despite its serious and obviou malfunctions.

Dissidents, who have experienced only restricted access to th marketplace, and little if any success in it, will of course not see th market process as arriving at the best perspectives. Marketplace theor is, in the minds of some dissidents, nothing but an ideological construc designed to deflate protest and delude the populace into believing tha it, rather than an elite, controls its destiny.[238] Such dissidents perceiv stronger and more strident expressions or actions as necessary to over come these market failures. Consequently, neither holders of dominan views nor dissidents need feel pressured to alter their views in light o market outcomes.

Although some dissidents believe the marketplace inevitably is bi ased and thus should be rejected, others who believe that free expres sion preserves individuality continue to support marketplac imagery.[239] This latter group stresses the need for marketplace reform to assure equal access to all.[240] Such cries for reform are, however, no limited to those uttered by dissidents.

III. Reforming the Market

To correct the imbalance in perspective that the marketplace offer to the public and to aid the effective advocacy of dissident, underprivi leged, and unorganized groups or interests,[241] Professor Jerome Barron almost two decades ago, argued for a first amendment right o

237. *Id.*

238. This was the view of Marcuse. *See supra* note 230 (quoting Marcuse).

239. *See, e.g.*, Baker, *supra* note 1, at 980-81.

240. *See, e.g., id.*

241. According to one critic, "enormous freedom exists for the press, but [due to unequa access], not for the readership." Solzhenitsyn, *supra* note 99, at 23.

access.[242] He questioned the worth of a right to speak if, because of the unpopularity of the message or the poverty of the speaker, no viable forum existed. This argument is reminiscent of Meiklejohn's assertion twenty years earlier that by the words of the first amendment, "Congress is not debarred from all action upon freedom of speech. Legislation which abridges that freedom is forbidden, but not legislation to enlarge and enrich it."[243] Thus, a first amendment tightrope becomes apparent: government intrusion into the marketplace may lead to unacceptable governmental control and media censorship,[244] yet governmental refusal to regulate the media may permit those with political and economic influence to maintain private control of the major channels of communication. Either outcome defeats free expression as envisioned by the marketplace model of the first amendment. Despite the danger of government censorship, however, the Supreme Court has encouraged presentation of, and has at times approved of, market reform proposals.[245]

A. *Reform Proposals.*

By creating various access rights, reformers hope to give dissenting individuals or groups effective opportunities to communicate with large audiences. Reformers rely upon these access rights to overcome disparities in speakers' capitalization, communicative and marketing skills, perceptivity, popular acceptance, organizational skills, continuing commitment, stature, hard work, charisma, luck, and all other factors which traditionally determine a speaker's effectiveness in communicating with his audience. Yet such reliance seems unfounded; indeed, these reforms create significant problems of their own.

All reform proposals attempt to ensure either "adequate" or "equal" access.[246] Adequate access does not mean that everyone must

242. Barron, *supra* note 73, at 1678.

243. A. MEIKLEJOHN, POLITICAL FREEDOM 19 (1960); *see also* COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 127 (1947)(adopting a similar view). The Supreme Court, however, has struck down some statutes ostensibly designed to enrich the flow of ideas. *See, e.g.*, First Nat'l Bank v. Belotti, 435 U.S. 765, 790-92 & n.30 (1977); Buckley v. Valeo, 424 U.S. 1, 48-49 (1975).

244. For a discussion of the dangers of entrusting government with power to regulate media access, see *infra* text accompanying notes 269-75.

245. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1975)("It is the right of viewers and listeners, not the right of the broadcasters, which is paramount."); *see also* CBS, Inc. v. FCC, 453 U.S. 367, 394-95 (1981). *But see* Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 126-30 (1973).

246. *See generally* B. SCHMIDT, FREEDOM OF THE PRESS VS. PUBLIC ACCESS 18-22 (1976) (discussing purposes of access requirements). Some reformers have suggested that vigorous enforcement of antitrust laws would dismantle monopolistic control of mass communications. *See, e.g.*, B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION 184-86 (1975). The Court itself suggested this method of reform in Associated Press v. United States, 326 U.S. 1, 20 (1945)("Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom."). Even if such proposals successfully diversified ownership, however, the prohibitive cost of purchasing or beginning a newspaper or broadcasting station would still limit media ownership to the wealthy who, like their predecessors or competitors, are likely to choose only acceptable viewpoints for widespread dissemination. *See supra* note 195; *supra* text accompanying notes 186-99.

247. *See* Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 122 (1973); A. MEIKLEJOHN, POLITICAL FREEDOM 26 (1960); Emerson, *supra* note 75, at 818.

248. If the Constitution only requires that each view receive adequate access, the government could permissibly restrain the speech of individuals wanting to further support a position that someone has already expressed in the marketplace. *But see* Buckley v. Valeo, 424 U.S. 1, 39-51 (1976)(disallowing restraint of speakers even though their perspective may have already been expressed in the marketplace by others); Baker, *supra* note 1, at 982-83 & n.65.

249. *See supra* text accompanying notes 153-233.

250. Meiklejohn, for example, stressed that under the first amendment "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said." A. MEIKLEJOHN, POLITICAL FREEDOM 26 (1960). Meiklejohn did not specify, however, how to determine what speech is "worth saying."

251. The practical functioning of adequate access proposals reminds one of the capriciousness with which Humpty Dumpty attached meanings to words, *see* L. CARROLL, THROUGH THE LOOKING GLASS 94 (spec. ed. 1946), for one does not have any idea whether access is sufficient until the government so determines. *See* The Handling of Public Issues under the Fairness Doctrine and

be given a voice or that all perspectives must be granted equal time. It demands only that all viewpoints receive enough access to the public to allow members of society rationally to evaluate each viewpoint's truth and value.[247] Consequently, where "adequate," "fair," or "reasonable" access has been granted, further access is not required.[248]

For adequate access reform proposals to succeed in correcting the market, however, the public must be able to separate the form and style of a message from its substance. Unless the public can rationally evaluate a communication's content irrespective of its packaging, adequate access provides only the appearance, rather than the reality, of an opportunity to gain a foothold in the marketplace of ideas. Unfortunately, the public's ability to make these necessary distinctions is, at best, doubtful.[249]

Adequate access reform proposals also require objective criteria for determining whether access has been adequate, criteria that are difficult if not impossible to develop.[250] To know whether a perspective has received adequate access, a decisionmaker must consider the context, form, and content of the proposed and competing perspectives, as well as the accessibility, socialization, interests, and experiences of the audience. These considerations do not lend themselves readily to standardized judgments; thus, decisionmakers usually must rely on their own subjective judgment.[251] This of course opens the door for market failures of a different kind.

When government officials evaluate adequate access, arbitrary judgments are especially likely.[252] A speaker may fail to win acclaim for his idea in the marketplace either because of inadequate access or because the public rejected the merits of his argument. Consequently, before the government can determine whether access has been adequate, first it must decide implicitly the proper outcome of the marketplace debate.[253] If the citizenry rejects a perspective which government officials believe is "true" or "best," the officials might well account for the public rejection as due to inadequate market access. On the other hand, if a dissident group, with which government officials disagree, claims its viewpoint has not succeeded in the marketplace because of inadequate access, government officials are likely to assert that access was adequate and that the dissident viewpoint simply failed to persuade its audience.[254] If the first amendment requires that unpopular ideas be given an opportunity to defeat established dogma, government

the Public Interests Standards of the Communications Act, 58 F.C.C.2d 691, 707 (1976)(memorandum opinion and order on reconsideration of the fairness report)(Robinson, Comm'r, dissenting). For a description of the fairness doctrine, see *infra* text accompanying notes 277-80.

Lack of objective standards leads to further difficulties. A debate participant who loses the debate usually believes his perspective failed, not because of its lack of "rightness," but rather because of a malfunctioning market. The losing participant may therefore feel justified in using unconventional, disruptive methods to correct these market malfunctions. Such methods, however, might well further alienate his prospective audience. *See supra* text accompanying notes 232-33.

252. If the decision rests with an executive agency, there is always the risk that the doctrine will be used to censor and ultimately restrict the number, scope, and diversity of viewpoints gaining exposure. *See* Note, *Advocacy Advertising: A Question of Fairness and the Reasonable Agency*, 27 CATH. U.L. REV. 785, 802 (1978). *See generally* Note, *The Fairness Doctrine and Access to Reply to Product Commercials*, 51 IND. L.J. 756 (1976)(arguing that FCC may not insulate product advertising from fairness obligations); Note, *Fairness and Unfairness in Television Product Advertising*, 76 MICH. L. REV. 498 (1978)(examining effect of television product advertising upon viewers and investigating statutory basis of possible FCC intervention). Judicial oversight is available to prevent such censorship, of course, but judicial line-drawing can itself become a facade for governmental censorship. Many first amendment scholars, not surprisingly, have expressed concern over discretion arising from unclear boundaries limiting governmental action. *See, e.g.*, T. EMERSON, FREEDOM OF EXPRESSION, *supra* note 1, at 10.

253. Historical experience should foster a hearty skepticism about government officials' ability to decide what is "adequate" or "fair" political debate. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974)(rejecting the ability or appropriatenesss of judges deciding on an ad hoc basis which defamatory publications addressed issues of "general and public interest" and which did not).

254. Precisely such a governmental attitude may explain the disagreement between O'Brien's position and Justice Harlan's concurrence in United States v. O'Brien, 391 U.S. 367, 388 (1968), discussed *supra* note 226. The question whether other "adequate" opportunities for presenting O'Brien's views existed was central to Justice Harlan's position. *See O'Brien*, 391 U.S. at 388-89 (Harlan, J., concurring). O'Brien argued that the very continuation of the war and draft proved the inadequate access afforded his viewpoint, because his "correct" position would have been successful in a properly functioning market. Justice Harlan, in turn, presumed adequate access for

officials should not be allowed to determine the adequacy of access. In short, adequate access proposals almost inevitably further the status quo market bias.

Equal access reform proposals attempt to guarantee either all viewpoints or all individuals "equal" access to the marketplace of ideas. Reformers who advocate equal access for all *viewpoints*[255] believe that the marketplace can produce a "true" or "best" result, but reject the assumption that the public can separate a message's packaging from its substance. Consequently, by equalizing access for all viewpoints, these reformers seek to neutralize the advantages of "well-packaged" and frequently offered messages.[256] In addition to being based on a naive belief in the existence of a "true" or "best" result,[257] this reform approach also poses the danger of presenting the public with more information than it realistically can assimilate. Consequently, rather than guaranteeing all perspectives an opportunity for success, the equal access for viewpoints approach may only make the public perceive the marketplace as an arena full of nothing but "noise," and thereby decrease the public's willingness to reassess opinions it already holds.

Reformers advocating equal access for all *individuals* reject all the assumptions underlying the classic marketplace model: the existence of objective truth, the dominance of rationality, and the ability of the public to distinguish between a message's form and substance. These reformers justify continued support of the marketplace not because the market produces the "best" results, but rather because it helps to perpetuate a democratic system of government by allowing all people to participate equally in public decisionmaking.[258] The leveling effect of the equal access for individuals approach seems, however, inconsistent with the capitalist foundation of our society.[259]

Both forms of equal access, that which focuses on individuals as well as that which focuses on viewpoints, suffer additional infirmities. Both define ambiguously what must be equalized. For example, should a viewpoint indifferently held by a few receive access equal to

O'Brien's perspective did exist and that O'Brien's view merely had insufficient support to change governmental policy. *See* Baker, *supra* note 1, at 987-88.

255. Meiklejohn's use of the town meeting image to symbolize first amendment goals appears to envision equal access for all viewpoints. *See* A. MEIKLEJOHN, POLITICAL FREEDOM 26 (1960).

256. Baker, *supra* note 1, at 983.

257. *See supra* text accompanying notes 121-51.

258. *See* A. BICKEL, *supra* note 176, at 62; Baker, *supra* note 1, at 984; Scanlon, *Theory of Freedom of Expression*, *supra* note 40, at 214.

259. *See* Baker, *supra* note 1, at 984.

that of a perspective passionately held by many?[260] If so, scarce resources may be wasted on trivial ideas,[261] and the marketplace may reflect inaccurately the strength, and possibly the value, of positions competing for adherents.[262] Furthermore, guaranteeing such equal access is virtually impossible without an intricate and extensive leveling system of public subsidies and spending restrictions. Even if government officials could design and properly administer such a system, there is no guarantee that an opportunity for equal access would create an opportunity for equal influence.[263] Regardless of equal access, values in which the public have been indoctrinated or socialized will still prevail, and speakers with stature, influence, and skill will still be more persuasive than those without.[264] Because equal access still allows variance in the opportunity to influence among differing individuals or viewpoints, equal opportunity to influence can be attained only through affirmative action such as by giving the least popular or least able speaker the most access to the marketplace.[265]

260. *Cf.* Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 66-77 (the equality created by making certain goods and services free, or by subsidizing their use by some individuals, may lead to grossly inefficient use of scarce resources). In a market where communications are costless or publicly subsidized, individuals or groups with only the most remote or incidental interest in an issue's outcome would have equal input with those for whom the issue may be a matter of life and death. One must question whether such inequality of concern or impact should be irrelevant in allocating communicative opportunities.

The voting-rights cases mandating a one person/one vote requirement suggested that, at least for elections, the Constitution requires governmental indifference to the intensity with which public views are held. *See* Reynolds v. Sims, 377 U.S. 533, 561 (1964). In an election situation, however, voter intensity is accounted for through the voters' ability and willingness to organize and lobby to influence both election outcomes and the behavior of elected officials. A system of truly equal market access, however, would need to guarantee equality of all communication, including lobbying techniques. Consequently, it is unlikely that equal market access systems could register differences in the intensity with which public views are held.

261. Consequently, Meiklejohn insisted that the first amendment protects only speech "worth saying." *See supra* note 250 (quoting Meiklejohn).

262. *See generally* Baker, *supra* note 1, at 989.

263. The Court noted this concern in Buckley v. Valeo, 424 U.S. 1, 56-57 (1976).

264. Martin Mayer, criticizing the access reform movement in his popular study *About Television*, has written that

> access to *media* means nothing at all . . . . Access to *audience* might have some value. . . . But access to audience must be earned, with talent. There is something bittersweet funny about the sight of all these groups of ardent young lawyers and graduate students and junior executives at foundations, none of whom can write a song anyone would sing or a book anyone would read or a play anyone would act, none of whom holds a position which gives his thought significance in the lives of others or could gather twenty-five people to hear him speak at a meeting—"demanding" access to the great audience of an entertainment medium.

M. MAYER, ABOUT TELEVISION 388 (1972), *quoted in* B. SCHMIDT, *supra* note 246, at 212.

265. *Cf.* N. POLSBY, *supra* note 149, at 135 (discussing Dahl's principle that those with views outside of the "political consensus" may require enormous resources to achieve their goals).

This exposes a dilemma of marketplace reform. Earlier I argued that market outputs will be biased in favor of dominant values because certain individuals of stature, such as public officials and established interest group leaders, exercise particular influence when they communicate.[266] Correction of this imbalance would demand greater access to the marketplace for those lacking such stature. Such a system would give the greatest access opportunities to those who have no responsibility or accountability to act in the public interest. The development of opinion leaders and individual expertise would be discouraged.[267] Those individuals perceived by the public as without wisdom and experience would receive greater access than those believed to have such qualities. Thus, overcoming the marked bias in favor of the statured communicator may create an even more unfortunate result: it may require us to be confronted most by those who may, in fact, have the least of significance to say. Equal access reform proposals, therefore, either prove insufficient to correct marketplace bias, or create problems equal to those they correct. Additionally, all market reform proposals pose the danger of unacceptable governmental interference with the market.

B. *The Dangers of State Intervention.*

Because market reform proposals create the need for government oversight of the mass media, of the allocation of resource subsidies, and of the enforcement of expenditure restrictions, all such proposals would generate significant government interference in the marketplace. The success of these reform proposals would require intricate and extensive government regulation. If the principle of equal access were taken seriously, for example, the likely result would be "a complex of redistributive measures which would make current welfare programs look extremely modest."[268] Thus, such reform measures may put "the head of the camel inside the tent and enable administration after administration to toy with [the media] in order to serve its sordid or its benevolent ends."[269]

Constitutional limitations on government ensure the public's freedom from arbitrary governmental interference in a restricted number of areas, which are predominantly political rather than economic.[270]

266. *See* text accompanying note 234.

267. *See* Baker, *supra* note 1, at 989.

268. Buchanon, *Autonomy and Categories of Expression: A Reply to Professor Scanlon*, 40 U. PITT. L. REV. 551, 557 (1979).

269. Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 154 (1973)(Douglas, J., concurring).

270. *See* Manning, *Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations*, 55 NW. U.L. REV. 38, 46-53 (1960).

The first amendment has been a primarily negative force preventing government from prohibiting, harassing, or interfering with speech or other forms of communication.[271] If courts permit reformers to alter the first amendment's traditional role as a limitation on governmental authority so as to authorize affirmative government action to apportion access rights to the marketplace, the judiciary unwittingly may create a massive censorship system masquerading as marketplace reform.

Indeed, entrusting government with the power to determine media access creates at least three dangers. First, if government requires media to bear the cost of providing access for those opposing a viewpoint that the media have presented, media managers may simply choose not to present controversial issues.[272] Second, such a process might invite manipulation of the media by the very governmental bureaucrats appointed to ensure access.[273] Finally, governmental interference may escalate from access regulation to more dubious types of governmental control. For example, giving government administrators discretion in access decisions risks the use of administrative machinery to force the

271. Professor Thomas Emerson attempted to list the possible ramifications of a system of governmental censorship. He studied the contexts in which governments have invoked censorship and the actions of the responsible agencies. Emerson found that:

> (1) There was a consistent tendency to overestimate the need for restriction upon freedom of expression. . . .
> (2) The forces generated in the administration of limitations on freedom of expression tended to push application of the measures to extremes. . . .
> (3) The difficulties in framing definite and precise limitations were not solved. . . .
> (4) . . . [A]dministration of the limitations resulted in the creation of an enforcement apparatus which embodies practices most obnoxious to a free society. . . .
> (5) In practice the restrictions were employed to achieve objectives quite different from the theoretical purposes of the law. . . .
> (6) The social gains attributable to the restrictions proved to be minimal. . . .
> (7) On the other hand, the social losses were heavy. The impact of the restrictions was felt not only by those convicted, but by many who were merely prosecuted and by countless others who could not accurately judge the boundaries imposed on freedom or those who were fearful to take the risk.

T. EMERSON, FIRST AMENDMENT, *supra* note 1, at 23-24. Many similar ramifications are likely to result from governmental programs and agencies responsible for marketplace "reform."

272. For example, television networks have rejected requests for the purchase of noncommercial advertisements (advertisements pertaining to issues not directly related to promoting the sale of a product or service) by claiming such advertisements would trigger the FCC's fairness doctrine. *See* Lee, *The Problems of "Reasonable Access" to Broadcasting for Noncommercial Expression: Content Discrimination, Appellate Review, and Separation of Commercial and Noncommercial Expression*, 34 U. FLA. L. REV. 348, 352 (1982). For a discussion and evaluation of the fairness doctrine, see *infra* text accompanying notes 277-314.

273. Even Newton Minow, former Chairman of the FCC, has acknowledged that groups can and have harassed stations by convincing scores of individuals who have been criticized on the air to request reply time under the fairness doctrine: "Inevitably, stations react by trying to avoid such critical programs." Minow, *Foreword* to S. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA at XI (1978). Walter Cronkite of CBS News has testified that "[i]t is only natural that station management should become timid, and newsmen should sidestep controversial subjects rather than face the annoyance of such harassment." *See id.*

media to conform to official positions. Such governmental supervision thus could undermine the media's role as government critic and antagonist.[274] Therefore, rather than guaranteeing a voice for dissenters, access reforms may well protect government from having to confront a potent media adversary.[275]

As the foregoing analysis reveals, market reform proposals either continue the status quo bias of the marketplace or create new and potentially dangerous problems. A review of two governmental attempts at market revision,[276] the Federal Communications Commission's (FCC) fairness doctrine and the Federal Election Campaign Acts (FECA), demonstrate that experience has confirmed this conclusion.

1. *The Fairness Doctrine.* Since the 1940's the FCC has placed a "fairness" duty upon radio and television broadcasters.[277] Broadcasters must provide time, free of charge if necessary,[278] for the coverage of

274. *See* Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATION 476-77 (1947).

275. Nevertheless, corporations that engage in the media business and government may have more areas of common agreement than disagreement. *See infra* part IV and text accompanying notes 352-63.

276. Although courts have upheld legislative attempts at market reform, the government has never been affirmatively compelled by the courts to protect or enhance anyone's market opportunities. The Supreme Court has refused to create a constitutionally mandated access right, *see* Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 127 (1973), or a right to know, *see* Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978). *But cf.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)(absent some overriding circumstance, the first amendment guarantees the public and the press the right to attend criminal trials, despite unopposed request of defendant for closed trial).

277. *See* Barrow, *The Equal Opportunities and Fairness Doctrine in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CIN. L. REV. 447, 462 (1968). For a concise, layman's explanation of the fairness doctrine, see A. SHAPIRO, MEDIA ACCESS 107-217, 247-54 (1976). For an early history of the doctrine and its original purpose, see Simmons, *Fairness Doctrine: The Early History*, 29 FED. COM. B.J. 207 (1976). Key fairness doctrine documents include: Broadcast Procedure Manual, 39 Fed. Reg. 32,288, 32,290 (1974); The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1 (1974) [hereinafter cited as Fairness Report]; Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10,415 (1964); Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949) [hereinafter cited as Editorializing]. For an excellent contemporary analysis of the constitutional questions raised by the doctrine, see Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213; *see also* Schenkkan, *Power in the Marketplace of Ideas: The Fairness Doctrine and the First Amendment*, 52 TEX. L. REV. 727, 733-40 (1974).

278. Reply time often has to be provided at the broadcaster's expense, *see* Cullman Broadcasting Co., 40 F.C.C. 576, 577 (1963); Fairness Report, *supra* note 277, at 14 n.13; the FCC feared that otherwise the sale of media time would merely convert economic power into political power. This fear also may explain the Supreme Court's unwillingness in Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), to accept the Democratic Party's insistence that CBS was required to sell time for editorial advertisement. Such a ruling would only protect groups who could pay for such advertisements and thus still would most support economically comfortable organizations. *Id.* at 123.

controversial issues of public importance[279] and for the presentation of contrasting views concerning such issues.[280] Furthermore, individuals personally attacked during a broadcast on these issues are entitled to "reply time" so they can broadcast a response to the attack.[281] The fairness doctrine developed because the electronic media were allegedly unwilling to open their communication channels to others.[282] Fairness regulations presume that when a few individuals or groups control a critical medium, they will stifle competition of ideas and block the emergence of truth.[283]

The fairness doctrine epitomizes the tension within the first amendment between the broadcasters' right to control program content and the audience's need for access to diverse perspectives.[284] In *Red Lion Broadcasting Co. v. FCC*,[285] the Supreme Court upheld the FCC's reply time requirement,[286] and found that rather than violating the broadcasters' first amendment rights, the fairness doctrine furthered the

279. A holder of a federal broadcast license is required to survey community interests within the receiving area of his licensed broadcast signal. Fairness Report, *supra* note 277, at 10 & n.9 (citing Primer on Ascertainment of Community Problems by Broadcast Applicants, 20 F.C.C.2d 880, 881 (1969)). A nontrivial portion of broadcast time must be devoted to the treatment of public issues deemed significant within his broadcast area. Fairness Report, *supra* note 277, at 7, 9. Each broadcaster bears this expense, if commercial sponsorship is unavailable, whether or not the licensee would personally have chosen to forebear such coverage. *See supra* note 278.

