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Confessions of a Horizontalist: A Dialogue on the First Amendment

Larry Yackle
Boston University School of Law

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CONFESSIONS OF A HORIZONTALIST: A DIALOGUE ON THE FIRST AMENDMENT

*Larry W. Yackle**

It is hardly surprising that the Supreme Court has never developed a satisfying theory of the first amendment. Free speech and press problems are many and varied, demanding the most delicate balance of interests in order to preserve a system of freedom of expression and at the same time afford proper respect for competing governmental objectives. Doctrine adapted to one medium of expression may not sit well when applied to others. With the passage of time, changes in technology, economic conditions, and the very nature of expression tend to outstrip the Court's ability to keep pace with doctrinal innovations. There was a time when the first amendment meant little more than a prohibition on prior restraints of the press, and it was only in this century that the Court fashioned the ill-fated "clear and present danger" test for contending with subsequent penalties upon expression. Even as the Court grappled with the meaning of free speech for a few wartime dissenters, technological advancements transformed the communications industry in this country into an extraordinary complex of mass circulation newspapers supported by the great wire services, broadcast stations and networks using the electromagnetic spectrum, and community antenna systems relying upon microwave transmissions and the coaxial cable. Most importantly, control of the industry came rapidly into the hands of communications cartels wielding untold power over American affairs, public and private. Analyses designed for other times and other problems were no match for these challenges, and the Court groped for new tools with which to meet them.

All this might have occasioned legislation, for it is Congress that has the wherewithal to investigate and resolve complex problems with thorough-going enactments that by nature are superior to the gradualism of case-by-case adjudication. To be sure, Congress did enter the field—but only in the fashion of the Roosevelt years, by establishing an administrative agency with ill-defined responsibility for orchestrating the use of the radio spectrum. Congress left unattended related problems in other communications fields, and even with regard to broadcasting little attention was paid to expression-related matters. Later, when Congress focused upon the content of broadcast signals, its actions were poorly conceived and accordingly proved counterproductive, provoking hostility from all sides. Even today, as Congress debates proposals to "rewrite" the fundamental communications statute, it

* Associate Professor of Law, University of Alabama. A.B. 1968, J.D. 1973, University of Kansas; LL.M. 1974, Harvard University. Research for this Article was supported by the University of Alabama Research Grants Committee. Steve Suitts, Executive Director of the Southern Regional Council, criticized an early draft. While Mr. Suitts does not share all the views expressed here, his comments have helped to ensure technical accuracy, and his insights into fundamental problems have contributed significantly to any success this Article may enjoy.

appears that free speech issues are subordinated to the economic interests of the industrial giants sought to be controlled.

Meanwhile, developments in communications continue apace. It now seems clear that broadcasting will in time displace newspapers entirely and, in turn, that broadcasting will be displaced by still more dramatic technological achievements. Already cable systems pose a serious threat to broadcast interests. Before very long, broadband programming, satellite communications unrestricted by the horizon, and fiber optics will eclipse over-the-air broadcasting by local stations. Two-way communications systems are already in use, promising to transform the making of public policy as we know it. Perhaps most troubling, subliminal messages seem destined to invade our homes in the guise of entertainment programming, influencing American thought and behavior in ways not even their creators can comprehend. Plainly, if these developments are left to be dealt with by Congress, the enormously significant free speech consequences will be swallowed up by the political and economic concerns of conglomerates that wish to fend off any technology they cannot dominate. It is critical, then, that the Court fashion a constitutional doctrine that has up to now eluded it. Never in our history has free speech at once faced such enormous potential for expansion and such frightening threats of obliteration.

The dialogue that follows makes no attempt to address the fascinating questions posed by technological and economic developments still in the future. Its sights are lowered to an examination of the Court's work to date, in an effort to identify doctrinal strains that hold some promise of usefulness in the years ahead. In this field, as in others, the Court will likely find answers to important questions, not in radical insights that arrive unannounced, but in ideas or combinations of ideas that have already appeared from time to time in court opinions and related literature. The dialogue draws upon three such ideas—(1) an asserted ban on content discrimination in free speech cases, (2) a demand for access to the mass media for speakers and messages outside the communications industry, and (3) a recognition of governmental responsibility for the present state of affairs. This third idea rejects the "state action" barrier to the application of constitutional analysis to impediments to free speech that are erected by ostensibly private interests. The dialogue gives these notions a collective name—horizontalism—and suggests how they can be employed to address free speech issues that the Court has failed to treat adequately on more familiar theoretical bases. To the extent the dialogue is successful, it may offer theoretical tools with which the Court may work in resolving the increasingly difficult issues that lie ahead.