280. Each licensee who broadcasts a partisan perspective on any controversial public issue must also provide a fair representation of other views, although not necessarily on the same program and not necessarily in equal proportion to the time, or timing, of the original broadcast. Fairness Report, *supra* note 277, at 7-8, 10-11. This obligation is not lessened even when other broadcasters in the same market have carried opposing views, *id.* at 10-11, or when such views already may have been featured in other sources of news and opinion (such as newspapers and magazines) readily accessible to persons within the same market. *See* Brandywine Main Line Radio, Inc. v. FCC, 473 F.2d 16, 63-80 (D.C. Cir.)(Bazelon, J., dissenting), *aff'g* 27 F.C.C.2d 565 (1972), *cert. denied*, 412 U.S. 922 (1973).

281. *See* Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates, 8 F.C.C.2d 721, 723-24 (1967).

282. *See* M. ERNEST, THE FIRST FREEDOM 176 (1946)(quoting Sen. Burton K. Wheeler)(radio broacasters fail to present all views).

283. *See* Editorializing, *supra* note 277, at 1249. For an attack on the premise that the broadcasting industry is monopolistic, see R. POSNER, ECONOMIC ANALYSIS OF LAW § 22.3, at 312-13 (1972).

284. For a discussion of broadcast regulations and the first amendment, see generally B. OWEN, *supra* note 246; B. SCHMIDT, *supra* note 246; Robinson, *The FCC and the First Amendment: Observations on Forty Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967).

285. 395 U.S. 367 (1969). During part of a "Christian Crusade" broadcast series aired by the defendant station, the Reverend Billy James Hargis attacked author Fred J. Cook. Hargis, discussing Cook's book, *Goldwater—Extremist on the Right*, claimed that a newspaper had fired Cook because Cook had falsely leveled charges against a city official and that Cook had subsequently worked for *The Nation*, "one of the most scurrilous publications of the left." *Red Lion*, 395 U.S. at 371 n.2. Cook demanded free reply time and, upon the station's refusal, filed a formal letter of complaint with the FCC.

286. The Court contended:

> [the first amendment] to preserve an uninhibited marketplace of ideas

first amendment's goal of informing the public.[287] The Court attempted, however, to limit the *Red Lion* opinion to the broadcast medi under a "public airwaves" rationale.[288] Because the number of available television and radio frequencies cannot accommodate all thos wishing to broadcast their message, the government licensing of fr quency use was justified to prevent airwave interference from cripplin the broadcast system.[289] On the basis of this practical justification fo governmental regulation, the Court upheld the doctrine's regulation program content.[290] As a result, government is now fully involved i and is allegedly responsible for the opening of communication char nels to groups otherwise unable to command access.[291]

> market, whether it be by the government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.

Red Lion, 395 U.S. at 390. In CBS, Inc. v. FCC, 453 U.S. 367, 397 (1981), the Court held constitutional a statute that provided candidates for federal office with "reasonable access" to the broadcasting media. *See* 47 U.S.C. § 312(a)(7) (1976). Chief Justice Burger, writing for the majority reiterated the conclusion that " 'it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.' " *Id.* at 395 (quoting *Red Lion*, 395 U.S. at 390)(emphasis omitted).

287. *Red Lion*, 395 U.S. at 375.

288. Indeed, the Court has subsequently indicated that *Red Lion* has only such limited applicability. *See* First Nat'l Bank v. Belotti, 435 U.S. 765, 791 n.30 (1978).

289. *See Red Lion*, 395 U.S. at 389:

> There is nothing in the First Amendment which prevents the government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

290. *Id.* at 388-90. The logic of *Red Lion*, however, is flawed. Although there may be a threshold need for governmental regulation, techniques less intrusive than the fairness doctrine could solve problems of frequency interference. *Cf.* Shelton v. Tucker, 364 U.S. 479, 488 (1960)(insisting that state use least restrictive means when regulating first amendment interests).

291. Many states, responding to similar claims of unfair access distribution, enacted statutes requiring newspapers either to retract defamatory statements they had circulated or to publish a reply by the defamed individual. The Court held these statutes unconstitutional in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974). In 1972 Tornillo was a candidate for the Florida House of Representatives. The *Miami Herald* on two occasions printed editorials criticizing of his candidacy. In response, Tornillo demanded the paper print verbatim his replies. The *Herald* refused. *Id.* at 243-44. Tornillo brought suit under the Florida "right of reply" statute, FLA. STAT. ANN. § 104.38 (West 1973)(repealed 1975):

> [I]f any newspaper in its columns assails the personal character of any candidate for nomination or for election, . . . [or] attacks his official record, . . . such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to.

Tornillo argued that restriction of entry into the media marketplace had given newspapers the same control over communication that limited frequencies gave to broadcasters. He stressed that the economic environment had caused American newspapers to become big business, placing "in a few hands the power to inform the American people and shape public opinion." *Tornillo*, 418 U.S. at 250. Consequently, the reply statute was a rough counterpart to the FCC's fairness doc

The fairness doctrine raises innumerable questions. Who determines whether a broadcaster is being fair? What controversial issues of

trine reply provision and should be held equally constitutional. The Court rejected Tornillo's argument. *Id.* at 254. The Court feared that the economic ramifications of a right to free reply space would "chill" the press. *Id.* at 257-58. The Justices also were concerned that the Florida statute would intrude upon the function of editors. *Id.* at 258.

The apparent contradiction between *Tornillo* and *Red Lion* must be considered. If scarcity of resources is the basis for regulation, any distinction between the cases seems unjustified, both in the context of the cases themselves, *see* F. FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT 5-7 (1975)(*Miami Herald* much less subject to meaningful competition than *Red Lion* broadcast licensee), and in the context of their corresponding media forms today. As the number of newspapers decreases and the cost of running successful ones increases, many communities have fewer papers than broadcast stations. *See "Freedom and the First Amendment"*, Remarks by William S. Paley, Chairman, CBS, Inc., delivered at The Family of Man Awards Dinner held by the Council of Churches of the City of New York 4-5 (Nov. 16, 1982)(nearly 8½ broadcasting stations and cable systems for each daily newspaper in 1981)(copy on file with author) [hereinafter cited as Paley Speech]. But even if we accept the distinction and assume persons can enter the print media more easily than the broadcast media, the question remains why the purported openness of the newspaper market cannot be considered an important factor in assessing the significance of concentration in the broadcast media. Conceivably, an alternative conclusion to draw from this situation is that legislative action is not required in any media branch, i.e. the print media, as long as people can gain access somewhere within the mass media as a whole.

In considering why the Court has allowed broadcasters to be closely regulated under the auspices of the FCC while it has protected the print media, at least three factors merit discussion. First, the print media in the United States has a history and tradition of crusading against, and being protected from, governmental interference. *But cf.* Act of July 14, 1798, ch. 74, 1 Stat. 596 (Sedition Act, expired 1801); Espionage Act, ch. 30, § 3, 40 Stat. 217, 219 (1917)(repealed 1948). Because electronic media are relatively young and have always been subject to some governmental control, there is no tradition of freedom to overcome and there is thus less appearance of illegitimate governmental action. If the first amendment's concern is only to maintain the *appearance* of a government prohibited from illegitimate interference with the media, the difference between *Red Lion* and *Tornillo* makes sense.

Second, unlike the electronic media's licensing system, the print media has an unlimited number of frequencies, i.e., printing presses; accordingly, there is no threshold need for government rationing. The argument that the prohibitive cost of starting a newspaper limits access in a way analogous to the scarcity of broadcast frequencies, and therefore justifies state involvement, has not been successful. Our existing capitalist system of value distribution therefore has been preserved: although the press may be an economically scarce resource, it remains generally available to the wealthy. The well to do, however, are not assured access when dealing with a scientifically scarce resource, the electronic media, which by necessity is distributed by a nonmarket process. Thus, because the science of the broadcast media has practical imperatives, market reform in this latter setting is not as clearly inconsistent with capitalist principles as is the case with the print media.

The first two suggested grounds for distinguishing the press from the electronic media both address the *appearance* of governmental involvement. Yet the marketplace model assumption of open access makes no distinction between limitations from governmental and nongovernmental sources; it can tolerate limits from neither. If market reformers intend to break down elitist control of communications, it is indefensible to distinguish the press from the electronic media. *Cf.* Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 2 (1976)("the Court should now acknowledge that for first amendment purposes broadcasting is not fundamentally different from the print media").

The third potential distinction between *Red Lion* and *Tornillo* is of a somewhat different order. Certain types of individual behavior, including some kinds of speech, are capable of creat-

public importance must a broadcaster include in his programming? What is a reasonable balance between contrasting views on issues? How should groups be guaranteed an opportunity to speak their views over the airwaves? Does government intervention to balance public issue programming improperly inhibit broadcasters from determining the content of their programming? Does government intervention itself create the market distortion it is supposed to prevent?

The requirement that issues be both *controversial* and *of public importance* before the fairness doctrine can be invoked is an understandable attempt to ensure that scarce and expensive resources are not wasted with trivialities or matters of only marginal public concern.[292] This requirement, however, unavoidably results in government officials or judges determining the agenda of issues worthy of public consideration. The scenario of governmental officers debating what the public does and does not have a right to know is constitutionally questionable at best. The fairness doctrine inevitably requires repeated ad hoc evaluations of whether coverage of a specific "issue" would be wasteful, a mere whetting of public curiosity, or would convey information about which the public has a justifiable interest. Such determinations by government officials conflict with the very core of first amendment marketplace theory.[293]

To minimize the potential danger and arbitrariness of purely subjective evaluations of an issue's importance, the FCC has added a number of "objective" criteria for determining which issues are both important and controversial.[294] "Public importance" is determined, at least in part, by the degree of media coverage and the degree of attention an issue receives from government officials and other community

ing highly impassioned community responses. When dealing with such areas, federal courts have been more comfortable with decisions made by federal agencies such as the FCC, representing national communities, than with those made by state institutions representing secluded local communities such as in *Tornillo*. *Cf.* Ingber, *supra* note 124, at 866 & n.31 (noting that federal statutes are more likely to survive "lack of notice" challenges than are state laws). *But see* Miller v. California, 413 U.S. 15, 24 (1973)(local community standards to be applied in defining obscenity). Judicial acceptance of federal but not state reform proposals, therefore, may protect a national dominance in the creation of orthodoxy in the face of challenges from locally dominant groups whose views do not conform to those of national elites. This point, as well as that suggesting that prevention of the *perception* of governmental bias of the market is the true function of the first amendment, will be developed more fully *infra* in part IV.

292. This concern with not wasting scarce media resources is precisely the ground upon which the Court concluded, in Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 125 (1973), that an unlimited right of access would not best serve the public interest.

293. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

294. Fairness Report, *supra* note 277, at 13-14.

leaders.[295] "Controversiality" demands a consideration of these same factors, as well as whether an issue has been debated vigorously within a given community.[296] In addition, the fairness rules require only that "major viewpoints and shades of opinion"[297] be aired; they do not require that all opinions on the subject be presented.[298] Consequently, the views of small minorities may well not receive any assistance from the doctrine.

Obviously there is a tension between a first amendment designed to protect speech that the community wishes to silence[299] and a fairness doctrine contingent upon debate among substantial elements of the community. Because ideas must already be popular to some degree to merit the doctrine's application,[300] the doctrine gives government assistance to viewpoints precisely when government involvement is least important. In fact, the doctrine grants further access to views of significant community leaders that already have been actively debated within the marketplace. This merely compounds the market advantage held by community leaders over those who find the media intractable and community leaders insensitive or unsympathetic.

In addition to these theoretical difficulties, the regulatory apparatus created to enforce the fairness doctrine has potential for abuse. During the Nixon presidency, executive branch officials attempted to use the FCC to reduce media criticism of the administration[301] and

295. *See id.* at 11-12. Polls and contacts with previously identified community leaders are required for the determination of "public importance." Because such a process of information gathering is likely to reflect rather than challenge the concerns of existing leadership, it contains an inherent bias in favor of the status quo.

296. *Id.* at 12.

297. *Id.* at 15 (emphasis omitted).

298. *See generally* Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971).

299. Even the FCC, at an earlier time, required that licensees ignore the "possible unpopularity" of a viewpoint. Editorializing, *supra* note 277, at 1250, para. 7. This position is clearly not in accord with the standards articulated in the 1974 Fairness Report. *See* Fairness Report, *supra* note 277, at 11-12.

300. If the rest of the community scoffs at a lone dissenter's ideas, there is no debate and therefore no fairness requirement. *See* Fairness Report, *supra* note 277, at 11-12. If rejection of the idea is due to insufficient access for a full articulation of the viewpoint, or to unappealing non-media packaging, then the fairness doctrine will deny an idea access because it did not have sufficient *initial access* to develop beyond an embryonic stage. These circularity problems should not be discounted.

301. In 1970 Charles Colson, the Special Counsel to the President, wrote a memo to White House Chief of Staff H.R. Haldeman containing the following:

> I will pursue with Dean Burch [the FCC Chairman appointed by President Nixon] the possibility for an interpretive ruling by the FCC on the role of the President when he uses TV, as soon as we have a majority. I think this point could be very favorably clarified and it would, of course, have an inhibiting impact on the networks. . . . I think we can dampen their ardor for putting on "loyal opposition" type programs.

Washington Post, Dec. 3, 1973, § A, at 24, col. 5 (memorandum reprinted).

In addition, the New York Times contended in May 1974 that the Nixon White House had actively considered the imposition of reprisals against the Washington Post for its Watergate coverage by not renewing broadcast licenses held by the Post's parent company. N.Y. Times, May 16, 1974, at 1, col. 3.

punish those members of the media viewed as the worst offenders.[302] There is no reason to believe that this abuse of process is limited to the Nixon/Watergate era. Professor Fred W. Friendly has uncovered evidence that in 1963 the Democratic National Committee (DNC) used the evolving reply right for partisan political purposes.[303] Democrats discovered that the fairness doctrine could be used to inhibit broadcasts favoring conservative positions associated with Senator Barry Goldwater. According to Friendly, the DNC set up and funded a "nonpartisan" committee to monitor such broadcasts, and, by demanding free reply time, the DNC sought to harass stations that carried right-wing programs. The DNC thus hoped not merely to gain balanced coverage but to inhibit anti-Democratic broadcasts.[304] One cannot help but wonder if the doctrine's potential for governmental abuse of this sort is worth whatever marginal advantage disadvantaged groups obtain through governmental interjection.[305]

The impact of the fairness doctrine on the marketplace of ideas may, in fact, be counterproductive. The fairness requirement may encourage bland, noncontroversial programming as a result of both eco-

302. The New York Times published a memo written by White House Assistant Jeb Stuart Magruder to Chief of Staff H.R. Haldeman suggesting that "the FCC begin 'an official monitoring system' to prove bias on the part of the networks." N.Y. Times, Nov. 1, 1973, at 34, col. 3.

303. *See* Friendly, *What's Fair on the Air?*, N.Y. Times, Mar. 30, 1975, § 6 (magazine), at 12.

304. An excerpt from a report by Wayne Phillips, the executive at the DNC who set up the monitoring effort, indicates the DNC's intent: " '[E]ven more important than the free radio time, however, was the effectiveness of this operation in inhibiting the political activity of these right-wing broadcasts.' " *Id.* at 37, col. 1. Although a DNC attempt simply to give airtime to Democratic viewpoints would be quite consistent with the premises of the fairness doctrine, another DNC memorandum quoted by Friendly shows that this was not the DNC's primary motive:

> The right-wingers operate on a strictly cash basis and it is for this reason that they are carried by so many small stations. Were our efforts to be continued on a year-round basis, we would find that many of these stations would consider the broadcast of these programs bothersome and burdensome (especially if they are ultimately required to give us free time) and would start dropping the programs from their broadcast schedule.

N.Y. Times, Apr. 27, 1975, § 6, pt. 1 (Magazine), at 70, col. 4 ("letters" section). This abuse of the fairness doctrine obviously is similar to another of Professor Emerson's conclusions about censorship systems. *See supra* note 271 (quoting Emerson).

305. These concerns with potential government abuse echo a number of the dangers Professor Emerson identified in systems of censorship. *See supra* note 271 (quoting Emerson). He concluded that governments often overestimate the need for restriction, have difficulties in framing definite and precise limitations, and utilize restrictions which only minimally contribute to articulated goals. *See id.*

nomic cost and institutional insecurity.[306] Broadcasters, fearing the cost of balanced presentations or the expense of defending against a complaint for unbalanced programming, may avoid controversial issues altogether. In 1979, for example, over 5000 such complaints were filed with the FCC.[307] Only a handful were successful,[308] but those successes demonstrate a governmental power to control aspects of the media. The mere existence of this power chills some broadcasters and causes others to censor themselves.[309] Given the indefiniteness of the standards to which the FCC will hold broadcasters and the significant expense and disruption of defending against a complaint,[310] broadcaster conservatism should take no one by surprise.[311] Rather than encouraging diversity in public debate, a "fair" market may instead be dominated by a dull "centrism."[312]

The fairness doctrine thus has not assured marketplace access to those individuals, groups, and viewpoints least able to gain public ex-

306. Many critics of the fairness doctrine argue that it discourages journalists from engaging in discourse on important social issues. *See* Paley Speech, *supra* note 291, at 7; *see also* Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15, 19-23 (1967); Robinson, *supra* note 284, at 136-40; *cf.* Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. REV. 1, 70-71 (1973)(discussing right of reply).

The possibility that journalists will shirk their responsibility to address controversial issues is accentuated because the FCC has more vigorously enforced the requirement that broadcasters present the issues that they choose to air in a balanced fashion than it has enforced the requirement that licensees devote a reasonable time to issues of public importance. Simmons, *The Problem of "Issue" in the Administration of the Fairness Doctrine*, 65 CALIF. L. REV. 546, 548 (1977). Thus, broadcasters can minimize the doctrine's impact on their programming by minimizing the coverage of controversial issues.

307. Paley Speech, *supra* note 291, at 3.

308. *Id.*

309. *Id.*

310. For example, Sherwyn H. Heckt, 40 F.C.C.2d 1150 (1973), a fairness doctrine case resolved in favor of the licensee, consumed 480 hours of station personnel time and legal expenses of about $20,000. *First Amendment Clarification Act of 1977: Hearings on S.22 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, & Transportation*, 95th Cong., 2d Sess. 62 (1978)(statement of Henry Geller); *see* H. GELLER, THE FAIRNESS DOCTRINE IN BROADCASTING: PROBLEMS AND SUGGESTED COURSES OF ACTION 40-43, 134 (Rand Corp. No. R-1412-FF 1973).

311. *See* Interview with Bill Monroe by Steven J. Simmons (Sept. 12, 1975), *quoted in* S. SIMMONS, *supra* note 273, at 217 (describing broadcaster conservatism in face of FCC complaints).

The broadcasters' responses to the fairness doctrine are reminiscent of Professor Emerson's conclusion that the impact of censorship is felt not only by those convicted, but also by many merely prosecuted, and by countless others who cannot accurately judge the boundaries imposed on freedom or who are fearful to take the risk of prosecution. *See* T. EMERSON, FIRST AMENDMENT, *supra* note 1, at 23-24 (quoted *supra* note 271).

312. This tendency toward conservatism is eloquently criticized in Lange, *supra* note 306, at 77-89. Broadcaster conservatism is further encouraged by the Commission's statement of duties under the fairness doctrine. Fairness Report, *supra* note 277, at 15 ("the broadcaster . . . is not expected to present the views of all political parties no matter how small or insignificant").

posure. Indeed it has enhanced access differentials between tradit positions and unconventional views. It also has been employe achieve objectives inconsistent with the doctrine's theoretical pose.[313] Cogent arguments have been made that instead of corre marketplace flaws and biases, the fairness doctrine has compou them.[314]

2. *Federal Election Campaign Acts.* The Federal Election C paign Acts (FECA)[315] suffer from similar infirmities. In 1976 Supreme Court confronted a number of constitutional challenges t key provisions of FECA in *Buckley v. Valeo*.[316] With FECA, Con attempted to reform the marketplace by limiting the influence o vantaged individuals or groups during federal election campa FECA appeared to foster "equal" access for both viewpoints and viduals whereas the fairness doctrine assures "adequate" present for varied viewpoints.

FECA combined complex contribution and expenditure li tions,[317] reporting and disclosure requirements,[318] and public subs

313. The Supreme Court's recent approval of federal legislation that provides federal dates with "reasonable access" to the broadcasting media, *see* CBS, Inc. v. FCC, 453 U.S. 3 (1981), may itself lead to abuse. Justice Stevens, in dissent, expressed the fear that the approach to the candidate access claims "creates an impermissible risk that the Commi evaluation of a given refusal [to grant a candidate access time] by a licensee will be biased—appear to be biased—by the character of the office held by the candidate making the reques at 419.

314. "I have no doubt," remarked William S. Paley, the Chairman of CBS, "that broad would produce a greater abundance of diverse and informative programming" if the fairne trine was eliminated along with the provisions for equal time and the criteria for access. Speech, *supra* note 291, at 7. In fact, there has been some movement, though unsucces repeal the fairness doctrine and other equal opportunity requirements. *See, e.g., Repeal of Time" Requirements: Hearing on H.R. 6013 Before the Subcomm. on Communication of the Comm. on Interstate & Foreign Commerce*, 96th Cong., 2d Sess. 5 *passim* (1980).

315. Regulation of federal elections was accomplished through numerous statutes and a ments. *See* Presidential Election Campaign Fund Act, Pub. L. No. 92-178, 85 Stat. 562 Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (both statutes *amen* Federal Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, *and* F Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, *and* Federa tion Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339)(both statutes c as amended in scattered sections of 2 U.S.C., 26 U.S.C., and other scattered sections). otherwise noted, this statutory scheme will be discussed as the Court confronted it in Buc Valeo, 424 U.S. 1 (1975), and will be referred to under the single rubric of "FECA."

316. 424 U.S. 1 (1976).

317. *See* FECA Amendments of 1974, § 101, 88 Stat. 1263, 1263 (substitute provisions by FECA Amendments of 1976, § 112(2), 90 Stat. 475, 486 (codified as amended at 2 § 441a (1982))). The contribution and expenditure limits were, together, an attempt to pre financially well endowed candidate from defeating another candidate by merely outspendi in the marketplace. The Act imposed a $1000 limitation on an individual's contributio single candidate, a $5000 limitation on contributions by a political committee to a single

of election campaigns[319] to foster the goal of equality. The *Buckley* Court found only a portion of this legislative package consistent with the first amendment.

In a per curiam decision, the Court upheld FECA's contribution restrictions as a limitation upon "the actuality and appearance of corruption resulting from large . . . financial contributions";[320] but the Court held expenditure restrictions unconstitutional because they reduced the quantity of expression in the marketplace and, thus, restricted "the number of issues discussed, the depth of their exploration, and the size of the audience reached."[321]

Without expenditure limitations, however, FECA can accomplish little market reform. Wealthy candidates and their financially able supporters can still inundate the marketplace with their message, and thereby block out fair perception of the positions of their less well-heeled opponents.[322] In fact, the *Buckley* Court explicitly rejected as illegitimate any congressional goal to equalize the relative ability of individuals and groups to influence the outcome of elections.[323]

The Court, however, did uphold the FECA provisions that authorized public funding of presidential election campaigns.[324] It viewed leveling campaign expenditures among presidential candidates not as a mechanism to abridge, restrict, or censor speech, but rather as an attempt to use public money to "enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."[325] The subsidy provisions do not, however, treat *all* candidates as equals. Major political parties—defined as parties that had secured over twenty-five percent of the vote in the preceding presidential election—qualify for up to two million dollars of funding for expenses incurred in connection with their nominating campaigns and for subsidies of up to twenty million dollars for their candidate's presidential campaigns.[326] Minor parties—defined as those that had secured between five percent and twenty-five percent of the vote in the preceding presidential election[327]—qualify for convention reimbursements and campaign subsidies proportional to their share of the vote in the preceding election, with the possibility of additional post-election payments if they increase their share of the vote.[328] Other political parties or candidates qualify for post-election support only if they obtain over five percent of the vote in the current election.[329] The *Buckley* Court brushed aside as "speculative" the insistence by representatives of nonestablished groups that such a subsidy system would harm their interests.[330] The Court deemed such harm insufficient to overcome Congress's purpose to prevent the use of public money to "foster frivolous candidates, create a system of splintered parties, and encourage unrestrained factionalism."[331]

date, and a $25,000 limitation on total contributions by an individual during any calendar year. FECA Amendments of 1974, § 101(a), 88 Stat. 1263, 1263. The Act also limited expenditures made by individuals and groups "relative to a clearly identified candidate" to $1000, FECA Amendments of 1974, § 101(a), 88 Stat. 1263, 1265, restricted candidates in the use of their own personal funds, and placed ceilings on total campaign costs, FECA Amendments of 1974, §§ 101(a), 101(b), 88 Stat. 1263, 1264, 1266.

318. *See* FECA Amendments of 1974, §§ 201-208, 88 Stat. 1263, 1272-79 (codified as amended at 2 U.S.C. §§ 431-434 (1982)).

319. *See* Presidential Election Campaign Fund Act, Pub. L. No. 92-178, 85 Stat. 562 (1971), *amended by* FECA Amendments of 1974, §§ 403-408, 88 Stat. 1263, 1291-97 (current provisions codified as amended at 26 U.S.C. §§ 9001-9008 (1976 & Supp. V 1981) and other scattered sections).

320. Buckley v. Valeo, 424 U.S. 1, 26 (1975). In addition, the Court upheld reporting and disclosure provisions as a means to provide the electorate with information as to where political campaign money originates in order to aid the voter in evaluating those who seek federal office. *Id.* at 66-67. The Court also deemed the requirements justified as a means of deterring corruption and the appearance of corruption and as an essential means of gathering the data necessary to detect violations of the Act's contribution limitations. *Id.* at 67. The provisions required campaign organizations periodically to report to the Federal Election Commission all individual contributions of over $100 and all political committee contributions regardless of their size. FECA of 1971, § 304, 86 Stat. 3, 15 (codified as amended at 2 U.S.C. § 434 (1982))(the $100 requirement since has been raised to $200, FECA Amendments of 1979, § 104, 93 Stat. 1339, 1351).

321. *Buckley*, 424 U.S. at 19.

322. Because the Court upheld individual and group campaign contribution limitations, *see Buckley*, 424 U.S. at 24-38, individuals or groups desiring to sponsor advertising that supported a candidate's election often have funneled their money through organizations other than the candidate's official campaign committee or have purchased the time or space for such advertising themselves.

323. *See id.* at 48-49 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) and Roth v. United States, 354 U.S. 476, 484 (1957)):

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "

324. *See Buckley*, 424 U.S. at 85-109.

325. *Id.* at 92-93.

326. Presidential Election Campaign Fund Act, §§ 9002-9008, 85 Stat. 562, 563-69, *amended by* FECA Amendments of 1974, §§ 404-406, 88 Stat. 1263, 1291-96 (current provisions codified as amended at 26 U.S.C. §§ 9002-9008 and other scattered sections)(apart from the $2,000,000 provided for in § 9008, which has since been raised to $3,000,000, *see* FECA Amendments of 1979, § 202, 93 Stat. 1339, 1368 (codified at 26 U.S.C. § 9008(b)(1) (Supp. V 1981)), these provisions adjust the amounts disbursed in any given year to account for inflation).

327. *See* Presidential Election Campaign Fund Act, § 9002(7), 85 Stat. 562, 563 (codified at 26 U.S.C. § 9002(7) (1976)).

328. Presidential Election Campaign Fund Act, § 9004(a)(2)(A), 85 Stat. 562, 565, *amended by* FECA Amendments of 1974, §§ 404(b)(1), 406(a), 88 Stat. 1263, 1291, 1294 (codified as amended at 26 U.S.C. §§ 9004(a)(2)(A), 9008(b)(2) (1976)).

329. Presidential Election Campaign Fund Act, § 9004(a)(3), 85 Stat. 562, 566 (codified as amended at 26 U.S.C. § 9004(a)(3) (1976)).

330. *Buckley*, 424 U.S. at 101.

331. *Id.*

The public campaign finance measures do little or nothing to give powerless groups or individuals enhanced access to effective means of political expression. No money is made available for parties receiving less than five percent of the vote in both the current and previous election.[332] Funds for primaries are available only for parties that hold a convention or for candidates that participate in primaries.[333] Such regulations create significant disadvantages to minority parties and independent candidates,[334] who are most likely to need help publicizing their views. In fact, the subsidy system may decrease the chance that a minority party will receive five percent of the vote, by increasing the funds available to its already richer rivals.[335] Public financing under FECA appears to have "enshrined the Republican and Democratic parties in a permanently preferred position."[336]

332. A party may receive funds subsequent to an election in which it received over five percent of the vote, even if it received less than five percent in the previous election. *See* Presidential Election Campaign Fund Act, § 9004(a)(3), 85 Stat. 562, 566 (codified as amended at 26 U.S.C. § 9004(a)(3) (1976)). The possibility of a minority party or independent candidate receiving public funds after the election does not assuage, however, the disadvantage to holders of minority views. Candidates need funds before the election. Candidates who could secure five percent of the vote if given the funds prior to the election very well may not reach the five percent threshold without the additional resources those funds provide. The suggestion by some that such candidates could secure loans before the election, *see Buckley*, 424 U.S. at 102, may be overly optimistic. There is, in any event, something troubling about committing the fate of a candidate to the opinion of a "loan officer"; indeed, the financial community may well be hostile to the candidate's views.

John Anderson's storied campaign for the presidency in 1980 accumulated an estimated $5,000,000 debt in anticipation of receiving post-election funds. *See* N.Y. Times, Nov. 5, 1980, at A21, col. 1. The difficulties in candidates and creditors relying on such funds is reflected in Mrs. Anderson's response to a question as to what she and her husband would do if the funds were not received: "we will both get jobs." *Id.* at A21, col. 2. Luckily for Mrs. Anderson, Mr. Anderson tallied over 5% of the electorate.

333. *See* FECA Amendments of 1974, §§ 406(a), 408(c), 88 Stat. 1263, 1299 (codified as amended at 26 U.S.C. §§ 9008, 9033 (1976)).

334. Chief Justice Burger recognized in his *Buckley* opinion these disadvantages to minority parties and independent candidates. *Buckley*, 424 U.S. at 251 (Burger, C.J., concurring in part and dissenting in part).

335. Publicly financed elections in this context may strengthen the stronger rather than aid the overwhelmed.

336. *Id.* at 293 (Rehnquist, J., concurring in part and dissenting in part). One critic has aptly depicted the public campaign finance measures as "public subsidies for established parties." Buchanon, *supra* note 268, at 556.

This difficulty may be accentuated now that all candidates, regardless of political persuasion, are granted reasonable access to television and radio. FECA of 1971, § 103(a)(2)(A), 86 Stat. 3, 4 (adding 47 U.S.C. § 312(a)(7) (1976)("The [FCC] may revoke any station license . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time . . . by a legally qualified candidate for Federal elective office on behalf of his candidacy.")); *cf.* CBS, Inc. v. FCC, 453 U.S. 367, 394-97 (1981)(upholding 47 U.S.C. § 312(a)(7) as constitutional). The federal legislation creating this right appears on its face to be neutral to all views, but federal candidates having sufficient funds actually will receive significantly greater access than will those that are poorly funded, because a broadcaster may continue to refuse all requests for free access, *see CBS, Inc.*, 453 U.S. at 382 n.8. This disparity greatly skews the marketplace in favor of only certain views because it is unlikely that well financed candidates represent the entire political spectrum. Further, because the legislation is directed toward *candidates*, groups that lack a candidate representing their viewpoint but who wish to speak *against* a candidate or his views have no access protection. The public funding of major parties, therefore, magnifies the already existing marketplace skew in favor of dominant groups and orthodox viewpoints.

Both Congress and the Court understandably were concerned with a market reform that might either make speech costless or so subsidize the speech of all groups that the outcome would be a cacophony of trivia, irrelevancies, and repetitions creating a dysfunctional level of noise and wasted resources. The *Buckley* Court recognized the need to distribute public largesse discriminately so as to avoid "artificial incentives to 'splintered parties and unrestrained factionalism.' "[337] But this concern is difficult to reconcile with the first amendment's "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[338] Minor parties add variety and complexity to public debate, and often force major parties to address candidly issues they might otherwise be tempted to avoid.[339] But even if this were not the case, marketplace theory proscribes government hostility to either new associations[340] or variety in public debate.[341] Both the fairness doctrine and FECA, upon analysis, support only those perspectives and viewpoints already well represented in the marketplace.

C. *Future Reform Possibilities.*

Reform attempts to minimize the marketplace of ideas' status quo bias have been of little aid to those with truly deviant ideas. At best, these reforms only slightly widen the market's mainstream views, but

337. *Buckley*, 424 U.S. at 96.

338. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

339. *See* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 185-86 (1979).

340. In 1960 the Supreme Court invalidated an ordinance which prohibited distribution of any handbill not bearing the name and address of the person who prepared, distributed or sponsored it. Talley v. California, 362 U.S. 60 (1960). The Court found that the potential chilling of the freedom of speech and association caused by requiring an individual to identify himself as a supporter of what might be an unpopular view or organization outweighed the state's interest in using this means to identify those responsible for fraud, false advertisement, or libel. *Id.* at 64-65. In *Buckley*, 424 U.S. at 60-84, however, the Court upheld reporting and disclosure requirements that are just as likely to have such chilling effects. Thus, this market reform measure may decrease the public exposure to and perception of dissident positions.

341. Although the major political parties *do* produce some variety in public debate, history has shown that for such parties to be successful they need to be amorphous, heterogeneous, and heterodox. *See* Brown, Book Review, 62 COLUM. L. REV. 386, 391 (1962). In order to retain and enlarge their electoral support, the major parties have assumed a nondivisive "centrism" very similar to that discussed in the context of the fairness doctrine. *See supra* notes 306-12 and accompanying text. It is therefore not surprising that the basic positions of the major parties have more in common with each other than in conflict.

their dependence upon government to regulate and perfect the market raises grave issues of government control of communication in a democratic society and is highly dangerous.[342] The dangers of government involvement and potential abuse seem so great that a laissez-faire system appears preferable to some despite all of its limitations.[343]

Representatives of the media[344] and a number of scholars[345] have insisted that the technology of cable television systems renders obsolete the scarcity of frequencies rationale for the fairness doctrine. These critics propose limiting government regulation to a requirement that cable systems dedicate one channel as a noncommercial public access channel available without charge at all times on a pure first-come, first-served basis.[346]

If a speaker desires a large, diverse audience, however, he will find special public access channels ineffective as forums in which to present competing views on controversial issues. There is something "bittersweet funny"[347] about seeing homespun attempts on public access channels competing with the professionally packaged presentations found on the commercial channels. The cost of advertising a message to be aired on a public access station in hope of gaining audience attention would often exceed the production costs of the message;[348] consequently, the audience for a public access channel usually consists of those who personally know the speaker, and thus already are informed of and committed to his views, and those who have tuned in because of random curiosity or a desire to be titillated by the possibly more than

342. *See supra* notes 268-76, 305-12, 324-41 and accompanying text.

343. Emerson, for example, a long-time advocate and defender of the expressive rights of dissidents, concluded that "[t]he system of freedom of expression is by definition a *laissez-faire* system and must tolerate differences in the economic capacity of the various participants. . . . [A]ny attempt to eliminate all differences based on economic factors would involve governmental regulation and governmental domination on a scale that would destroy the system." Emerson, *supra* note 75, at 823; *see* Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 125 (1973)(the risks of a laissez-faire system of free speech are "calculated risks" taken in order to preserve "higher values").

344. *See, e.g.,* Paley Speech, *supra* note 291, at 4-5.

345. *See generally* Simmons, *The Fairness Doctrine and Cable T.V.*, 11 HARV. J. ON LEGIS. 629 (1974).

346. *See* Bollinger, *supra* note 291, at 39. On February 12, 1972, the FCC issued rules requiring every cable system within the top 100 markets to provide such a public access station. Cable Television Report & Order, 36 F.C.C.2d 143, 190 (1972).

347. M. MAYER, *supra* note 264, at 388 (finding similar humor in the character of the persons demanding access time)(quoted *supra* note 264).

348. *Cf.* Price & Morris, *Public Access Channels: The New York City Experience*, in SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE app. 229, 230 (1971)("Unless an organization or an individual can be assured of some regularity of appearance on the public channel, the opportunity to develop a viewing 'constituency' . . . will be slight.").

occasional crackpot.[349] Limiting marketplace access to an area "that a benevolent government has provided as a safe haven for crackpots"[350] is a far cry from the freedom of expression that Brandeis and Holmes extolled. In order to understand the continued popularity of unimpressive market reform measures such as the public access station proposal, a different perspective on the marketplace of ideas must be explored.

IV. THE FUNCTION OF THE FIRST AMENDMENT

Whether the marketplace of ideas fulfills its classically articulated functions depends on whether it allows fair consideration of criticism of the fundamental beliefs and practices of society.[351] Yet the market, as it functions within our society of high technology and unequal distribution of wealth, position, and communicative skill, is strongly biased toward status quo viewpoints. A consideration of the social functions of the first amendment and its marketplace imagery helps to explain the continued use and popular acceptance of the market model.

A. *Fine-Tuning Among Elites.*

A major tenet of classic first amendment theory is that each citizen has a right to participate in governmental decisionmaking. Under this tenet, the commands of government are legitimated by a democratic process that, when it functions properly, ensures that the subject has a hand in making the laws to which he submits. The difficulty with this view of "self-government"[352] is that the role of citizens in the actual making of decisions involving public issues is quite attenuated. Although Meiklejohn concludes that the marketplace of ideas guarantees that "public issues shall be decided by universal suffrage,"[353] such issues actually are decided by those who claim to represent the people.[354] Public opinion is not an amalgam of the independent thoughts of individuals choosing among alternatives in a totally open system. Instead,

349. D. Othmer, The Wired Island: The First Two Years of Public Access to Cable Television in Manhattan (Sept. 1973)("Watching public access programming is much like spending an evening in Times Square. It is exhilarating, frustrating, shocking and boring—above all, it is simply amazing.").

350. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 513 (1969)("Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.").

351. *See* T. EMERSON, FIRST AMENDMENT, *supra* note 1, at 16.

352. Such a view of "self-government" is implicit in the writings of both Meiklejohn and Emerson. *See* sources cited *supra* note 1.

353. A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1960).

354. The "town meeting" analogy so often relied upon to analyze the relationship of freedom of speech to democracy is simply not an apt description of the process of community decisionmaking. Individual citizens rarely if ever directly make or implement public decisions.

an individual's opinion is influenced by his socialization and by the stature and style of the message bearer. Public opinion, therefore, is often the product of indoctrination and socialization. Right and wrong, and true and false virtually are predefined by a learned institutional mentality wherever these judgments affect the "vital interest" of our society.

The disagreements we perceive within our society are indisputably real; a plethora of issues divide our communities with vociferous proponents on various sides. Most of these conflicts, however, are among established groups battling for superiority while arguing over mere shadings of the same orthodox values. Their resolution involves societal fine-tuning rather than any basic reevaluation or critique of societal beliefs and practices. Although the positions of established groups are not totally congruent, they have more common than conflicting interests. Debate accordingly almost always is conducted within understood and usually respected parameters.

From this perspective, *Board of Education v. Pico*[355] can be understood more fully. Recall that Justice Brennan's plurality opinion, which held unconstitutional a school board's decision to remove certain books from public school libraries, emphasized the distinction between removing books and simply never acquiring them.[356] Yet, as asserted earlier,[357] the distinction between expulsion and exclusion should be irrelevant under classic marketplace theory. Regardless of the method used, the perspectives contained in the affected books would be denied to the library user.[358] If both the school board and local educators initially had agreed not to purchase these books because of their objectionable content, it seems clear that the Court would not have found a first amendment violation.[359] Although the petitioners in *Pico* were

355. 457 U.S. 853 (1982). *See generally supra* notes 141-46 and accompanying text.

356. Justice Brennan stressed that

> the action before us does not involve the *acquisition* of books. Respondents have not sought to compel their school board to add to the school library shelves any books that students desire to read. Rather, the only action challenged in this case is the *removal* from the school libraries of books originally placed there by the school authorities, or without objection from them.

Pico, 457 U.S. at 862 (emphasis in original).

357. *See supra* text accompanying notes 143-44.

358. Because the books involved were likely available at other locations, such as commercial book stores, this assertion may be too strong. A more precise statement may be that access to the perspective contained in the excluded books intentionally was made more difficult than access to "less objectionable" perspectives.

359. In an earlier case similar to *Pico*, the United States Court of Appeals for the Second Circuit concluded that

> some authorized person or body has to make a determination as to what the library collection will be. It is predictable that no matter what choice of books may be made by whatever segment of academe, some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions. If it did, there would be a constant intrusion of the judiciary into the internal affairs of the school.

Presidents Council, District 25 v. Community School Bd. No. 25, 457 F.2d 289, 291-92 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

students, the propriety, content, and impact of student indoctrination was not the issue; the issue for the Court was only whether the school board would control this specific indoctrination process, or whether it would be left to the educators to decide which books the students might read. Essentially, this issue represents a dispute between two elite groups over control of the socialization process. These two groups probably would agree on the selection of the overwhelming majority of books. The rare case of disagreement demands only some fine-tuning. The marketplace functions to allow such fine-tuning among established groups whether they are school boards and educators,[360] big government and big media, or Democrats and Republicans.

All these established groups implicitly accept a "community agenda of alternatives" consistent with the dominant culture. This community agenda is the universe of alternative decisions accepted as possible by that dominant culture, including both preferred and unpreferred alternatives.[361] Established groups may debate the question of which alternative is preferable, but the alternatives evaluated will all be drawn from a commonly held agenda. The community agenda of alternatives thus accounts for the empirically observable phenomenon that "[s]ome, perhaps most, possible alternatives are never considered in community decision-making."[362] The system encourages presentation of only a limited range of ideas from a limited group of individu-

360. In fact, the marketplace may fine-tune even more subtly, encouraging debates only between school boards and the *dominant* teachers' union. *See* Perry Educ. Assn. v. Perry Local Educators' Assn., 103 S. Ct. 948, 951 (1983)(school board can agree with dominant teachers' union to provide only that union, and no other, access to interschool mail system and teachers' mailboxes).

361. *See* N. POLSBY, *supra* note 149, at 133-35; Deutsch, *supra* note 149, at 254.

362. N. POLSBY, *supra* note 149, at 133. A contemporary example of the community agenda is the movement for equal treatment of women. At one time people generally felt that women need not be accorded the equal protection of the law guaranteed by the fourteenth amendment because they were different from men, being weaker, less self-sufficient, and less mature. *Cf., e.g.*, Bradwell v. Illinois, 83 U.S. 130, 141 (1873)("Man is, or should be, woman's protector and defender."). Statements to the contrary were rare and were usually discounted. It was not until this perception changed, particularly during World War I, *see, e.g.*, C. CATT & N. SHULER, WOMAN SUFFRAGE AND POLITICS 338 (1926); A. MARWICK, THE DELUGE 95-105 (1965)(discussing British experience), that women's equality was accepted as a possible *legal* alternative; until then marketplace consideration of legal equality among the sexes was not meaningful. Because an ideology initially perceived as radical became acceptable and was absorbed into the community agenda of alternatives, its legal counterpart became conceivable. For a discussion of the crucial question of how an alternative initially beyond the community agenda comes to be accepted into it, see *infra* text accompanying notes 417-18.

als. Therefore, market access reform, without more, will have little impact on the diversity of views that the marketplace might adopt.[363]

Political pluralists strenuously attack the concept of a dominant culture and a correlative community agenda of alternatives.[364] They reject the existence of any common consciousness in society. The work of Professor Robert Dahl is illustrative; his exploration of the political power distribution within New Haven in *Who Governs?* is particularly pertinent.[365] Dahl found that no single social or economic group either controlled, or regularly benefitted from, the decisionmaking process. He concluded, therefore, that power in New Haven was held by constantly shifting issue-oriented coalitions.[366]

The pluralists' theory, as illustrated by *Who Governs?*, however, is built on the assumption that the community decisions being canvassed represent conflicts sufficiently serious to force all potentially affected groups to mobilize their resources to influence the outcome. The theory fails to recognize that established groups are unlikely to participate in the dynamic political behavior studied by Dahl unless they perceive that important interests potentially are threatened. Dahl failed in his study to distinguish between conflicts that an elite would perceive as threatening and those over which it could remain relatively indifferent because of its belief that its core interests were not endangered.[367] Dahl, and the pluralists generally, also fail to consider whether different interest groups can clash in public debate over their positions even though these positions share and accept certain overarching common assumptions. This common acceptance of assumptions sets the parameters in which established groups conduct their public competition, and it is only the battle taking place within these limits that the pluralists observe.[368]

363. Market access reform is not likely to aid a group professing a perspective not encompassed by the community agenda. Such reform may produce only a new "centrism" with a slightly widened mainstream. *See* Lange, *supra* note 306, at 81-89.

364. Pluralism developed predominantly as a liberal attack upon the theory of a ruling elite, as expounded by radicals such as C. Wright Mills. *See generally* C. MILLS, THE POWER ELITE (1956).

365. *See* R. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY *passim* (1961). Dahl identified a number of important political decisions and the participants in them, studied the behavior of those participants in the course of decisionmaking, and analyzed the benefits and disadvantages various participants incurred as a result of the outcomes that ensued.

366. *See id.* at 85-86, 169-220.

367. For similar discussions of these objections to Dahl's findings, see Bachrach & Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 950-52 (1962); Deutsch, *supra* note 149, at 250-56; Simon, *Notes on the Observation and Measurement of Political Power*, 15 J. POL. 500 (1953).

368. This objection to the pluralist's methods arises from the pluralist's failure to take into account what Professor Carl Friedrich first described as the "rule of anticipated reactions": the belief that much political behavior is governed by the actor's perceptions of, and adjustments for, the reactions he expects would be provoked by possible actions on his part. *See* C. FRIEDRICH CONSTITUTIONAL GOVERNMENT AND POLITICS 16-18 (1937); *see also* Deutsch, *supra* note 149, at 252-53; Simon, *supra* note 367, at 505-06.

The pluralists ignore the possibility that policymaking institutions may ensure their own legitimacy by functioning like a chameleon and changing their color to conform to the dominant cultural environment. *Cf.* Ingber, *supra* note 75, at 346-48 (discussing the responsive nature of the Supreme Court). Instead of blindly assuming that pluralistic competition determines public policy, researchers must explore how dominant values, cultural myths, rituals, and political institutions tend to favor the vested interests of some groups relative to others. *See* Bachrach & Baratz, *supra* note 367, at 950.

Pluralism recognizes the extent to which the group has replaced the individual as the potent force in modern society,[369] but it views the group matrix as constantly open, fluid, and shifting. At one time this theory may have been an accurate account of American society; once pluralists depict the group matrix, however, the picture tends to become frozen. Thereafter, when changes occur in the pattern of social or economic groupings, pluralist theorists tend not to acknowledge them because such new groupings deviate from the accepted picture. A pluralist view of society, therefore, tends to favor existing groups over those in the process of formation. As Robert Paul Wolff observed in his critique of pluralism:

> There is a very sharp distinction in the public domain between legitimate interests and those which are absolutely beyond the pale. If a group or interest is within the framework of acceptability, then it can be sure of winning some measure of what it seeks. . . . On the other hand, if an interest falls *outside* the circle of the acceptable it receives no attention whatsoever and its proponents are treated as crackpots, extremists or foreign agents.[370]

The marketplace is useful for resolving differences among perspectives "within the framework of acceptability" but it is blind to potential evils outside of this boundary that afflict the body politic on the whole. Consequently, the marketplace cannot be depended upon to consider thoroughgoing social revisions that challenge, and help our evaluation of, the fundamental beliefs and practices of society.

Despite the idealism of pluralists and others, free speech is not useful primarily for the discovery of truth or the creation of an informed citizenry. An individual's experience bestows knowledge as much as do the lessons learned from speech. Individual choice and societal change therefore depend less upon free expression than upon the development of new needs, demands, and experiences allowing, or

369. Pluralism, therefore, views as pure rhetoric the presumption of the Jacksonian model of democracy that each person's ideas have the same inherent worth and that the widest possible articulation of different views maximizes society's benefit. *See* L. LEWIS, *supra* note 45, at 195-201. First amendment marketplace theory also professes this assumption of Jacksonian democracy. *See supra* notes 50-53 and accompanying text.

370. Wolff, *supra* note 195, at 43-44.

forcing, individuals to change their perspectives.[371] To focus on diversity of expression rather than diversity of experience is to focus on the dependent rather than the independent variable. Yet the dominance of the market model and conventional theories of the first amendment demonstrate our nation's emphasis on free expression. This focus is, obviously, less threatening to established norms because of its status quo bias. In short, in the United States today free speech is a device by which established interests may both refine their minor differences and promote their commonly held assumptions of truth; it is not a device to change society.

B. *Bestowing an Advantage on National Elites.*

There are situations, however, when even market fine-tuning is insufficient to resolve conflicts among established groups. Such occasions often arise during conflicts between the perspectives of national and local power elites.[372] When the community agenda of alternatives for national and local communities do not coincide, the first amendment may play a determinative role because the forum for final resolution of such differences will be the federal courts.[373] These courts more readily overturn the actions of state and local officials than those of the federal government.[374] The first amendment, therefore, gives national interests a veto of sorts over local established group positions by ensuring finality to decisions made by institutions attuned to nationally held perspectives.[375] First amendment protection of the civil rights movement,[376]

371. *Cf.* Nagel, *supra* note 18, at 304-05 (listing factors that "coalesce to determine the amount of tolerance or intolerance" of society).

372. A "locality" can in some instances comprise an entire region of the country, as was the case in the civil rights dispute.

373. *See* 28 U.S.C. §§ 1331-1332 (1976)(federal question and diversity jurisdiction for federal district courts); 28 U.S.C. § 1254 (1976)(Supreme Court review of federal appellate court decisions); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816)(Supreme Court authority to review constitutional validity of final decisions of highest state courts).

374. *See supra* note 291.

375. This may be reflected in the Supreme Court's decision to overturn a state reply statute in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974), while upholding the reply requirement of the FCC's fairness doctrine in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375 (1969). *See supra* note 291 and accompanying text.

376. *See* Gregory v. Chicago, 394 U.S. 111, 111-13 (1969)(reversing disorderly conduct convictions of "peaceful" and "orderly" civil rights marchers who disobeyed police order to disperse); Brown v. Louisiana, 383 U.S. 131, 136-37, 142-43 (1966)(plurality opinion)(reversing breach of the peace conviction for sit-down protest in public library); Cox v. Louisiana, 379 U.S. 536, 538, 552, 558 (1965)(reversing convictions of civil rights marchers for disturbing the peace and obstructing public passages, on numerous constitutional grounds); Edwards v. South Carolina, 372 U.S. 229, 230, 236-38 (1963)(reversing convictions of 187 persons arrested for breach of the peace during civil rights march).

and, at times, of the arts,[377] may be viewed not as the protection of dissident or outcast groups and perspectives, but as the imposition of national values over an overtly deviating local elite.

C. *System Legitimacy and the Myth of Autonomy.*

In spite of the fact that the marketplace of ideas significantly favors established groups and values, so long as representatives of disadvantaged groups and viewpoints do not perceive themselves as systematically excluded from the market,[378] the resultant social system remains "legitimate." Before the significance of the first amendment can be understood fully, one must first appreciate its mythical function and also take notice of the practical steps that most courts and commentators have taken to preserve the perception of myth as reality.

Although, when invoking "freedom of expression," people usually are focusing on the individual rights of those who wish to express themselves, first amendment theory usually emphasizes the interest of audiences.[379] The right to send ideas, to communicate, is most often viewed as a right to influence or to confront one's audience.[380] A number of theorists have questioned whether such a public utility justification for the freedom of speech is sufficient.[381] Some have proposed

377. When local artistic rejection conflicts with national artistic acclaim, the Supreme Court has found the local response a violation of first amendment principles, in spite of the Court's articulated deference to local community aesthetic perspectives in Miller v. California, 413 U.S. 15, 30-34 (1973). *See* Jenkens v. Georgia, 418 U.S. 153, 161 (1974)(finding film *Carnal Knowledge* to be protected speech in spite of local jury's determination that it was "patently offensive" under community standards); *see also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 549 n.4, 560-61 (1975)(denying municipal board managing city theatre in Chattanooga the right to refuse permission for theatre's use for showing of musical *Hair* under policy that called for its use only "for cultural advancement and for clean, healthful entertainment").

378. A popular consensus in favor of a marketplace biased toward the status quo does not necessarily indicate that established groups manipulate that consensus in some conscious sense. Established groups would presumably act to oppose any attempt to change the community agenda of alternatives to their disadvantage; however, as long as no such attempt occurs, as long as the populace generally perceives the market outcomes as properly derived, there is no reason to suppose that the established group's acceptance of the system is any more self-conscious than its acceptance by any other group.

379. Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 528-29 (1979).

380. Justice Brennan did attempt to characterize the essence of free speech as an interest of the communicator rather than of the recipient of communication when he noted that "the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them . . . . More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." Board of Educ. v. Pico, 457 U.S. 853, 867 (1982).

381. *See, e.g.*, Baker, *supra* note 1, at 964-67, 974-81; Scanlon, *supra* note 40, at 1043-46.

a theory of personality, a liberty perspective[382] viewing the freeing of the human spirit as the prime social value of free speech.[383] Still other theorists argue that the first amendment assures a necessary precondition of legitimate government by forcing the state to respect individuals as "equal, rational and autonomous moral beings."[384] Professor C. Edwin Baker asserts:

> Both the concept of coercion and the rationale for protecting speech draw from the same ethical requirement that the integrity and autonomy of the individual moral agent must be respected. Coercive acts typically disregard the ethical principle that, in interactions with others, one must respect the other's autonomy and integrity as a person. When trying to influence another person, one must not disregard that person's will or the integrity of the other person's mental processes.[385]

In contrast to Professor Baker's position, the first amendment protects only the *appearance* of individual autonomy, while it permits government and private power elites to socialize and indoctrinate the citizenry in support of these groups' beliefs.

1. *The Myth of Autonomy.* Both branches of the liberty/autonomy theory of the first amendment are plagued with difficulties. As a liberation of the human spirit, speech is no more pivotal than is any other human activity.[386] In fact, if an individual's perspective depends on how his interests, needs, and experiences lead him to slice and categorize sensory data, then the ability to follow a wide range of behavioral options is much more crucial for the liberation of the human spirit than is freedom of expression alone. Yet only freedom of expression is guaranteed. Emerson, in explaining this special status for

382. This liberty theory may be deduced from Justice Brandeis's concurring opinion in Whitney v. California, 274 U.S. 357, 375 (1927):

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.

But given the facts of the case, and the result of the decision that led to these beautiful abstractions, one remains skeptical of the theory's relevance.

383. Professor David Richards, for example, contends that "the first amendment rests more fundamentally on the moral liberties of expression, conscience and thought; these liberties are fundamental conditions of the integrity and competence of a person in mastering his life and expressing this mastery to others." Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 82 (1974). This view parallels Professor Emerson's concern for individual self-fulfillment and development. T. EMERSON, FIRST AMENDMENT, *supra* note 1, at 4-7; *cf.* L. TRIBE, *supra* note 13, § 12-1, at 576 (arguing that no instrumentalist explanation can do justice to first amendment).

384. Baker, *supra* note 1, at 991; *see* Scanlon, *supra* note 40, at 214.

385. Baker, *supra* note 1, at 1001-02.

386. *See supra* note 67

expression, admits that it is because "expression is normally conceived as doing less injury to other social goals than action. It generally has less immediate consequences, is less irremediable in its impact."[387] Although Emerson identified the most important difference between speech and behavior, he missed its significance. Expression is allowed precisely because a person's speech is of little danger when his experiences have first been molded and controlled. Established values are not threatened, for the individual is given only the sense of autonomy while the potential impact of this "autonomy" upon the governing system is minimized.

The branch of the liberty/autonomy theory that emphasizes the relationship between individual autonomy and governmental legitimacy is no less flawed. Ironically, the very scholars that recognize the fallacy of the marketplace assumption that individuals are independent, rational beings making unbiased choices among competing market alternatives continue to embrace a theory of liberty/autonomy which also presumes such an individual.[388]

The mechanisms of socialization and indoctrination that are necessary correlates of modern, complex society are, however, sufficiently subtle to allow the continued appearance of individual self-direction. The image of a neutral, objective, and fair marketplace of ideas promotes greater cohesion in society because people more readily accept adverse decisions if they feel they have, or could have, participated in the decisionmaking process. The citizenry perceives these decisions as legitimate rather than as imposed by dominant societal forces.[389] The mythology of the first amendment thus diverts efforts for social change away from attempts to overthrow forcibly the existing social power structure and toward attempts to create a popular consensus. If a government's citizenry and ministers view the system as guaranteeing free expression, they may well be content to replace the strategem of force with that of logic.[390] Logic, however, only ensures consistency within a

387. T. EMERSON, FREEDOM OF EXPRESSION, *supra* note 1, at 9.

388. *See, e.g.,* Baker, *supra* note 1, at 965-66. Individual autonomy presumably assumes that individuals may direct themselves and choose among alternatives without having predispositions engrained into them through indoctrination by government or private establishment groups. *See* Wellington, *supra* note 1, at 1135.

389. Professor Walter Weyrauch, when discussing the general public acceptance of adjudication, similarly observed that "the masks of objectivity, neutrality, and fairness give the legal process an independent power so that it is not [perceived to be] merely the tool of dominant social forces." Weyrauch, *Law as Mask—Legal Ritual and Relevance*, 66 CALIF. L. REV. 699, 718 (1978); *see also* T. ARNOLD, *supra* note 93, at 34.

390. *See* Dennis v. United States, 341 U.S. 494, 501 (1951)(Chief Justice Vinson rejecting the "right to rebellion").

given system of values.[391] Consequently, its use as a means to condemn as "illogical" positions advocating an alternative value system is an act of subtle obfuscation.

2. *Preserving the Myth.* Public acceptance of the myth of individual autonomy and the neutral marketplace of ideas imparts an aura of legitimacy and authority to our government. Obvious discrepancies exist, however, between this myth and how the system actually functions.[392] If the public were fully aware of these discrepancies, the legitimacy of the decisionmaking process would be threatened.[393] Protecting the myth thus is crucial to continued social stability. Preservation of the myth requires both that channels appear to be open to all who wish to communicate, and that there appears to be no systematized manipulation of the individual's perspective through processes of indoctrination or socialization. The first amendment furthers both perceptions.

The first amendment guarantees each individual his day in a public arena.[394] Be it in appearing on a cable public access station, printing and distributing leaflets, or delivering a street corner speech, the vocal critic is allowed to ventilate his feelings and beliefs. This constitutes the "feel good" function of the first amendment. The issue is not whether any one else cares, or even listens, but that a communication opportunity exists to mollify the speaker.[395] Although many people perceive these forums as an annoyance or disturbance (as in the street forum) or as dominated by oddballs and crackpots (as in the public

391. *See* Weyrauch, *supra* note 128, at 800.

392. An observer must distinguish between a *myth system* that expresses all the assumptions, rules and prohibitions of a society, and an *operational code* that tells "operators"—the elite—when, by whom, and how things are and can be done. This discrepancy, however, is not necessarily an intentional construction of elites, but rather is an inevitable byproduct of social complexity. *See generally* W. REISMAN, FOLDED LIES 1, 15-36 (1979)(outlining concepts of myth systems and operational codes).

393. *See id.* at 21; *cf.* Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 18 (1975)(discussing need for both professionals and clients to view professional as an elite if profession is to function effectively).

394. When Thurmond Arnold wrote that "the function of law is not so much to guide society as to comfort it," T. ARNOLD, *supra* note 93, at 34, he was referring to the function of law as a means of providing opponents of established conduct with at least : symbolic recognition of their precepts. For Arnold, it was essential to the legitimacy of the legal system that it assure each individual of "his day in court."

395. Emerson recognizes (without appreciating its role) that a system focused only on making limited communication channels available is functioning as little more than a pacifier. "Nor can it be said," admits Emerson,

> that our system affords equality in the ability to communicate different points of view or to pursue different goals of inquiry. . . . [N]either equal access to the mass media nor equal right to the support of public funds presently exists. What we have secured in this area is rather the right of the individual to follow the truth wherever it may lead, though the road is often a lonely one.

Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 747 (1977).

access stations), their availability probably decreases the pressure to grant non-mainstream opinions access to more influential forums.[396] Dissidents may thereby assume that they are standing firm against the stream while in fact they are being pulled along by the current.[397]

As long as the system bias in favor of established groups and dominant value perspectives remains subtle, and individuals do not feel manipulated or forced to believe or act in a certain way, the system retains its legitimacy in spite of its biases.[398] If the government wishes to preserve the myth of a free market, it cannot overtly prefer some messages over others. Accordingly, it is not surprising that the Court has held it impermissible for government to restrict speech on the basis of the message conveyed.[399]

The legal process has helped to preserve the myth by refocusing value conflicts away from the intense ideological plane to the less impassioned levels of process.[400] By a remarkable sleight of hand the ideological differences between contending positions are forgotten; the ideological basis or significance of the underlying governmental decision loses its importance. This shift in focus screens the inherent biases of the system while it gives challengers to the status quo the impression that an avenue is open to obtain both resolution of their conflict[401] and

396. This may explain the popularity of public access stations and the proposals suggesting the repeal of the fairness doctrine in favor of such stations. *See supra* text accompanying notes 347-50.

397. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 n.9 (1974), the Supreme Court, by grudgingly acknowledging the role of self-help in defamation, recognized that channels of communication must appear open more to ventilate the emotion of the speaker than to give information or insight to any potential audience.

398. The public is very sensitive to the appearance of being manipulated. When the government required automobile manufacturers to make automobiles so that the ignition system would not operate unless the front seat belts were buckled, the public showed its disapproval both vocally and by the numbers of individuals who illegally rewired the ignition system to bypass the safety mechanism. The public has never demonstrated a comparable displeasure toward governmentally mandated passive restraints, even though consumers are given no choice in their purchase. The difference between active and passive restraints is the *perceived experience* of being controlled that exists in one and is lacking in the other.

399. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 791 n.31 (1978); Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85, 94 (1977); L. TRIBE, *supra* note 13, § 12-5, at 591; Bogen, *The Supreme Court's Interpretation of the Guarantee of Freedom of Speech*, 35 MD. L. REV. 555, 557 (1976); *cf.* United States v. O'Brien, 381 U.S. 367, 377 (1968)(government regulatory interests must be unrelated to the suppression of freedom of expression).

400. For a full discussion of the common use of procedure, ceremony and rhetoric as means to minimize conflict, see Ingber, *supra* note 94.

401. For a literary example of the use of procedure to settle conflicts while concealing ideological disputes, see Shirley Jackson's short story, *The Lottery*, in S. JACKSON, THE LOTTERY 291

official support of their positions.[402] The leafleteer who wins the right to distribute his literature must feel vindicated whether or not anyone reads or takes notice of his beliefs. Thus conflict successfully is refocused to a nonideological level[403] because the individual challenger feels victorious while the policy or ideology with which he initially took exception continues.[404]

Board of Education v. Pico[405] illustrates this function of the first amendment. Justice Blackmun, in a separate concurrence, attempted to confront Chief Justice Burger's assertion that there was no greater " 'official suppression' " in a "decision to *remove* a book" than in one "not to acquire a book desired by someone" in the first place.[406] With exemplary candor Justice Blackmun confessed,

> I also have some doubt that there is a theoretical distinction between removal of a book and failure to acquire a book. But as Judge Newman [of the Second Circuit] observed [in his concurrence to the lower court decision], there is a profound practical and evidentiary distinction between the two actions: "removal, more than failure to acquire, is likely to suggest that an impermissible political motivation may be present. There are many reasons why a book is not acquired, the most obvious being limited resources, but there are few legitimate reasons why a book, once acquired, should be removed from a library not filled to capacity."[407]

(1949). The society Jackson describes in *The Lottery* has no predilection against individual sacrifice for collective goals. In fact, it prefers such an arrangement. The story describes a communal ceremony wherein lots are drawn to determine who will be stoned to death for some unspecified community need. Although the eventual winner of the lottery objects, the objection is couched in terms of procedure—that the lots were drawn too quickly—and is not directed at the substance of the activity. *Id.* at 299.

402. The struggle for official support of a position often causes the idea of right and wrong, the ethical-juridical conception, to be overshadowed by emphasis upon which groups "win" and which "lose," the purely agonistic conception. *See* J. HUIZINGA, HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE 78 (1949). In Greenland, for example, an Eskimo who has a complaint against another challenges him to a drumming contest. *Id.* at 85. The agonistic nature of this form of conflict resolution is readily apparent. Eskimo society, being in a less "advanced" phase of cultural development, has not developed the subtleties by which more developed societies conceal the "battle" element of conflict resolution.

403. In Board of Educ. v. Pico, 457 U.S. 853 (1982), for example, Justice Brennan emphasized his concern that the process used to remove the library books departed from the procedures previously used to make library decisions in the school system: "This would be a very different case if the record demonstrated that petitioners had employed established, regular, and facially unbiased procedures for the review of controversial materials. But the actual record in the case before us suggests the exact opposite." *Id.* at 874 (plurality opinion). Although conformity with process may assure consistency of treatment and limit the impact of a momentary whim, the student who desires to read the book is equally frustrated regardless of the process used for its removal. When special procedures are used the deprivation is merely more dramatic and overt. Consequently, the community is more likely to perceive that the school board has manipulated the students.

404. *See* Weyrauch, *supra* note 389, at 717-19.

405. 457 U.S. 853 (1982).

406. *Pico*, 457 U.S. at 892 (Burger, C.J., dissenting).

The issue, therefore, is not access or expression, or even actual governmental control and indoctrination; the issue is instead the *appearance* of governmental manipulation and indoctrination.[408] Justice Brennan, consequently, could conclude that the ultimate question was the intent underlying the school book removal, and not the impact of its removal on the marketplace.[409]

Admittedly, school officials may remove books for both bad motives and good motives. But if the Constitution grants a right to receive information, the reason for the denial should not matter.[410] The Court's concern in *Pico* clearly was that of avoiding the appearance

407. *Id.* at 878 n.1 (Blackmun, J., concurring)(quoting Pico v. Board of Educ., 638 F.2d 404, 436 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982)); *see also* 457 U.S. at 871-72 (plurality opinion of Brennan, J.)(limiting holding to book removal).

408. Justice Rehnquist responded in dissent that if the issue was public visibility "a school board's public announcement of its refusal to acquire certain books would have every bit as much impact on public attention as would an equally publicized decision to remove the books." *Pico*, 457 U.S. at 916-17. Although he may have been right, Justice Rehnquist neglected a vital aspect of reality. Given the need for routine decisions as to which books the school should initially purchase, there would be no need to publicize a decision not to purchase any given book. The decision to remove a book already purchased, however, is likely to be sufficiently exceptional to require, if brought to public notice, some public explanation. Further, even assuming an isolated school board member publicly discusses his decision not to acquire a given book, the Court is likely to hold, as it did in United States v. O'Brien, 391 U.S. 367, 384 (1968), that "[w]hat motivates [one official] . . . to make a speech about [an institutional decision] . . . is not necessarily what motivates . . . others to [so decide] . . . and the stakes are sufficiently high for us to eschew guesswork."

409. *Pico*, 457 U.S. at 870-71 (footnote omitted):

> [W]hether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' action. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution.

410. *See id.* at 917 (Rehnquist, J., dissenting). The concern in *Pico* over a governmental decisionmaking process tainted by an impure motivation is reminiscent of equal protection decisions establishing a distinction between de facto and de jure discrimination. *E.g.*, Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 265 (1977)(intent to segregate is the essential element of de jure segregation); Washington v. Davis, 426 U.S. 229, 240 (1976)(proof of discriminatory intent is needed to show equal protection violation); Milliken v. Bradley, 418 U.S. 717, 745 (1974)(cross-district busing improper without showing that intentional discriminatory acts had interdistrict effect); Keyes v. School Dist. No. 1, 413 U.S. 189, 208-09 (1973)(shifting burden to school authorities once intentionally segragative policy found in meaningful or significant segment of school system, and emphasizing distinction between de facto and de jure segregation). The focus on purposiveness in these decisions seemingly mandates an *apparent* purity of the decisional process while making no assurances as to the outcome of that process and its impact on the citizenry. Furthermore, courts and commentators have ably shown the problems inherent in the use of "legislative" intent. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 224-25 (1971)(Black, J.); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205 *passim* (1970).

rather than the reality of marketplace and governmental control and indoctrination.[411]

3. *Defusing Disenchantment.* The idea that first amendment freedom of expression functions to reduce social strife is not new. Justice Brandeis articulated this concept in *Whitney v. California*:

> Those who won our independence . . . knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[412]

Normally, commentators present defusing disenchantment as a secondary function of the first amendment, subordinate to such features as the search for truth, self-government, and individual development and autonomy. In the 1960's, "New Left" spokesmen viewed this function as the main purpose of the first amendment. They concluded that the

411. The extent to which established groups can use first amendment rhetoric to preserve the myth of individual autonomy may be increasing. In the modern welfare state, how the government decides to allocate its wealth can greatly influence people's substantive behavior. *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964). As we become increasingly socialized, depending more and more upon government for the support of education, research, and the arts, the opportunity for governmental control of an individual's life will markedly increase, while the appearance of individual choice and autonomy is still preserved. The state appears to forbid nothing and merely seems to regulate distribution of governmental largesse "for the public good." Under such auspices, and potentially consistent with first amendment doctrine, further inroads may be made on individual autonomy while retaining the appearances necessary to keep the system-legitimizing myth intact.

The concern expressed here is not equivalent to that of "unconstitutional conditions" frequently confronted by both jurists and scholars. *See* Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 *passim* (1935); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 *passim* (1966). The doctrine of "unconstitutional conditions" seems to provide that a waiver of first amendment rights cannot be annexed to the rationing of goods and services in the public sector. As Professor William Van Alstyne properly notes, however,

> the doctrine merely protects *preexisting* rights from surrender-by-contract with the welfare state. It is limited to a case in which in exchange for some valuable privilege, the state presumes to take from the individual some measure of freedom previously held by that individual and still held by all others.

Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on* Red Lion, 29 S.C.L. REV. 539, 567 (1978)(footnote omitted). Thus, a poor individual receiving food stamps along with other poor individuals could not be denied further governmental aid for speaking critically of the President. A preexisting statutory right would be conditioned upon surrender of a constitutional one. Nothing in the doctrine, however, forbids government, during a bicentennial anniversary, for example, from allocating money to support the writing of patriotic and laudatory novels, plays, and poetry while creating no equal fund for works critical of the nation or supportive of foreign governments. Yet, such governmental promotion will clearly bias the marketplace and mold and direct the individual.

system was "a meaningless sop, designed to siphon off protest and delude the populace into believing it has a participating voice."[413]

As the preceding pages have demonstrated, these contentions are not without factual foundation. The first amendment may function more to placate and divert social tensions than to foster a bubbling of controversy and encourage individual diversity. But the New Left presumed that this effect resulted from a conspiracy of established groups. Their view of the system as a construct of devious, manipulating elites seems overly simplistic. The elites need not consciously create and impose a system in order to benefit from it. The bias or skew toward established groups and dominant value perspectives instead may be unavoidable in a high-technology society in which resources and skills are distributed unequally.[414] Dominant social perspectives may be molded not by conspiracies, but by social and economic externalities[415] that make up the ecological setting.[416] Those groups that perform in harmony with this ecological setting may be only the passive beneficiaries of the system in which they find themselves.[417] It may nonetheless be beneficial to society for the elite to feel responsible for the discrepancy between the myth of the marketplace of ideas and the reality of socialization and indoctrination.[418] This unease may cause the elites to question the justification for, and their own qualifications to participate in, an elitist decisionmaking process that affects others. They also may question the wisdom, justice, authority, and necessity of their decisions.

V. CONCLUSION

In our complex society, affected by both sophisticated communication technology and unequal allocations of resources and skills, the marketplace's inevitable bias supports entrenched power structures or

413. T. EMERSON, FREEDOM OF EXPRESSION, *supra* note 1, at 726. *See generally* R. WOLFF, B. MOORE & H. MARCUSE, *supra* note 191.

414. *Cf.* Nagel, *supra* note 18 (claiming the judicial process is unsuited to fulfill goals of the marketplace model).

415. These externalities might include the density of population and the division of labor. *See generally* E. DURKHEIM, SUICIDE 314-20 (J. Spaulding & G. Simpson trans. 1951)(discussing externalities and their relationship to the individual and society); E. DURKHEIM, DIVISION OF LABOR IN SOCIETY 256-82 (G. Simpson trans. 1933)(discussing population and division of labor).

416. Ecological setting, like nationalism, includes the concepts of history and cultural development. Unlike nationalism, however, it does not necessarily include an individual perception of national identity; instead, it takes into consideration those factors which cause people to feel such an identification with a nation.

417. *See* Deutsch, *supra* note 149, at 255.

418. A fuller discussion of the importance of elites being sufficiently imbued in the myth to feel uncomfortable over the operating reality may be found in Ingber, *supra* note 75, at 352-56.

ideologies. Most reform proposals do little to help the marketplace reach its theoretical potential. Instead, such suggestions perpetuate the marketplace's status quo bias or result in unacceptable levels of governmental interference and regulation. These reform systems easily could decay into formal systems of governmental censorship or popular indoctrination.

This critique of the marketplace of ideas has led to the unsurprising conclusion that protection of expression alone does not guarantee an environment where new ideas, perceptions, and values can develop. A diversity of perspectives first requires a corresponding diversity of social experiences and opportunities. Consequently, in spite of the rhetoric surrounding it, freedom of speech by itself cannot ensure a diverse and interactive marketplace of ideas.

If we intend to design a social and political system open to the development of diverse perspectives and values, we must first understand how an idea initially outside the community agenda of alternatives becomes accepted within it. There is little doubt that a change in the ecological setting necessarily creates new interests and needs which in turn alter perspectives. At rare times, as during the Depression, change comes swiftly. The severity and widespread dislocation caused by the Depression led to the abrupt realization that poverty was not necessarily the fault of the poor. Popular consensus so completely turned away from the traditional values of laissez-faire economics that policy decisions based on such values became disreputable. Such an abrupt change, however, is rare. Usually, ecological change takes considerable time.[419] Perspectives change slowly enough so that the "new" ideas generally are absorbed into the community agenda as aspects of the status quo.

In addition to ecological change, new perspectives and values may be nurtured in a society that encourages, or at least permits, the development of new interests and experiences. Consequently, the status quo bias of the marketplace can probably be neutralized only by protecting a greater liberty of action—allowing people to choose among lifestyles offering differing roles and relationships—rather than merely supporting the freedom of speech. American jurisprudence simply has focused on the wrong leg of Mill's theory of liberty. Instead of merely embracing his theory of the liberty of thought and discussion,[420] our courts

419. For example, increased population and decreased demand for manual labor may slowly lead to greater acceptance of abortion, homosexuality, and women's liberation. *Cf.* Nagel, *supra* note 18, at 337 (arguing that the current mood of societal tolerance was partly caused by fundamental cultural shifts).

420. *See supra* text accompanying note 22.

should emphasize his view of limited societal authority over the individual, a theory of freedom of *conduct*:

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forebear . . . because, in the opinions of others, to do so would be wise, or even right.[421]

Mill recognized, however, that rulers and fellow citizens tend "to impose their own opinions and inclinations as a rule of conduct on others."[422] He thought that this imposition was hardly ever restrained by anything but the negation of power.[423] Courts reasonably could interpret the first amendment's right of assembly and free exercise clauses to effectuate Mill's negation of power. Courts could construe these clauses to prevent governmental interference with the development of diverse communal groupings that perform their own distinct forms of socialization and indoctrination.[424] Such new groupings, in turn, might insulate or reduce established groups' control of the marketplace. The legal doctrine that has developed surrounding these clauses, however, has kept them from fulfilling this potential.

Courts generally have viewed assemblies simply as a means of conveying speech and spreading ideas. Consequently, the Supreme Court has given rights of assembly only subsidiary importance, subjecting them to regulation as "speech-plus."[425] Furthermore, the Court has never considered the "freedom of association,"[426] arguably based within the right of assembly, to be a unique, independent right. Instead, the Court has treated freedom of association as little more than a shorthand phrase that protects traditional first amendment rights of speech

421. J. MILL, *supra* note 5, at 8-9.

422. *Id.* at 12.

423. *Id.*

424. Such was the view of one scholar. *See* Baker, *supra* note 1, at 1029-39.

425. *See* T. EMERSON, FREEDOM OF EXPRESSION, *supra* note 1, at 292-98; Baker, *supra* note 1, at 1030.

426. The notion of a right of association developed in the 1950's and 1960's as the federal and some state governments sought to identify members of allegedly dangerous organizations such as the Communist Party and the NAACP. *See* E. CORWIN, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 966 (rev. ed. 1973). Decisions considering the right are numerous. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); *see also* Griswold v. Connecticut, 381 U.S. 479, 482-84 (1965).

and petition as exercised by individuals in groups.[427] To the Court, the freedom of association has meaning only when the association's participants are attempting to accomplish an objective independently protected by the freedom of speech.[428] Accordingly, people may associate to advocate certain behavior but may not associate to take action to implement the ideas advocated. Psychology has long recognized, however, that requiring behavior inconsistent with belief creates tension within an individual. That tension is often resolved by altering the belief system to make it consistent with the compelled conduct. This theory of cognitive dissonance[429] recognizes an inalienable connection between action and belief. The Court's attempt to separate them accords with the myth of individual autonomy discussed earlier.[430] To be meaningful, assembly and associational rights must transcend expression and protect the right of individuals to combine to pursue and fulfill communal goals.[431]

The Constitution, however, has developed as an unrealistically atomistic document.[432] For example, restrictive interpretation has hindered the potential of the free exercise clause to foster diverse ways of living. As early as 1879, the Supreme Court interpreted the free exercise clause to permit a state to prohibit any action regardless of its religious implications, so long as it did not formally prohibit a belief.[433] Chief Justice Waite insisted that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[434] Under the Court's interpretation, the freedom to believe was absolute but the freedom to act upon what one believed was subject to governmental regulation.[435]

Yet if one cannot behave in compliance with one's religious or ethical beliefs, these beliefs are of little importance.[436] As argued earlier, fundamental religious beliefs are extremely difficult to hold if one is required by the state to act inconsistently with them.[437] A change of belief may be much easier on the psyche than the burden of eternal damnation. Although our society may require some limits on freedom of religion, both courts and commentators must question more seriously the extent to which religious behavior should be insulated from governmental authority.[438]

427. *See, e.g.,* Bates v. City of Little Rock, 361 U.S. 516, 522-23 (1960)("And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment."); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958)("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.").

428. *See* L. TRIBE, *supra* note 13, § 12-23, at 701-02. For an example of a judicial effort to limit the freedom of association to group action furthering only free speech objectives, see Runyon v. McCrary, 427 U.S. 160, 175-76, (1976)(parents could establish private education academies to advocate segregation, but could not employ admission practices implementing the ideas without violating Civil Rights Act, 42 U.S.C § 1981 (1976)).

429. The literature on cognitive dissonance is extensive. *See, e.g.,* J. BREHM & A. COHEN, EXPLORATIONS IN COGNITIVE DISSONANCE (1962); L. FESTINGER, CONFLICT, DECISION, AND DISSONANCE (1964); R. WICKLUND & J. BREHM, PERSPECTIVES ON COGNITIVE DISSONANCE (1976); Faxia, Zanna & Cooper, *Dissonance and Self-Perception: An Integrative View of Each Theory's Proper Domain of Application*, J. EXPERIMENTAL SOC. PSYCHOLOGY, Sept. 1977, at 464-79; Nichols & Duke, *Cognitive Dissonance and Locus of Control: Interface of Two Paradigms*, J. SOC. PSYCHOLOGY, Apr. 1977, at 291-97; Tesser & Cowan, *Some Attitudinal and Cognitive Consequences of Thought*, J. RESEARCH PERSONALITY, June 1977, at 216-26; Yashida, *Effects of Cognitive Dissonance on Task Evaluation and Task Performance*, JAPANESE J. PSYCHOLOGY, Oct. 1977, at 216-23.

430. *See supra* text accompanying notes 386-91.

431. As argued earlier, *see supra* text accompanying notes 364-70, freedom of speech and the marketplace of ideas alone do not assure a pluralistic society.

432. *See* L. TRIBE, *supra* note 13, § 12-23, at 700-01.

433. Reynolds v. United States, 98 U.S. 145, 168 (1879)(upholding the application of federal law prohibiting polygomy to Mormon whose religion required him to engage in the practice).

434. *Id.* at 164.

435. *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

436. Baker, *supra* note 1, at 1037; *see, e.g.,* Murdock v. Pennsylvania, 319 U.S. 105 (1943)(distributing religious pamphlets is protected right not subject to license tax).

437. *See supra* text accompanying notes 429-30 (discussion of cognitive dissonance).

438. Wisconsin v. Yoder, 406 U.S. 205 (1972), was a small step in the direction of constitutional protection for differing lifestyles. The Supreme Court held that Wisconsin could not require members of the Amish church to send their children to public school after the eighth grade. *Yoder*, 406 U.S. at 234. Two aspects of the *Yoder* decision, however, give us reason to pause before attributing to the Court an interest in protecting divergent lifestyles. First, the Court stressed that similar claims would likely be unsuccessful, if founded upon a personal or philosophical rejection of secular values, *id.* at 215-16, or a "recently discovered . . . 'progressive' or more enlightened process for rearing children for modern life," *id.* at 235. *See* J. NOWAK, *supra* note 158, at 877-78; L. TRIBE, *supra* note 13, § 14-10, at 856-57; Baker, *supra* note 1, at 1036.

This narrow approach to religion, distinguishing religion from fundamentally held beliefs, is inconsistent with the broad perspective the Court used in the conscientious objector decisions. *See* United States v. Seeger, 380 U.S. 163, 166 (1965)(sincere belief occupying "a place in the life of its possessor parallel to that filled by the orthodox belief in God" qualifies petitioner for conscientious objector status); *see also* Welsh v. United States, 398 U.S. 333, 340, 343 (1970)(petitioner who held deep conscientious scruples against participation in war was entitled to conscientious objector status despite his lack of belief in a "Supreme Being"). *See generally* Note, *Defining Religion: Of God, the Constitution and the D.A.R.*, 32 U. CHI. L. REV. 533 (1965). In cases involving tax exemptions for religious institutions, other courts have construed the applicable statutes to include non-theistic groups, interpreting "religion broadly in terms of the social function of the group rather than the context of its beliefs." Galanter, *Religious Freedom in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 260; *see* Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 692-93, 315 P.2d 395, 406 (1957)(equal protection rationale). Even though the conscientious objector and tax exemption cases add questions of statutory interpretation, the explicit attempt to separate *Yoder* from the approach of these decisions suggests a continued insensitivity or resistance by the Court to the important role such divergent groupings could play.

Media Economics

Understanding Markets, Industries and Concepts

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Iowa State University Press / Ames

1996

2

ECONOMIC CONCEPTS

In this chapter you will understand:

- How an economic system is organized.
- The differences between command, market and mixed economies.
- The concepts of supply and demand and how they guide the economic system.
- How price affects supply and demand in the media industries.

The economic structure of any society is impacted by the political, legal and social characteristics that influence and shape business practices among firms. The nature of a society's political system determines the environment in which media firms operate. Many types of political systems are possible, ranging from a totalitarian-based authoritarian system emphasizing strict government control to one of laissez-faire, denoting the absence of any sort of regulatory/governmental control.

In the United States, media companies operate primarily in a capitalistic, free enterprise system. Economists refer to this type of system as a mixed capitalist society, with rights primarily in the hands of the citizenry, but where regulatory and other types of constraints impact business practices (Owers, Carveth and Alexander, 1993). In a mixed capitalist society, both public and private institutions produce and distribute products and goods. In the United States, most of the production of media content is handled by private companies (also referred to as the private sector) rather than by government companies and entities (also called the public sector).

Media companies produce and distribute products to consumers in order to generate revenues and ultimately profits in a mixed capitalist society. This

system encourages the interaction and interplay among media producers and consumers and, in the case of advertisers, media buyers. Consumers influence media companies by the types of media content they use or demand. In terms of television, local broadcast channels, cable networks and superstations compete for consumer attention (and advertising dollars), along with other forms of video entertainment such as premium cable channels, pay-per-view and videocassette rentals and purchases. Have you ever wondered how all of these entertainment options can effectively coexist with one another?

As for the print industries, there are numerous choices in regards to selecting a book or magazine to purchase. Depending on the subject matter, the options may seem unlimited. There are fewer choices, however, when it comes to reading a daily newspaper. Many cities are now only served by one major newspaper. Why is it that magazines and books have multiplied while local newspapers have suffered a decline?

These questions can be answered in part by understanding the basic concepts of how the economic system is organized. In Chapter 1 you learned that the resources used to produce media content and other goods are considered scarce because there are not enough resources to satisfy all of the needs and wants of consumers. Therefore, allocative decisions must be made regarding how best to utilize existing resources in a society. Economists refer to this decision-making process as the economic problem of a society.

The Economic Problem

The economic problem involves a process of dealing with the important issues of production and consumption. These include the following questions: (1) How much of which goods will be produced? (2) How will the goods be produced? (3) Who will consume the goods? The answers to these questions determine the underlying organization of the economic system.

In addition to determining what goods will be produced, the producers must also consider the quantity of the goods that will be produced and the method of production. Differences exist between the public sector and the private sector in determining the amount of goods to produce. For example, in the public sector, the government makes decisions on how much money to spend for the nation's defense, while at the same time determining how much to allocate for domestic programs such as health care. In the public sector, decisions are often based on social and politically sensitive choices (i.e., social security and other entitlement programs), rather than as a response to specific economic considerations.

In the private sector, production decisions are influenced by the interaction between buyers and sellers or, in the case of the media, content providers and

consumers. For example, in the book industry, not only must the selection of which titles to print be considered, but also how many copies of each book to print. Further, publishers must decide the format of the book—whether it will be available as a hardcover, a softcover and/or an audio format. In considering this book for publication, the publisher had to consider a number of different variables including the demand for the book, the likely users of the book and the value of the work.

With respect to determining *who* will produce the goods, individual media outlets determine *how many* people to use in the production of the content. Labor is an important concept in any decisions involving production of goods and services and, in the media industries, labor represents one of the most expensive resources (Dunnett, 1990). In the radio industry, this may involve the decision to use a live, on-air staff or to select an automated, satellite-delivered service. Film directors determine the location for their movies—whether it be in a Hollywood studio or an exotic tropical location; the more elaborate the locale, the more personnel are needed to create the film.

In determining who will consume the goods, certain policies established by the individual media outlets or some form of government may determine who will be able to consume the content. For example, cable television fees vary from city to city and are subject to certain types of regulation, but broadcast signals are available for free. Early in broadcast history, regulators claimed the airwaves were public property, so broadcast radio and television were provided to the public at a very low cost (the cost of buying a receiver and possibly an antenna). Governmental policies led to the establishment of separate classes of broadcast service (AM, FM, VHF, UHF) and, ultimately, created a three-network system that dominated broadcasting for several decades. In answering the three economic questions posed earlier, the government [through the Federal Communications Commission (FCC)] decided (a) how many channels each community would receive; (b) who would be allowed a license to those channels through the licensing process; and (c) that the public would only have to pay for a receiver in order to use or consume the content.

As for cable television, the situation is different. Local municipalities determine how many cable companies will be awarded a franchise (how much will be produced) and also specify the requirements of the system (how the good will be produced). It is left up to individual households to determine whether or not they wish to subscribe to cable (who will consume). When the Congress and the FCC established new cable rate regulations in 1992, regulators sought to encourage greater consumption of cable by requiring operators to lower their fees for basic service.

These two examples illustrate how a society may provide different answers to the three questions that form the economic problem. The type of economic structure in a society influences production, distribution and consumption.

Types of Economies

When a government regulates answers to the economic problems facing a society, a *command economy* exists. In this type of economy, the government makes all decisions regarding production and distribution. The government decides what will be produced and the quantity; it establishes wages and prices and also plans the rate of economic growth. Choice of available consumer goods is limited to what the government produces. Clearly, countries utilizing command economies are on the wane with the collapse of communism in many parts of the world. However, countries such as China and Cuba still represent command economies.

In a *market economy*, a complex system of buyers, sellers, prices, profits and losses determines the answers to questions regarding production and distribution, with no government intervention. The market economy is more or less an idealized economic system and is not truly represented in any major countries in the world today.

In a *mixed economy*, combinations of the market and command economies are found. In the United States, as well as in most of the developed countries of the world, the mass media operate under a mixed economic structure. Typically, these mixed economic systems involve some governmental policies and regulations, while allowing the media to be privately owned. In the United States, the individual media industries establish their own policies in pricing their products, either through advertising or direct payments by consumers (Vogel, 1990).

Perhaps what is most interesting in studying the U.S. mass media as economic institutions is the amount of order that exists due to the elements of the market economy. The observation that the economic system functions in an orderly fashion was first theorized by Adam Smith in a book published in 1776, titled *The Wealth of Nations*. Smith introduced the *invisible hand doctrine*, which suggests that the economy is directed by an unseen force to the benefit of all producers and consumers. Smith advocated the idea of noninterference by the government (laissez-faire) in letting market forces prevail.

Other philosophies recognized that not everyone would benefit from a system of laissez-faire, leading to some segments of society being impoverished and enslaved by the market system. As a result, government involvement led to the creation of mixed economies. Economists have long since argued and refined the concept of the invisible hand as other economic philosophies have emerged, but the idea of unseen order leading the economic system still holds merit. Consider that every day of the year, the mass media is involved with producing and distributing media content, which is in turn consumed in different quantities by various audiences. Yet much more is involved on a daily basis than just production, distribution and consumption.

Take, for example, the daily newspaper. Many scarce resources, such as newsprint, ink, water, electricity and equipment, are used to produce the paper. These raw materials must be obtained from suppliers of these types of products and then converted into the finished product during the production process. Concomitantly, advertisers purchase space in the newspaper in different forms and formats in order to reach the people who read the newspaper. The space must be sold in advance in order to make sure the advertisements meet the objectives of the client. Thus, a system of buying and selling of future advertising space continues on a daily basis. The finished paper reaches consumers in different ways. Some customers purchase subscriptions, though others may only purchase a single paper, such as the Sunday paper, at a supermarket or convenience store. Other consumers may read someone else's paper, and some avoid reading the newspaper altogether.

Supply and Demand

At work driving the market economy (the notion of an invisible force) are a number of buyers and sellers working on behalf of their own self-interests. The newspaper example illustrates in a rather simplistic fashion how the market economy functions, starting with the raw materials needed to print the paper and ending with the creation of the finished product consumed by the consumer. Underlying this example are two fundamental concepts of the market system: *supply* and *demand*. In a market economy, supply and demand mechanisms work together to solve the economic problems of a society (see Fig. 2-1).

Supply is normally thought of as the amount of a product producers will offer at a certain price. Producers determine the quantity, but make most of their production decisions based on the anticipated needs of those who will consume the product. The newspaper publisher purchases enough ink, paper and equipment to produce the daily paper, but will be hesitant to print more copies than consumers normally purchase. In other words, the producer attempts to produce enough of the product to meet the anticipated demand of the consumer. This not only ensures proper allocation of scarce resources, but also enables the publisher to anticipate profits (or losses) based on revenues and expenses.

The available supply of a product is directly affected by the demand for the product placed by consumers. Demand is defined as the measure of the quantity of a particular product or service that consumers will purchase at a given price. The interplay of product, price and market characteristics all influences consumer demand. In general economics, production decisions in competitive markets are based on supply, rather than demand, characteristics. In media economics, demand characteristics are somewhat problematic given the unique nature of media products (content).

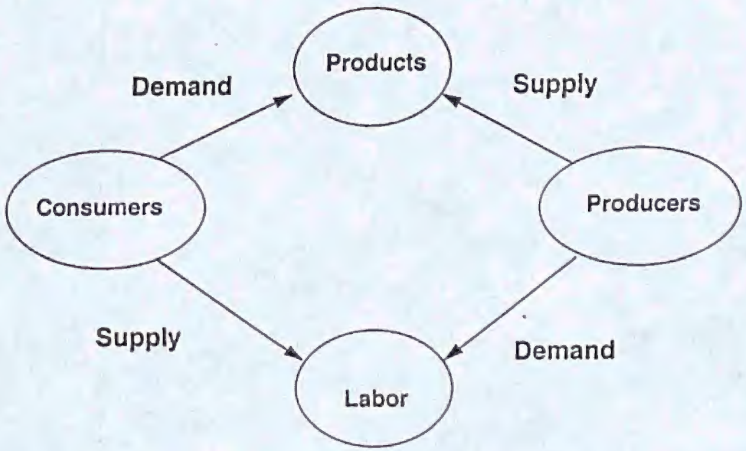

FIGURE 2-1. *The market system.*

The demand curve. Economists use a tool called a demand curve to chart the changes that supply and price cause on consumer demand. Demand curves are normally downward sloping, meaning that as the price for a particular good or service decreases, the quantity (or supply) demanded by consumers increases. On the other hand, if prices are increased, the quantity demanded will decrease. There are occasions in media economics where the demand curves may not follow normal patterns through the range of possible price values; in most cases though, the demand curve is usually thought of as downward sloping.

Figure 2-2 illustrates a typical demand curve. In this example, the demand curve reflects the price of a video recording (such as the movie *A Few Good Men*). Note that the higher the price, the lower the quantity demanded for the product. As the price for the video drops, the quantity demanded for the product increases. When a video distributor prices a new VHS release at $89.95, the product is not really intended for purchase in the consumer market, but instead is targeted to video rental outlets such as Blockbuster Entertainment. Conversely, if the price of the video was set at $19.95, many more consumers would likely consider purchasing the tape for their home library. The demand curve normally holds true for both consumers and markets as a whole, in that market demand is simply an aggregate of a number of individual consumer demand curves.

Elasticity of demand. Change in price resulting in a change in the quantity demanded by consumers is referred to as *elasticity of demand,* or more commonly called *price elasticity of demand.* Economists have identified three types of price elasticity of demand: elastic, unit-elastic and inelastic. The types of price elasticity of demand are presented graphically in Figure 2-3. In elastic demand, a change in price results in a greater change in the quantity demanded. We often see this happen as new technologies are introduced. Initially, prices for certain technologies were highly priced when first introduced to consumers (e.g., hand calculators, VHS VCRs, personal computers), but as prices dropped, many more households adopted the technology. Under unit-elastic demand, a change in the price results in an equivalent change in quantity. Lowering the price does increase the quantity demanded, but on a directly proportionate basis. Inelastic demand occurs when a change in price results in no significant change in the quantity demanded. Lowering the price does not always mean that consumers will demand more of the good; if it is not wanted or needed or has little value, then the quantity demanded will not change. Perhaps this is one reason why eight-track tapes are no longer for sale!

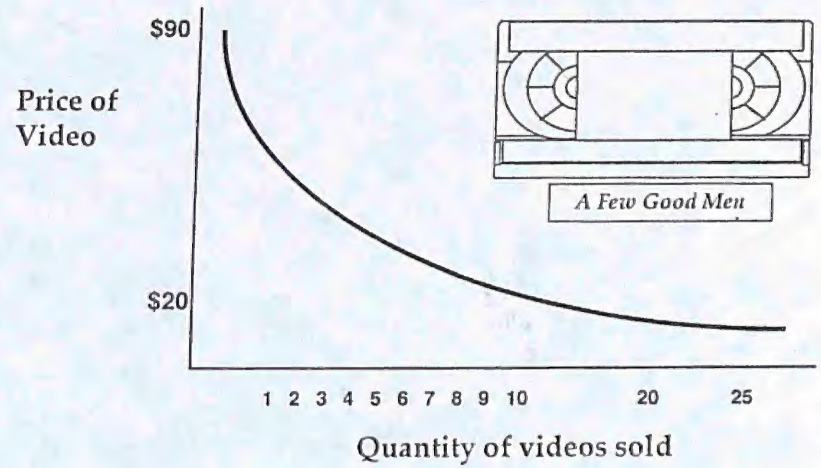

Figure 2-2. Demand curve for differently priced products.

Price elasticity of demand can be calculated by dividing the percentage change in the quantity of a product by the percentage change in price:

$$\text{Price elasticity of demand} = \frac{\text{Percent change in quantity}}{\text{Percent change in price}}$$

A positive or negative sign preceding the statistic indicates the direction of the demand; in most cases, price elasticity of demand is a negative number.

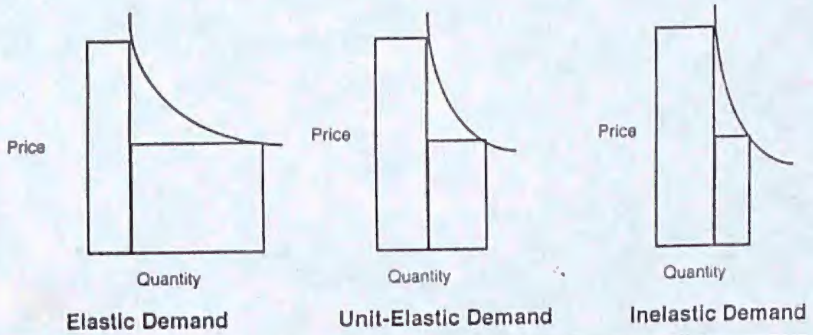

FIGURE 2-3. *Price elasticity of demand.*

Economists use the following criteria to determine elasticity. If the statistic is greater than ±1.0, demand is said to be elastic. If it is less than ±1.0, demand is inelastic, whereas a statistic of ±1.0 represents unit elasticity. Table 2-1 illustrates these price elasticity of demand formulas, how they are defined and their impact on revenues.

Price elasticity of demand is an important concept to grasp in the study of media economics, as it helps to understand how consumer demand is affected by the value of particular products to consumers, and the price at which goods

Table 2-1. Summary of price elasticities of demand

Value of Demand Statistic	Type of Demand	Definition	Impact on Revenues
Greater than one (E_d>1)	Elastic	Percentage change in quantity demanded *greater* than percentage change in price	Revenues *increase* when price decreases.
Equal to one (E_d=1)	Unit-elastic	Percentage change in quantity demanded *equal* to percentage change in price	Revenues *unchanged* when price decreases.
Less than one (E_d<1)	Inelastic	Percentage change in quantity demanded *less* than percentage change in price	Revenues *decrease* when price decreases.

Source: Adapted from Samuelson and Nordhaus (1992).

are made available by producers (suppliers). Price elasticity of demand provides producers with information regarding production and consumption for particular goods, and aids the producer in understanding how demand for products varies at different price levels.

Cross-elasticity of demand. Although price is a very important factor in analyzing consumer demand, it is important to recognize that demand is also affected by the availability of other products (and their respective prices) that can be substituted for one another. Changes in tastes and preferences, demographic characteristics, individual household income and technology all encourage the substitution of different media products or services. In the media industries, a number of competitors produce similar media content, and consumers often sample and substitute other media products regularly. In the study of economics, this process is called *cross-elasticity of demand.*

In a very broad sense, the media industries are engaged in the production and dissemination of information and entertainment content, yet this does not mean that any of the media are interchangeable with one another. For example, to access news, a consumer can use radio, television or the newspaper. Each differs in the amount of time and space devoted to the presentation of the news. They serve more as *complements* to one another, rather than as pure substitutes. On the other hand, a movie on a premium cable channel can usually be accessed in other ways, such as through a video rental store or through direct purchase.

Cross-elasticity is a useful tool in economic analysis, in that it can be used to determine "the extent to which different media compete for different portions of media product and service markets" (Picard, 1989, p. 47). Cross-elasticity has been used in the public policy arena, particularly in analyzing antitrust cases that examine competitive practices in certain markets (Samuelson and Nordhaus, 1992).

In the media industries, cross-elasticity of demand usually increases when there are many potential substitutes, as in industries such as magazines or cable television. In general, studies examining cross-elasticity in the mass media among consumers have shown that as the percentage of income required to consume a good increases, so does cross-elasticity.

TYPES OF DEMAND FOR MEDIA PRODUCTS It is important to note that there are different types of demand present at different levels of analysis in the mass media. Clearly, there is a demand for the media content by the audiences. Here, demand can be measured on the individual level by consumer usage of the product. This can be studied by examining direct consumer purchases (such as a newspaper, book or movie ticket) or, in the case of content offered for free (such as television), by the *utility* (satisfaction) offered by the product. Typically, utility is a subjective measure, and individuals assign *value* (Figure

2-4) to the content based on the satisfaction derived from the product. Studies of audience uses and gratifications routinely measure the satisfaction, or utilities, desired from media content.

Representative studies by Dimmick (1993) and Albarran and Dimmick (1993) relate the concept of gratifications to economic utility in a series of studies involving the ecological theory of the niche. In calculating measures of utility, the authors found cable television to be superior to broadcast television and other forms of video entertainment in serving audience needs.

There is also demand for access to audiences by advertisers trying to market their products and services to consumers. The advertising industry operates in an interdependent relationship with much of the mass media in our country. Without cooperation, neither industry would flourish. The demand for advertising can thus be studied on an organizational, or macro, level. Most studies of advertising demand have observed little cross-elasticity in the advertising industry. For example, Busterna (1987) found no cross-elasticity of demand for national advertising among several different advertising media, and Picard (1982) found that newspapers are more concerned with industry trends than with with consumer demand in setting advertising prices.

Another type of demand is the demand for media outlets, as evidenced by the large number of mergers and acquisitions that occur annually in the media industries. Most of these studies attempt to determine what variables influence the price of a particular media property—such as a television or radio station, or cable system. In most cases, this type of analysis occurs on the market level, which is the focus of Chapter 3.

What is value? Economists think of value as the worth of a particular product or service. It is a subjective process that is linked to individual satisfaction.

Consumers assign value based on individual wants and needs for a particular product. In terms of media use, this process helps consumers decide what type of media content to utilize in order to meet their needs.

FIGURE 2-4. *Value.*

In addition to the studies mentioned in the preceding paragraphs, a limited number of academic studies have been conducted to determine the demand for media content, advertising and media outlets. Studies are limited because so much of the data needed by researchers are proprietary in nature and are held confidentially by media companies and independent firms. A sample of these studies, the industries examined and their findings regarding demand are shown in Table 2-2.

Table 2-2. Examples of demand studies

Author(s) and Date	Industry Examined	Findings
Lacy (1990)	Newspaper	Competition increases higher quality news operations.
Childers and Krugman (1987)	Cable, VCR, PPV	Significant cross-elasticity of demand observed.
Mayo and Otsuka (1991)	Cable Television	Demand for basic cable ranges from inelastic in rural areas to elastic in urban markets; demand for pay services is also elastic.
Bates (1988)	Broadcast TV Stations	Deregulation had little impact on demand or on price of TV stations.

Source: Adapted from Bates (1988).

Summary

The economic system determines who will produce goods, how goods will be produced and who will consume the goods based on the type of economic structure found in a society. In most developed countries, a mixed economy is in operation regarding the mass media, which establishes a market economy with limited governmental regulation.

The market economy is guided by supply and demand interacting throughout the market to maintain equilibrium. In a market-based economy, supply and demand interact to make the economy function. The mass media are continually engaged in supply and demand in our country, obtaining resources on a daily basis in order to supply consumers with the media content/products they desire.

Demand can be measured at different levels and is affected by many variables including price, value, changing tastes and preferences, and income.

When different forms of media content can be substituted for each other, cross-elasticity of demand exists. Cross-elasticity of demand is a useful tool in economic analysis and is often used in public policy decisions.

This chapter has presented the basic concepts of an economic system and their application to the mass media industries. In Chapter 3, the focus shifts to the individual market level rather than the economic system as a whole. Markets are discussed in terms of their structure, conduct and behavior in an economic system.

References

Albarran, A. B. and Dimmick, J. (1993). Measuring utility in the video entertainment industries: An assessment of competitive superiority. *Journal of Media Economics* 6(2):45–51.

Bates, B. J. (1988). The impact of deregulation on television station prices. *Journal of Media Economics* 1:5–22.

Busterna, J. (1987). The cross elasticity of demand for national newspaper advertising. *Journalism Quarterly* 64:346–351.

Childers, T. L. and Krugman, D. M. (1987). The competitive environment of pay per view. *Journal of Broadcasting and Electronic Media* 31:335–342.

Dimmick, J. (1993). Ecology, economics, and gratification utilities. In: Alexander, A., Owers, J., and Carveth, R. (eds.). *Media Economics: Theory and Practice*. New York: Lawrence Erlbaum Associates, pp. 135–156.

Dunnett, P. (1990). *The World Television Industry: An Economic Analysis*. London: Routledge.

Lacy, S. (1990). A model of demand for news: Impact of competition on newspaper content. *Journalism Quarterly* 67:40–48; 128.

Mayo, J. W. and Otsuka, Y. (1991). Demand, pricing, and regulation: Evidence from the cable TV industry. *Rand Journal of Economics* 22(3):396–410.

Owers, J., Carveth, R., and Alexander, A. (1993). An introduction to media economic theory and practice. In: Alexander, A., Owers, J., and Carveth, R. (eds.). *Media Economics: Theory and Practice*. New York: Lawrence Erlbaum Associates, pp. 3–46.

Picard, R. G. (1982). Rate setting and competition in newspaper advertising. *Newspaper Research Journal* 3(April):2–13.

Picard, R. G. (1989). *Media Economics*. Beverly Hills: Sage.

Samuelson, P. A. and Nordhaus, W. D. (1992). *Economics*, 14th ed. New York: McGraw-Hill.

Vogel, H. L. (1990). *Entertainment Industry Economics: A Guide for Financial Analysis*, 2nd ed. Cambridge: Cambridge University Press.

3

UNDERSTANDING THE MARKET

In this chapter you will learn:

- How a market is defined in media economics.
- Different types of market structure found in the mass media.
- How individual firms are affected by market structure.
- How market structure impacts market conduct and market performance.

The market economy introduced in Chapter 2 is actually composed of many individual markets; but what exactly is a market? A *market* is where consumers and sellers interact with one another to determine the price and quantity of the goods produced. A market consists of a number of sellers that provide a similar product or service to the same group of buyers/consumers. Market activity varies across different locations because individual products differ and there are different groups of buyers and sellers. The market for soft drinks is much different than the market for automobile insurance. Likewise, the market for magazines is different from the pharmaceutical market. Yet any market can be analyzed using similar concepts. In this chapter, the focus is on analyzing a market in terms of its structure, behavior and performance.

A market is sometimes referred to as an industry. In reality, a market and industry differ from each other. The market refers to an interrelated group of buyers and sellers, whereas an industry refers only to the sellers in a particular market (such as the film industry) or across several markets (as in the newspaper industry, which is engaged in selling the paper as well as retail and classified advertising).

Today, the majority of media companies participate simultaneously in

several different markets. For example, Sony manufactures electronic hardware such as compact disc (CD) players and other audio equipment. Sony also participates in the manufacture and sale of software through ownership of CBS Records and the sale of blank audio and video tape. Sony also owns a film studio, Columbia Pictures, which produces programming (another form of software) for film and television. Hence, Sony is a major "player" in three separate, yet related, media markets. And Sony encounters different competitors, as well as different buyers, in each market.

The Sony example illustrates one of the important aspects of studying media economics: that media firms operate across a range of product and geographic markets. This distinction is clarified later in this chapter in a discussion of product-geographic markets.

Markets Defined: Product and Geographic Dimensions

Picard (1989) explains that media industries are unique in that they function in a dual product market. That is, although media companies produce one product, they participate in two separate good and service markets. In the first market, the good may be in the form of a newspaper, radio or television program, magazine, book or film production. The good is marketed to consumers and performance is evaluated in different ways.

Newspaper and magazine performance is measured through circulation data from subscribers and purchases of individual issues. Radio and television programs use audience ratings, and film performance is measured by ticket sales. Some products require a purchase to be made by the consumer, such as a cable television subscription or video tape rental. Other products may be accessed simply by acquiring a receiver, as in the case of broadcast radio and television. However, all media products require the use of individual time (a scarce resource) in order to be consumed.

The second market in which many media companies are engaged involves the selling of advertising. Advertisers seek access to the audiences using media content. These two areas strongly influence each other (see Fig. 3-1). Greater demand for media content enables companies to charge higher prices for their advertising. Likewise, a drop in audience ratings, reader circulation or other media usage will trigger a decline in advertising revenues.

This dual product market is a unique characteristic for much of the mass media. Most companies that produce consumable products only participate in a single market, that of providing the good to the consumer. Take McDonald's as an example. As a leader in the fast food industry, McDonald's offers a variety of food products to its customers. However, when we consume food from McDonald's, the product is used up. In contrast, media products represent

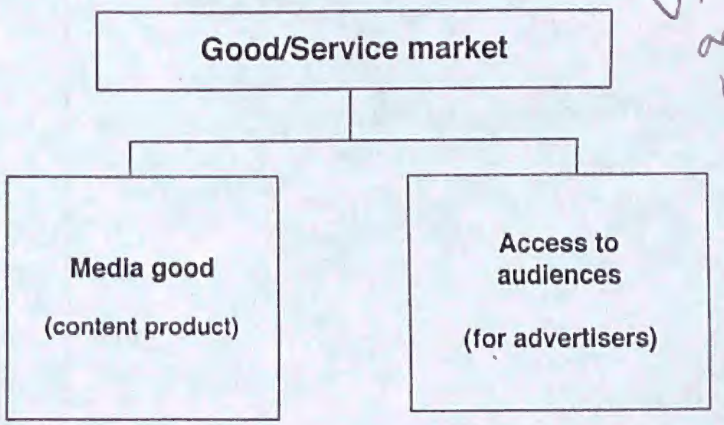

FIGURE 3-1. *The dual product market.*

entertainment and informational goods that can be used over and over again. As such, media firms do not produce typical products, as information goods are not consumable in the purest sense of the term.

In addition to operating in a dual product market, many media companies operate in specific areas, or *geographic regions*. Some firms, such as radio, television, and cable networks, compete on a national basis, whereas other companies, such as local radio and television stations and newspapers, compete in a regional geographic area.

In a few media industries, the geographic region is regulated by some form of government. For example, the Federal Communications Commission (FCC) grants broadcast licenses to specific areas, and local municipalities award franchises to cable system operators. Media industries not subject to governmental regulation simply pick and choose the geographic markets in which to operate.

Defining a media market consists of combining both the product and geographic dimensions (Fig. 3-2). This process delineates a specific market for the media firm in which it offers some or all of its media products to potential buyers. The number of suppliers in a particular market—and the extent of the competition among suppliers for buyers—is affected by the characteristics of the market or what economists refer to as *market structure*. In turn, the type of market structure affects the conduct and performance of the market. A theoretical tool used to understand the relationship of market structure, conduct and performance is the industrial organization model.

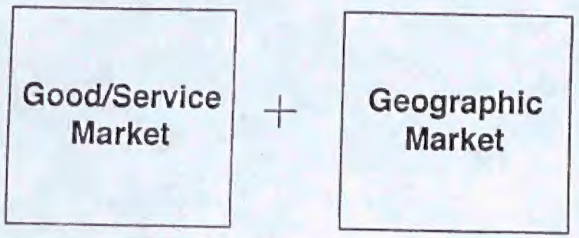

FIGURE 3-2. *Defining the market.*

The Industrial Organization Model

The industrial organization model is commonly used to understand the relationships among market structure, conduct and performance. The industrial organization model (see Fig. 3-3) explicated by Scherer (1980) offers a systematic approach to analyze the many abstract concepts encountered in studying a market. Busterna (1988) adds that the model helps in understanding the interaction of market forces and their impact on market activities. Further, the industrial organization model explains why market performance is linked to market structure and conduct.

In the following sections, the components of the industrial organization model are briefly examined with an explanation of key terms and principles. Readers desiring more detailed treatment should consult Scherer (1980) or Bain (1968), two widely cited sources on industrial organization.

MARKET STRUCTURE A market is better understood through an examination of its economic characteristics. The structure of a market is dependent on several factors, but several important criteria clarify the type of market structure. These criteria are the concentration of buyers and sellers (producers) in the market, the differentiation among the various products offered, barriers to entry for new competitors, cost structures and vertical integration.

The number of producers or sellers in a given market explains a great deal about the *concentration* in a given market. A market is concentrated if it is dominated by a limited number of large companies. The lower the number of producers, the larger the degree of power each individual firm will wield. For many years, the broadcast networks (ABC, CBS, NBC) dominated the network television market, particularly with respect to advertising. But as cable television, other video technologies and the Fox Broadcasting Company emerged as competitors, competition for viewers and advertisers intensified.

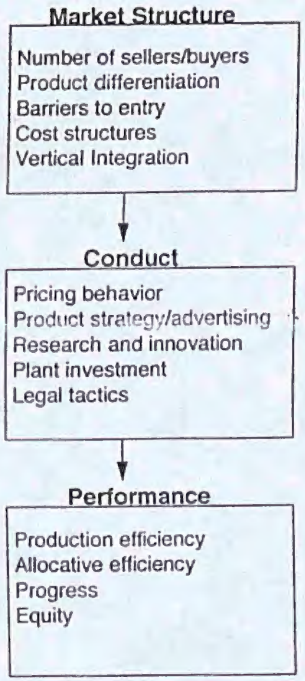

FIGURE 3-3. *Industrial organization model.* (Modified from Scherer, 1980)

Concentration can be measured in different ways, but in media economics two approaches prevail. One method measures the percentage of the market (using circulation or ratings data) reached by competitors through the product. Another method involves calculating the percentage of revenues (sales) controlled by the top four (or eight) firms. These ratios are discussed more fully in Chapter 4.

Product differentiation refers to the subtle differences (either real or imagined) perceived by buyers to exist among products produced by sellers. A number of magazines are geared to specific markets. For example, there are several publications targeted toward the world of business. Yet *Forbes*, *Business Week*, and *Money* all present different editors, columnists and other features geared toward their readers. Radio stations offer a variety of music formats, and their call letters, personalities, marketing campaigns and technical facilities create differences from one station to the next.

Barriers to entry are normally thought of as obstacles new sellers must

overcome before entering a particular market. Barriers may be limited to capital (money) or other factors. Wirth (1986) studied barriers to entry for the newspaper and broadcast industries and found that entry into the newspaper business involved far more economic barriers than did entry into broadcast radio or television. Before Rupert Murdoch could purchase a set of television stations in order to establish the Fox network, he first had to meet a number of federally mandated ownership criteria (including obtaining U.S. citizenship) in order to be approved by the FCC.

Cost structures consider the costs for production in a particular market. Total costs consist of both fixed costs—the costs needed to produce one unit of a product—and variable costs—costs that are variable in nature depending on the quantity produced (e.g., labor and raw materials). Industries that have high fixed costs, such as newspapers and cable television, often lead to highly concentrated markets. *Economies of scale* usually exist in these situations for the producer (seller). By economies of scale, we refer to the decline in average cost that occurs as additional units of a product are created.

Vertical integration occurs when a firm controls different aspects of production, distribution and exhibition of its products (Fig. 3-4). Time Warner Entertainment is an example of a company engaged in vertical integration. A movie produced by the Time Warner–owned Warner Brothers film studio eventually will appear on pay-per-view on Time Warner cable systems. Following pay-per-view, the movie will likely be scheduled on premium services such as Home Box Office or Cinemax. Finally, the movie may be offered as a package of feature films for sale to cable networks or local television stations. Time Warner maximizes its revenue for the film through the different stages of distribution and exhibition.

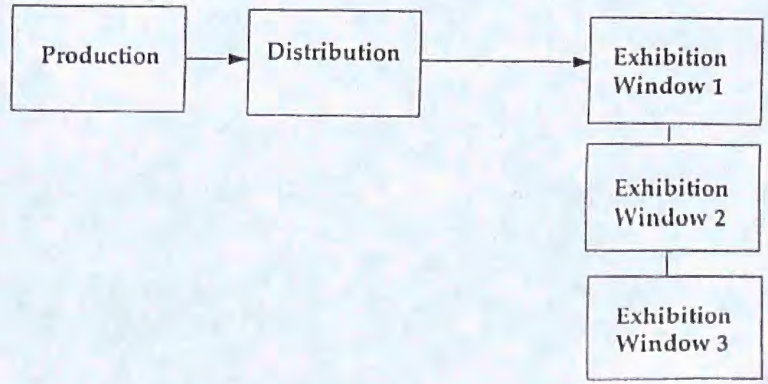

FIGURE 3-4. *Vertical integration.*

Analyzing the number of producers and sellers in a market, the difference between products, barriers to entry, cost structures and vertical integration gives insight into the structure of a market. Four types of market structure serve as theoretical models. These four types of market structure are recognized popularly in much of the literature as the "theory of the firm" (Litman, 1988).

The theory of the firm. The four types of market structure are monopoly, oligopoly, monopolistic competition and perfect competition. The four market structures represent a continuum, with monopoly and perfect competition found at opposite ends, and oligopoly and monopolistic competition occupying interior positions (Fig. 3-5). These types of market structure are represented in different industries, including the mass media.

A *monopoly* is a type of structure whereby a single seller of a product exists and thus dominates the market. Generally, a monopolistic structure assumes there is no clear substitute for the product; a buyer must purchase the good from the monopolist or avoid consumption of the good altogether. Because of this, economists refer to monopolists as "price-makers," as they can set the price in order to maximize profits. As expected, barriers to entry are very high in a monopoly.

The monopolist can also exhibit power in the market by restricting production output (if desired). In a monopolistic structure, the demand curve for the product is the same as the industry demand curve (Fig. 3-6). If no close substitute exists, demand is generally perceived as inelastic. It is important to recognize that not all consumers (buyers) demand the seller's product. If demand is weak and substitutes emerge, the monopolist will have little market power.

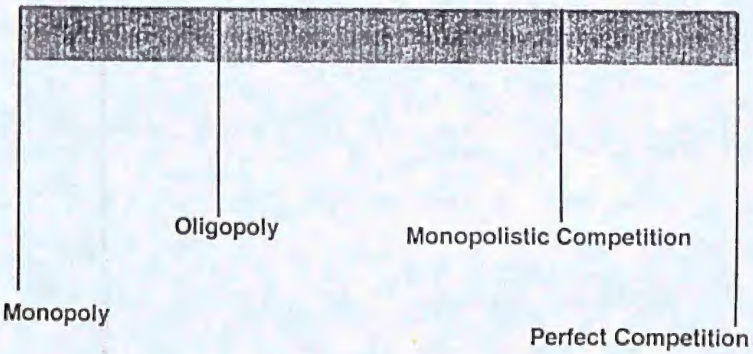

FIGURE 3-5. *Market structure.*

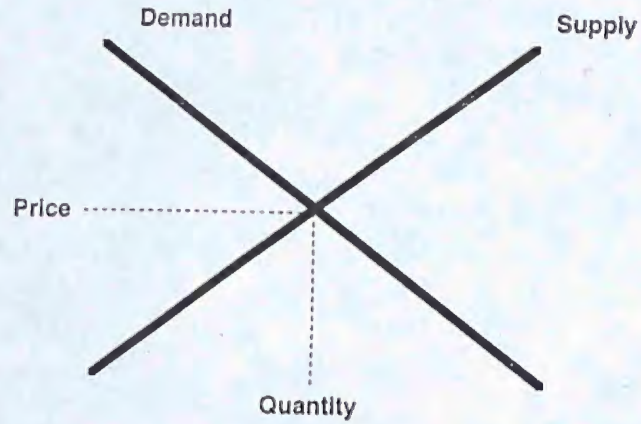

FIGURE 3-6. *Monopoly demand curve.*

An *oligopoly* differs from a monopoly in that an oligopolistic structure features more than one seller of a product. Products offered by the sellers may be either homogeneous or differentiated. Typically, a market dominated by a few firms is considered an oligopoly, and each firm commands a similar share. Firms in an oligopoly are mutually interdependent, with the actions of the leading firm(s) affecting the other firms in the market. These firms consider their actions in light of the impact on the market and their competitors. Depending on the reaction of other competitors, changes made by the leader(s) may move firms in an oligopoly toward more cooperation or competition.

In an oligopoly, price is normally set by the leader, and others follow suit. The small number of sellers and the lack of substitutes create an inelastic demand curve for the oligopolistic market structure (see Fig. 3-7). Barriers to entry may take several forms in an oligopoly, but they are not as significant as those found in a monopoly. For example, the Fox network was able to enter the television network market successfully despite the fact that ABC, CBS and NBC held dominance with audiences, advertisers and affiliates.

A third type of market structure, *monopolistic competition,* exists when there are many sellers offering products that are similar, but not perfect, substitutes for one another. Barriers to entry are lower than those found in an oligopoly. Each firm attempts to differentiate its products in the minds of the consumer through various methods including advertising, promotion, location, service and quality.

Unlike in the oligopoly, price varies in this type of market structure with

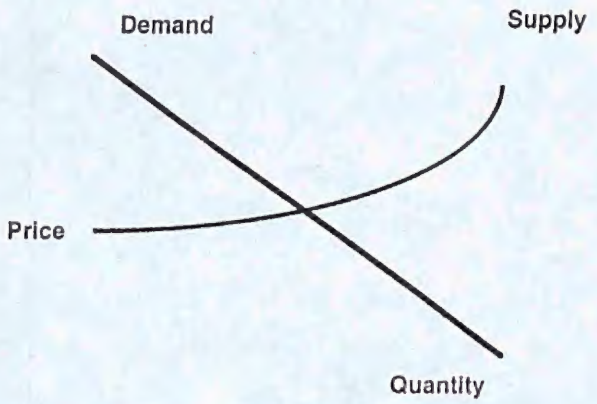

FIGURE 3-7. *Monopolistic competition demand curve.*

price decisions set by both the market and the individual firms. Monopolistic competitive firms, believing they operate independently in the market, will often lower prices in order to increase revenue. However, other competitors facing similar conditions may also lower their prices, which results in a downward-sloping demand curve (see Fig. 3-8) for the market.

In *perfect competition*, the market structure is characterized by many sellers in which the product is homogeneous and no single firm or group of firms dominates the market. With no barriers to entry, the characteristics of the market economy dominate in a perfectly competitive market structure.

Individual firms operate as "price-takers," in that the market sets the price for the product, and prices are naturally constrained downward (Picard, 1989). The only production decision the firm makes in this type of market structure is how much of the good to produce, as it has no control over price. The demand and supply curves are straight under perfect competition (see Fig. 3-9).

MEDIA INDUSTRIES AND MARKET STRUCTURE In order to apply the theory of the firm to the media industries, one must first understand the specific market and the number of firms operating in the market and determine the amount of control the firm(s) has over its competitors. Media industries occupy different positions across the four types of market structure shown in Figure 3-10.

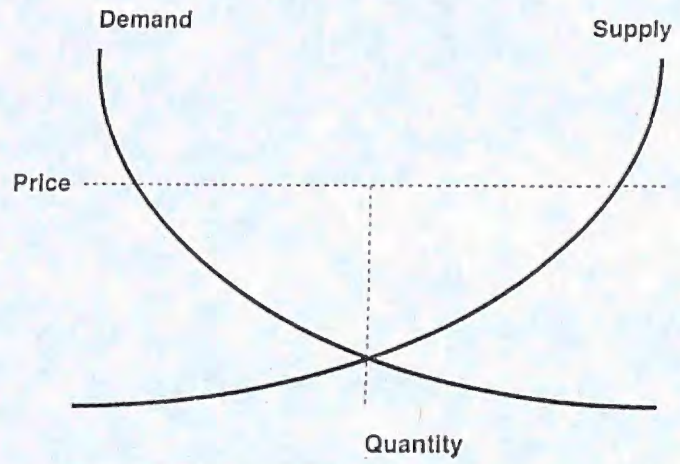

FIGURE 3-8. *Oligopoly demand curve.*

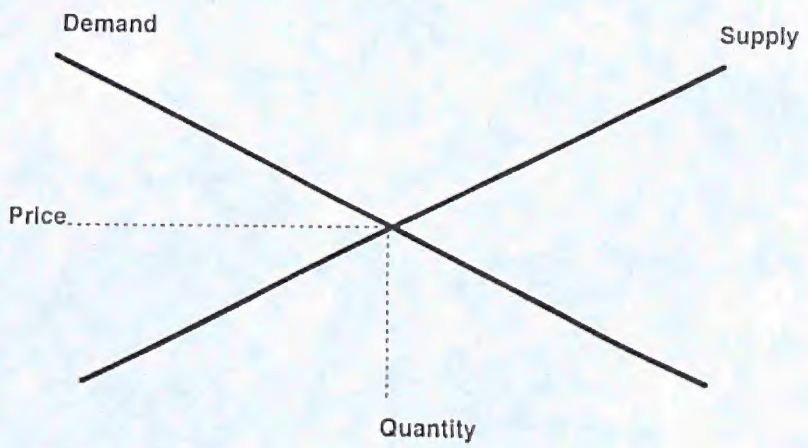

FIGURE 3-9. *Demand curves in perfect competition.*

- **Monopoly**
  - Cable television
  - Newspapers (in most markets)
- **Oligopoly**
  - Television networks
  - Motion pictures
  - Recording industry
- **Monopolistic competition**
  - Books
  - Magazines
  - Radio

FIGURE 3-10. *Key media industries by market structure.*

The closest example of a monopoly market structure in the mass media is cable television. Cable systems are locally regulated according to franchise agreements established between the cable operator and the local form of government and are specified for a set period of time. The cable industries' monopoly position is being threatened by competition from local telephone companies and direct-broadcast satellite systems, as well as other competitors.

Newspapers tend to fall in either a monopolistic or oligopolistic structure depending on the number of newspapers published in a particular geographic area. The number of cities served by more than one daily newspaper has declined rapidly over the past few decades (see Fig. 3-11), suggesting a move toward a monopolistic structure.

For the most part, broadcast television stations operate in an oligopolistic market structure, as do the broadcast networks. The TV industry utilizes the same types of programming—situation comedies, dramas, movies, sports, news, reality, etc. The product is relatively homogeneous, although competition for audiences is intense. Other industries with an oligopolistic structure include the motion picture and recording industries.

A number of media industries fall under the monopolistic competition market structure, including the magazine, book and radio industries. Although each of these industries differs in terms of barriers to entry and product differentiation, they are all best described as monopolistic competitive. A true perfectly competitive market structure does not exist in the mass media.

Scherer's two-dimensional model. The theory of the firm helps clarify the distinctions found across the four types of market structure. In addition to the

Year	Number of Cities
1954	88
1959	81
1965	70
1975	65
1980	57
1990	43
1994	33

FIGURE 3-11. *Cities with two or more newspapers.* (Newspaper Association of America, 1994)

theory of the firm, Scherer (1980) offers a two-dimensional approach to understanding market structure (Fig. 3-12). The first dimension considers the number of sellers in a market (one, a few, many) and the second dimension separates homogeneous products from differentiated products.

This two-dimensional approach is helpful in clarifying some aspects of market structure left unanswered by the theory of the firm. This is evident in Scherer's distinction between homogeneous oligopolies and differentiated oligopolies. An example of a homogeneous oligopoly would be the broadcast TV networks and their relationships with advertisers. In this sense, the networks are similar; from an advertiser's view they each offer access to audiences in the same way. An example of a differentiated oligopoly would be the case of a city served by more than one newspaper. *The New York Times* is a different product than the *New York Post,* just as the *Chicago Tribune* is a different paper from the *Sun-Times.*

Both the theory of the firm and Scherer's seller/product dimensions are helpful in understanding market structure. The following sections focus on how market structure influences market conduct and market performance, the other components of the industrial organizational paradigm.

MARKET CONDUCT *Market conduct* refers to the policies and behaviors exhibited by sellers and buyers in a market. Market conduct centers around five specific areas: pricing behavior, product strategy and advertising, research and innovation, plant investment, and legal tactics. Of special interest is how

Type of Product	Number of Firms		
	One	A Few	Many
Homogeneous product	Pure monopoly	Homogeneous oligopoly	Pure competition
Differentiated product	Pure monopoly	Differentiated oligopoly	Monopolistic competition

FIGURE 3-12. *Scherer's two dimensions of market structure.* (Scherer, 1980)

these different types of behaviors appear to be coordinated among firms in certain types of market structure.

Pricing policies or behaviors are the most observable type of market conduct. Here, the interest is understanding how pricing policies are established. Picard (1989) explains that pricing policies involve a series of decisions regarding how products are packaged, discounted and set. Picard identifies four common price orientations: (a) demand-oriented pricing, where prices are set via market forces; (b) target return pricing, which is based on a desired amount of profit; (c) competition oriented pricing, in which prices are based on those offered by competitors; and (d) industry norm pricing, which is based on the industry at large, rather than market forces.

Product strategy and advertising refer to decisions based on the actual products offered by a firm, including how a product is packaged or designed. In the media industries, it may involve what type of programming to secure for a new cable channel, the type of music format selected for an FM radio station, or the quality of paper on which to print a magazine. As discussed previously, firms must also consider which market to enter from a geographic perspective, by targeting a national audience or concentrating on specific areas.

Advertising entails a range of activities designed to create awareness of media products and services. Promotional and marketing activities aimed at consumers are ultimately designed to increase market share at the expense of other competitors. Clearly, in more competitive types of market structure, advertising is vital in order for media products to maintain an image and position in a market.

Research and innovation refer to the effort of firms to differentiate or improve their products over time. Because of the insatiable appetite that consumers have for media content, continuing emphasis is placed on research

in order to better understand the behaviors and characteristics of media consumers. Further, technological innovations have enabled media content to be delivered to consumers faster, more accurately and with more options. This forces other firms to respond in order to remain competitive in their individual markets.

Plant investment refers to the different resources needed to create or purchase the physical plant in which goods will be produced. Some of the mass media industries involve a significant investment in capital and physical plant. In particular, newspapers, motion pictures and cable television require a sizeable investment on the part of participants.

Legal tactics encompass the entire range of legal actions utilized by a firm in a particular market. The most visible use of legal tactics occurs through the use of patents and copyrights for particular goods. The history of the electronic media in the United States is replete with examples of patent disputes, particularly in the development of the radio industry. Copyright is still very important today, as video and audio piracy (illegal copying and distribution of copyrighted material) creates millions of dollars of lost revenue for the film and recording industries (Vivian, 1995).

MARKET PERFORMANCE *Market performance* involves analyzing the ability of individual firms in a market to achieve goals based on different performance criteria. Market performance is usually evaluated from a societal perspective, rather than from the level of the firm. Policy makers can examine the economic efficiency of a particular industry through performance criteria and, if necessary, initiate structural or market conduct solutions to remedy problems. In this sense, performance is examined from a macroeconomic orientation. A number of variables including efficiency, equity and progress are considered in evaluating market performance.

Efficiency refers to the ability of a firm to maximize its wealth. Normally, two types of efficiency are reviewed: technical efficiency and allocative efficiency. *Technical efficiency* involves using the firm's resources in the most effective way to maximize output. Much of the conglomeration that has occurred in the media industries is designed to increase technical efficiency through mergers and acquisitions, which create economies of scale. *Allocative efficiency* occurs when an individual market functions at an optimal capacity, spreading its benefits among producers and consumers. Conversely, excess profits are often seen as allocative inefficiency, as they suggest that market resources are being used improperly. Normally, the solution is to encourage more competitors in the market in order to lower profits to more optimal levels. Decisions to limit ownership for television and radio stations encourage allocative efficiency as well as diversity of expression.

Equity is concerned with the way in which wealth is distributed among producers and consumers. Ideally, a market economy system will provide a fair distribution of equity so that no single firm receives excessive rewards. Naturally, equity is more problematic in monopolistic and oligopolistic market structures, where wealth is more concentrated among firms.

Progress refers to the ability of firms in a market to increase output over time. Progress goals are set by each firm, and evaluations for the market are determined by the aggregate sum of market output. Statistical data are compiled by various trade associations and some governmental agencies to monitor progress in different markets.

As the industrial organizational model implies, the structure of the market affects the conduct of different firms in a market, which in turn impacts the performance of the market. This framework is valuable in the study of media economics because it provides both theoretical and practical utility in the analysis of different types of media industries, as well as providing substance to abstract concepts.

Summary

This chapter has focused on understanding an individual market in media economics by introducing one of the unique aspects of media economics: the dual dimensions of product and geography used in defining a market. The industrial organization model is used to recognize how market structure, market conduct and market performance are linked together.

Market structure can be identified using several different criteria, including the concentration of buyers and sellers in the market, the differentiation among products, the barriers to entry for new competitors, cost structures and vertical integration. Media industries operate along a continuum involving four models of market structure: monopoly, oligopoly, monopolistic competition and perfect competition.

Market structure affects the market conduct of individual firms and is concerned with pricing behaviors, product strategy and advertising, research and innovation, plant investment and legal tactics. The conduct of firms in a market likewise impacts the performance of the market. Market performance is evaluated most often from a macro perspective with respect to different performance variables including efficiency, equity and progress.

In Chapter 4, emphasis is placed on evaluating individual media markets. Methods used to compare different markets are discussed and tools for analysis are introduced, along with a discussion on how regulation and technology may affect market behavior.

References

Bain, J. S. (1968). *Industrial Organization.* New York: John Wiley & Sons.

Busterna, J. C. (1988). Concentration and the industrial organizational model. In: Picard, R.G., McCombs, M., Winter, J. P., and Lacy S. (eds.). *Press Concentration and Monopoly: New Perspectives on Newspaper Ownership and Operation.* Norwood, NJ: Ablex Publishing Company, pp. 35–53.

Compaine, B. M. (1985). *Who Owns the Media?*, 2nd ed. White Plains, NY: Knowledge Industry Publications.

Litman, B. R. (1988). Microeconomic foundations. In: Picard, R.G., McCombs, M., Winter, J. P., and Lacy S. (eds.). *Press Concentration and Monopoly: New Perspectives on Newspaper Ownership and Operation.* Norwood, NJ: Ablex Publishing Company, pp. 3–34.

Newspaper Association of America (1994). *Facts About Newspapers.* Reston, VA:

Newspaper Association of America.
Picard, R. G. (1989). *Media Economics.* Beverly Hills: Sage.
Scherer, F. M. (1980). *Industrial Market Structure and Economic Performance,* 2nd ed. Chicago: Rand McNally. (Figures 3-3 and 3-12 also appear in Scherer, F. M. and Ross, D. 1990. *Industrial Market Structure and Economic Performance,* 3rd. ed. Boston: Houghton Mifflin. Reprinted with permission.)
Varian, H. R. (1984). *Microeconomic Analysis,* 2nd ed. New York: W. W. Norton & Company.
Vivian, J. (1995). *The Media of Mass Communication,* 3rd ed. Needham Heights, MA: Allyn & Bacon.
Wirth, M. O. (1986). Economic barriers to entering media industries in the United States. In: McLaughlin, M. (ed.). *Communication Yearbook,* 9. Beverly Hills, CA: Saje, pp. 423–442.

4

EVALUATING MEDIA MARKETS

In this chapter you will learn:

- Where to locate resources for information on media industries and individual firms.
- Methods used to measure market concentration.
- How to measure diversification within a firm.
- How regulation affects media markets and individual firms.
- How technology affects media markets and individual firms.

An understanding of market structure, conduct and performance is vital in order to analyze media markets properly. Theoretical models of market structure, such as oligopoly and monopolistic competition, provide descriptive information that clarifies the nature and extent of supply, demand, competition and barriers to entry.

Although this information is useful, it is helpful to have more precise analytical information with which to evaluate media markets carefully. In this chapter, you will be introduced to a variety of resources and methodologies to enable you to evaluate media firms and markets.

There are several reasons why an evaluation of media markets is important. First and perhaps most important to this text, an evaluation of media markets enables you to understand the various processes at work that cause media companies to operate in the manner in which they do. Every month seems to bring news of yet another proposed merger, acquisition or divestiture involving media companies. By understanding the economic characteristics of individual firms and markets, and by having the tools with which to analyze their activities,

one can better comprehend the role and function of the media in society.

Second, evaluating media markets is important for group and individual investment purposes. A majority of the companies engaged in the mass media are *public companies,* meaning they are publicly owned by individual and institutional stockholders who invest in a firm in hopes of obtaining profits through stock appreciation and corporate dividends. Brokerage firms and other analysts constantly monitor media market performance in order to pass along recommendations to buy, sell or hold shares in publicly traded companies. Prudent investing is thus contingent on the use of accurate information in making these important decisions.

Third, if you are considering employment in some aspect of the mass media, it is essential that you understand the economic characteristics of the individual market in which you wish to work. This will help you to identify the potential employers, understand the lines of business in which they are engaged and determine their position in the market—all factors that can impact your potential for salary, advancement and job stability. Surprisingly, many college graduates send resumes to potential employers without any understanding or investigation of the individual company, its ownership or financial condition.

In the following sections of the chapter, you are introduced to different resources used in evaluating media markets. Many of these resources are available in public and university libraries, as well as from individual companies. Later, methodological tools are introduced to provide measurements of market concentration. Finally, a discussion of exterior forces in the form of regulation and technology completes this examination of evaluating media markets.

What Is the Media Market?

In Chapter 3, we learned that a market is where consumers and sellers interact with one another to determine the price and quantity of the goods produced. Further, in defining a market, one must consider the geographic boundaries in which the market is engaged. However, defining media markets can be a difficult process. As Bates (1993, p. 4) has observed, "media markets are no longer neatly defined" due to increasing competition, close substitutes and geographic boundaries, which overlap on several levels.

For example, consider two markets in which the radio industry is engaged. Nationally, there are approximately twenty-five radio networks, which form a market that serves national advertisers and individual radio stations. National advertisers, working primarily through advertising agencies in media planning, use radio networks to help target specific audiences. Local radio stations may affiliate with a radio network to obtain specific news and features delivered by

the network to supplement their local format.

On the local level, there are over ten thousand radio stations operating in the United States. But the majority of these stations tend to be clustered in different geographic locations (or "markets," as the radio industry uses the term). In Top-10 markets, as many as 40 to 50 different radio stations may be scattered among the AM/FM band, with a variety of different formats. Clearly, not all stations compete for the same listeners and advertisers in the local economy, as different formats attract different groups of buyers and sellers.

Precise definitions of media markets are problematic without specific criteria. In defining a media market, researchers normally consider specific geographic boundaries, such as the international, national, regional or local market. Next, consideration is given to distinct areas, such as the market for advertisers or the market for audiences, both of which serve as indications of demand. Other areas can be used in defining the market, such as the number of sellers (suppliers) or the share of the market (e.g., advertising revenue, audience ratings or circulation data) held by each firm. Clearly, defining a market is not a cursory task, but a process involving careful analysis and decision making.

Who Are the Major Players in the Market?

Once the market is defined, attention can be turned to learning who are the major companies or "players" in the market or industry. There are many different resources to consult to obtain this information, and Appendix A to this text lists a number of resources normally available at most libraries. The following headings list some of the most useful sources.

Industry Sources. Libraries contain numerous directories and reference volumes for many individual industries. *The Standard Industrial Classification (SIC) Manual* provides a complete listing of different industries using the SIC code, and is a good starting point if you know little about a particular industry. It categorizes the U.S. economy by numbered segments or codes.

Researchers and analysts use the SIC codes in tabulating economic and financial data for the economy. The SIC system covers economic activity in nine major categories: agriculture, forestry and fishing; mining; construction; manufacturing; transportation, communications and public utilities; wholesale trade; retail trade; finance, insurance and real estate; and services. These categories are further divided into major groups, identified by two-digit codes; then into industry groups, with three-digit codes; and, finally, into industries, using four-digit codes.

Industries are arranged in alphabetical order and each industry has a unique numeric code. For example, all companies involved in broadcast television are assigned a code of 4833, cable television services, 4841, and newspaper

publishers, 2711. Once you know the SIC code for a particular industry, you can use the code to identify individual companies engaged in that industry. Several different directories show SIC code listings.

Standard & Poor's Industry Surveys, published since 1973, provides analyses of different industries and comparative financial statistics for key companies in each featured industry. The listing of companies in each industry is not exhaustive, but it does offer a quick review of the major players. The material is published quarterly.

Another useful source is the *U.S. Industrial Outlook,* a government publication. This source provides an overview of recent trends and financial outlook for some two hundred industries, including many different media-related industries. This annual publication, which began in 1960, was discontinued with the 1994 edition.

One other source for industry data is the *Value Line Investment Survey.* This particular resource provides reports on over 75 different industry groups and also analyzes some 1,500 companies. The Value Line service is used heavily by brokerage analysts and individual investors seeking more information on a particular company or industry.

Finally, industry-specific directories such as the *Broadcasting/Cablecasting Yearbook,* the *Television and Cable Factbook,* and the *Editor and Publisher International Yearbook* should be consulted as well. These directories are usually annual publications and contain some economic data.

Company directories. A number of directories are useful to obtain more information on specific corporations. Dun & Bradstreet, Inc. publishes a number of different directories including the *Million Dollar Directory, America's Corporate Families, America's Corporate Families and International Affiliates,* and *Dun & Bradstreet's Business Rankings.* Each of these publications differs in terms of their specific coverage of different companies, but most contain standard information such as SIC code indexes, parent/subsidiary cross references, company profiles, employment statistics and annual sales/revenues.

Additionally, *Ward's Business Directory of U.S. Private and Public Companies* is a very useful source to locate information on *private companies*—those not owned by the public and thus not available on any stock market. *Standard & Poor's Register of Corporations, Directors and Executives* is an excellent source for information on corporate officers and directors.

A clear advantage to researching media industries and companies today is found in the number of available electronic resources provided for users. Again, Appendix A offers a complete listing of the major electronic resources. One of the most popular is *Compact Disclosure,* a resource available on CD-ROM. *Compact Disclosure* offers data on eleven hundred public companies, including annual report information such as the president's letter and management discussion, financial data, and stock and earnings estimates. Individual companies can be searched using the company name, the description of a particular business segment, and the SIC code. Users have a number of options in retrieving information; you can download information to your own computer or simply print the information desired.

Market Concentration

Identifying the number of players in a given market will help to determine the type of market structure in which the firms are engaged. But remember that market structure does not necessarily explain how concentrated individual markets may be. Market concentration is an important variable in evaluating media markets. Highly concentrated markets usually lead to strong barriers to entry for new competitors. Historically, regulators have frowned on heavily concentrated markets, as evidenced by the policies of the Federal Communications Commission (FCC) on media ownership.

There are several different tools to measure different aspects of concentration in a market. To determine buyer concentration from the perspective of the audience, one can review the latest audience ratings or circulation data. In evaluating a market media, economists are usually interested in two other forms of concentration: concentration of ownership and concentration of market share (measured by revenue or some other variable).

Concentration of ownership. Concentration of ownership refers to the degree to which an industry is controlled by individual firms. Again, careful definition of the market under study is needed. Bagdikian (1993) documents a continuing decline in the number of firms involved in the media industries based on a variety of different factors. This trend will become more evident as you review later chapters that examine individual media industries. Concentration of ownership is considered problematic for society if it leads to a decline in diversity of expression.

The mass media are a critical force in helping to promote an informed electorate. Critics (Schiller, 1981) contend that as the media become more concentrated and less competitive, they not only have economic power, but political power as well, through the control and dissemination of information. As such, regulators attempt to limit concentration of control in order to maintain a diverse presentation of different views.

Concentration of market share. Different methods are used to measure the concentration of market share within a particular industry. One approach, mentioned briefly in Chapter 3, involves calculating *concentration ratios.* This measure of concentration compares the ratio of total revenues of the major players with the revenues of the entire industry, using the top four firms (CR4) or the top eight firms (CR8). If the four-firm ratio is equal to or greater than 50

percent, or if the eight-firm ratio is equal to or greater than 75 percent, then the market is considered highly concentrated (see Fig. 4-1).

Concentration ratios are best used to analyze trends over time. If the concentration ratio increases, this suggests a move toward monopolistic power. One problem with concentration ratios should be noted: the ratios themselves are not sensitive to the individual power held by single firms (Picard, 1989). For example, two different television markets may have identical concentration ratios, but the shares within the individual markets for each of the firms are very different. As Figure 4-2 illustrates, the distribution of market share is equal among the top four firms in market A, but in market B, the top firm clearly dominates the other three competitors.

	Top Four Firms	Top Eight Firms
High concentration	≥ 50%	≥ 75%
Moderate concentration	33% ≤ to < 50%	50% ≤ to < 75%
Low concentration	≤ 33%	≤ 50%

FIGURE 4-1. *Concentration ratios.*

Market A		Market B	
Firm 1	10	Firm 1	25
Firm 2	10	Firm 2	5
Firm 3	10	Firm 3	5
Firm 4	10	Firm 4	5

FIGURE 4-2. *Inequality in concentration ratios.*

The top-four and top-eight ratios have been frequently used to measure concentration in the media industries. An early study by Owen, Beebe and Manning (1974) found the market for television programs to be concentrated. Picard (1988) examined the newspaper industry using daily papers in local markets and found high concentration. Chan-Olmsted and Litman (1988) found that cable systems were moving toward concentration, although the ratios did not suggest that the market was highly concentrated.

Concentration can also be assessed graphically through the use of the *Lorenz Curve.* The Lorenz Curve illustrates the inequality of market share among different firms. Suppose one wishes to illustrate the fact that FM radio stations are the preferred choice over AM stations among listeners. An examination of a recent ratings book for a radio market finds 10 stations—five AM and five FM—competing for the audience in a particular time period. The five FM stations account for 82 percent of the radio audience, whereas the poor AM stations together only capture the remaining 18 percent. If audience shares were equally divided, then each station should have 10 percent of the audience. Thus, the FM stations should have only captured 50 percent of the market; however, because the FM stations reached far more than that, inequality exists.

The Lorenz Curve for the data in this example is illustrated in Figure 4-3. The 45° line represents equality in the market; the curve represents the actual distribution of shares among the radio stations. The more the Lorenz Curve departs from the 45° line, the greater the inequality. The utility of the Lorenz Curve lies in its graphical presentation, but it can be difficult to interpret

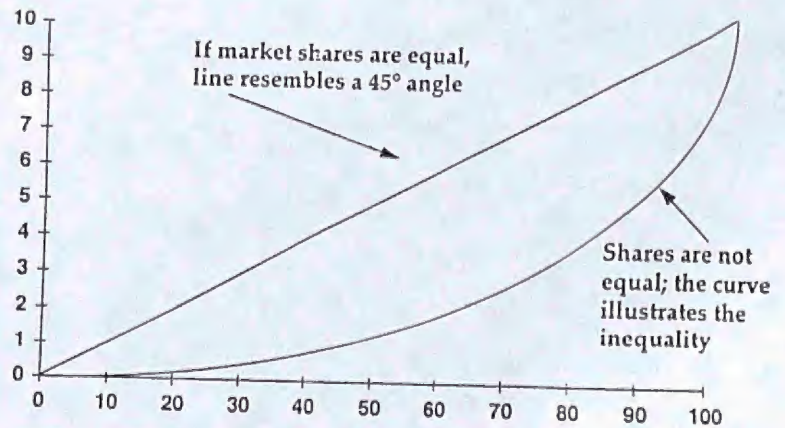

FIGURE 4-3. *Lorenz Curve.*

(Litman, 1985). It is best used when the number of firms in a market is greater than four.

A final measure of concentration, and probably the most sophisticated, is the Herfindahl-Hirschman Index (HHI). The HHI is calculated by summing the squared market shares of all firms in a given market. The index is considered more accurate than either concentration ratios or the Lorenz Curve in that the index increases as the number of firms declines and as inequality among individual firms rise. If the HHI equals 1,800 or higher, then a market is highly concentrated. If the index is less than 1,000, the market is considered unconcentrated (see Fig. 4-4). Calculating the HHI may be tedious if there are a large number of firms operating in a particular market.

The HHI has been used in several studies to measure media concentration, particularly in regards to network program categories. An earlier study by Litman (1979) used the HHI and found high concentration among program categories for the broadcast networks. Litman theorized that the data supported the proposition that the networks operate interdependently in an oligopolistic structure, rather than attempt to present a balanced program schedule.

The advantage of these three methods to measure concentration is that they offer different ways to measure and analyze concentration in a given market. Although a particular market structure may seem obvious with some media industries, the concentration measures can clarify the extent to which one or more companies dominate a particular market.

Corporate Diversification

On a related note, it may be of interest to determine how heavily an individual media firm is involved in a particular market. This can be done by analyzing the diversification strategy of individual companies. *Diversification* is the extent to which a company draws revenues across different markets or business segments. Normally, companies that draw profits from more than one segment or division are believed to be better equipped to handle fluctuations in

High concentration	**HHI > 1,800**
Moderate concentration	**1,000 ≤ HHI ≤ 1,800**
Unconcentrated	**HHI ≤ 1,000**

FIGURE 4-4. *Herfindahl-Hirschmann Index (HHI).*

the normal business cycle. Further, by drawing resources across different markets, the diversified company is also thought to be able to adapt more easily to changing environmental conditions.

In a case study of the broadcast television networks, Dimmick and Wallschlaeger (1986) developed an index to measure corporate diversification. The index is calculated by summing the squared revenues of each business segment, and then dividing that sum into one (see Fig. 4-5). The diversification (D) index ranges from a low of one (meaning profits are concentrated in one division) to a high equal to the number of divisions the firm operates. Thus, a firm with seven divisions would have a D range from one to seven, whereas a firm with three divisions would have a D range from one to three.

The D measure has also been used to study diversification practices by companies involved in the premium cable industry (Albarran and Porco, 1990). The D index is best used when studying a company over a particular time span, as opposed to a single-year measurement, to reflect more accurately the changes companies encounter over time in the normal business cycle.

The D measure can be calculated using financial data from a corporate annual report or from an electronic service such as *Compact Disclosure*. A disadvantage to the D measure is that many corporations lump some of their activities together, and thus the financial information does not reflect the actual differences that may exist within a business segment. Nevertheless, the D measure can provide another means to analyze individual firms with respect to how deeply they are involved in certain markets.

Financial Ratios and Market Performance

It is also useful to have a basic knowledge of financial ratios in order to evaluate the financial condition and performance of individual firms and industries involved in the media (see Fig. 4-6). Data used to calculate financial

$$D = \frac{1}{\sum_{i=1}^{n} pi^2}$$

FIGURE 4-5. *Diversification index.* (Dimmick and Wallschlaeger, 1986)

Growth Ratios	measure growth over time
Performance Ratios	measure financial strength
Liquidity Ratios	convert assets into cash
Debt Ratios	measure debt and leverage
Capitalization	used in stock valuation

FIGURE 4-6. *Types of financial ratios.*

ratios can be found in several sources such as corporate annual reports. Additionally, some resources such as *Compact Disclosure* and *Standard & Poor's Industry Surveys* include a number of financial ratios as part of their overview of individual firms and industries.

Different types of ratios are used to gauge different types of performance. For example, *growth measures* calculate the growth of revenue and assets over time, and also document historical trends. Financial growth is important to any business, and the stronger these measures, the better for the firm or industry examined. These include growth of revenue, operating income, assets and net worth. For each growth measure, the previous time period (month, quarter or year) is subtracted from the current time period (month, quarter or year), and this number is divided by the previous time period.

Performance or profitability measures are designed to measure the financial strength of a company or industry. Low profitability measures are indications of high liabilities, low revenues or excessive expenses. Included in this set of measures are return on sales, return on assets, return on equity, price-earnings ratio and profit margins.

Other ratios are used to measure liquidity, debt and capitalization. Liquidity refers to a firm's ability to convert assets into cash. *Liquidity ratios* include the quick ratio, the current ratio and the acid-test ratio. Ideally, liquidity measures produce at least a 1.5-to-1 ratio of assets to liabilities. *Debt ratios* measure the debt of a firm or industry. The leverage ratio is calculated by dividing total debt by total assets. The lower the number the better. Another common debt measure is the debt-to-equity ratio, which divides total debt by total equity. Ideally, the debt-to-equity ratio will be no larger than one. *Capitalization ratios* are concerned with the capital represented by both preferred and common stock. Two ratios are common: dividing preferred stock by common stock and dividing long-term liabilities by common stock. Appendix B lists the formulas for the most commonly used financial ratios used by analysts to evaluate media firms and industries.

Impact of Regulation

All media firms and industries are to some degree affected by governmental regulation. The most obvious form of economic regulation concerns taxation; governments levy different taxes on corporations, but may also enact policies either to influence a particular market or to promote social goals. Some media industries are greatly influenced by regulation, though others face little regulation. For example, the FCC currently limits ownership of broadcast stations for both television and radio. On the other hand, local governments specify the franchise area for a cable system, but place no restrictions on newspaper distribution.

Media industries attempt to limit the impact of governmental regulation by forming industry associations, such as the National Association of Broadcasters (NAB) or the Newspaper Association of America (NAA). One way to circumvent potential governmental regulation is to provide self-regulation; industry associations often take the lead in this effort. Trade associations are also involved with professional lobbyists to attempt to sway regulators to their point of view.

As you investigate later chapters that focus on individual industries, you will discover that some industries face more regulatory challenges than others. Regulation may have both positive and negative outcomes in regards to media economics. As such, it is important to understand the desired goals regulators hope to achieve through regulation, and how those goals impact supply and demand curves, market structure, conduct and performance.

For example, the Telecommunications Act of 1996 will spur competition between cable systems, local phone companies and long-distance carriers. It will lead to radical changes in the way many households receive information and entertainment content. Consumers will likely have a choice of services, some of which may be close substitutes for one another, whereas others may be quite different. How much will consumers be willing to pay for such things as interactive shopping, banking and games? How will new services impact demand for existing technologies such as broadcast television? Competition may lead to an increase in suppliers and buyers, and lower consumer costs. On the other hand, it may cause some suppliers to exit a particular market if they are unable to achieve enough market share.

It is important to understand how regulation impacts media industries, and an analysis of the regulatory environment and the potential for future regulation

is an important consideration in the evaluation of any particular media market. Monitoring the regulatory climate is an ongoing task in many media industries.

Impact of Technology

Like regulation, the mass media is affected by advances in technology. In the analysis of media markets, an effort should be made to understand the role technology plays in a particular industry. Technological change occurs rapidly in the communication industries. Like regulatory change, advances in technology can have both positive and negative outcomes. High-tech, automated equipment such as robotic-operated television cameras can operate flawlessly, but they also displace human camera operators. Satellite-delivered radio formats provide professional quality radio in many smaller markets, but at the same time, reduce a station's work force to a handful of employees.

From an economic standpoint, changes in technology will likely mean increases in equipment expenditures. When the newspaper industry moved from the old Linotype press to computerized layout and design, it resulted in massive purchases of new equipment. In covering television news, a continuing transition from film to video tape to instant coverage of events via satellite and microwave transmission has taken place in the last thirty years. In short, media industries must maintain efficient and modern methods to produce and distribute their content products with the highest possible quality.

The impact of technology must also be considered from the standpoint of the consumer. The decision by recording companies to invest heavily in the compact disc (CD) as the latest format for sound recordings was based in part on the fact that consumers would want the higher quality sound delivered by a digital audio system. However, this also drove up the cost for individual recordings and conversion to CD-based systems. Fiber optics and digital compression techniques can provide a television world of over five hundred channels of content, yet many users may only prefer a handful of channels.

The mass media are technologically driven industries and are heavily influenced by technological revolution. From an economic perspective, media industries should be examined in terms of their technical efficiency, as well as their ability to produce media content of consistently high technical quality. Technology should also be evaluated based on its ability to enhance a particular market, as well as the cost of implementing new technologies. Later chapters examine industries where technological change is most likely and how it may affect market performance.

Summary

This chapter summarizes different approaches used in evaluating media markets. This information enables you to understand the intricate processes at work in media economics among buyers and sellers. The ability to evaluate media markets is also important if you desire to invest in some part of the mass media, or if your professional goal is to gain employment in the mass media. Overall, a better understanding of the relationship between media and society and how economic factors impact that relationship is gained.

Evaluating a media industry first involves defining a particular market, which can be a difficult task. Careful examination and precise definitions are needed to clarify a particular market. A second step involves a process of determining what major companies are engaged in a particular market. Several reference resources are available to help in this process. Third, media markets should be evaluated in terms of the level of concentration that exists in the market. Different means of measuring concentration were introduced in this chapter, including concentration ratios, the Lorenz Curve, and the Herfindahl-Hirschman Index.

The chapter also introduced tools to examine individual companies, including an index of corporate diversification and a discussion of relevant financial ratios. The indices and ratios presented in the chapter offer different ways to interpret the economic viability of individual firms and industries.

All media industries are affected by regulation to some degree. Regulators use different goals for different industries, and regulations impact market structure, conduct and performance. Many industries attempt to minimize the impact of regulation by the presence of trade associations and lobbying efforts. Technology drives much of the mass media, and the impacts of technology must be examined in regards to how technology can affect market economics and performance, the pool for labor and talent in the media, and how consumers respond to new technology. As with regulation, technology can have both positive and negative impacts on media markets.

Understanding the criteria used in evaluating media industries presented in this chapter provides for a more comprehensive analysis of media markets and industries. Later chapters utilize this information in discussing specific media industries.

References

Albarran, A. B. and Porco, J. (1990). Measuring and analyzing diversification of corporations involved in pay cable. *Journal of Media Economics*, 3(2):3–14.

Bagdikian, B. H. (1993). *The Media Monopoly*, 4th ed. Boston: Beacon Press.

Bates, B. J. (1993). Concentration in local television markets. *Journal of Media Economics* 6:3–22.

Chan-Olmsted, S. and Litman, B. R. (1988). Antitrust and horizontal mergers in the cable industry. *Journal of Media Economics* 1:63–74.

Dimmick, J. and Wallschlaeger, M. (1986). Measuring corporate diversification: A case study of new media ventures by television network parent companies. *Journal of Broadcasting and Electronic Media*, 30(1):1–14.

Litman, B. R. (1979). The television networks, competition and program diversity. *Journal of Broadcasting* 23:393–410.

Litman, B. R. (1985). Economic methods of broadcasting research. In: Dominick, J. R. and Fletcher, J. E. (eds.). *Broadcasting Research Methods*. Boston: Allyn & Bacon, pp. 107–122.

Owen, B. M., Beebe, J. H., and Manning, W. G. (1974). *Television Economics*. Lexington, MA: D. C. Heath.

Picard, R. G. (1988). Measures of concentration in the daily newspaper industry. *Journal of Media Economics* 1:61–74.

Picard, R. G. (1989). *Media Economics*. Beverly Hills: Sage.

Schiller, H. I. (1981). *Who knows: Information in the Age of the Fortune 500*. Norwood, NJ: Random House.