Q: What, may I ask, is a horizontalist?

A: Simply one who has wrestled with a fundamental question emerging from free speech jurisprudence and come to at least a tentative resolution. The primary free speech question at present is whether the focus of the first amendment is vertical or horizontal. If the focus is vertical, the first amendment appraises the relationship between government and the individual apart from the interests of others and proscribes governmental interference with the individual's speech except in circumstances in which extraordinary societal interests justify restraint. If the focus is horizontal, the first amendment views the interest of the individual against the

background of the interests of others and permits, even demands, governmental involvement to referee expression in a manner that prevents some speakers and messages from drowning out others.

Q: I am not certain that I understand. I agree that in state cases ostensibly controlled by the fourteenth amendment the Court has held, more or less, that due process *means* free speech.[1] But you seem to suggest that free speech, in turn, *means* equal protection of the laws.[2]

A: That is not far off the mark. The verticalist emphasizes language. "The Congress shall make no law . . . ." The first amendment is understood to establish a bias against governmental involvement in speech. It takes society as it finds it. Inequalities in wealth, position, and power are accepted, and governmental intervention is no less suspicious when it comes in the guise of strengthening the marketplace of ideas by enhancing the ability of the weak to make themselves heard. The horizontalist, on the other hand, does not wince at every governmental involvement in expression-related activity, but asks in every case whether the government's intervention advances the presentation of competing views, without unjustifiably favoring one message over another. The fault in the eyes of the horizontalist is not governmental involvement but governmental involvement that discriminates on the basis of the content of speech.

Q: And the latter is your view?

A: I confess to you that I am a horizontalist. But make no mistake. I hardly suppose that there are no more than two ways of looking at any first amendment case, that they can be labeled verticalist or horizontalist, and that I can and will choose the horizontalist view consistently. Nevertheless, I do believe that an acknowledgement of the problem of first amendment focus clarifies thinking and aids understanding. And, for myself anyway, I find the horizontal focus far more satisfying in treating the free speech issues of the modern age.

Q: Let *me* confess that your position is surprising. I have always thought you to be a staunch defender of individual liberty. I am astonished that you should define these two competing views of the first amendment as you have and then adopt the one that contemplates significant governmental interference with speech.

A: To be candid, it has taken me a long time to reach this position. Like others who usually find themselves on the side of the individual, I entertain what I consider to be a healthy suspicion of government. For the better part of my professional life I have quite naturally embraced the more traditional, verticalist approach to the first amendment. When in doubt, it may fairly be proposed that the civil libertarian should resist governmental intervention and insist upon private autonomy. That, at any rate, has been the working theory of those in the forefront of libertarian

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[1] Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming that freedom of speech is "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment").

[2] *See* Karst, *Equality as the Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

thought through the middle third of this century.[3] Up to now, verticalism has made eminent good sense. I daresay that we have built a system of freedom of expression in this country in large measure by repeated successes in keeping government out of the expression field. Now, however, I am convinced that circumstances have changed. The attempt to exclude government has ultimately failed or is failing, and if freedom of expression is to be maintained into a second century, it must have the assistance rather than the neglect of government. Mine is a new generation. I have come to intellectual maturity in the age of mass communications, and I believe that first amendment theory must take account of that undeniable change of circumstances.

Q: Do you mean to imply that the tension between the verticalist and horizontalist views of the first amendment is entirely new? Has it no history?

A: To be sure it does. I have mentioned Holmes' metaphor.[4] The mental picture of a marketplace of ideas in which all views may be offered for belief acknowledges that government has no business favoring one over another. Indeed, to some extent, Holmes can be characterized as an early horizontalist, and Meiklejohn, who now is usually associated with horizontalism,[5] as a verticalist. It was Meiklejohn who criticized Holmes for failing to distinguish between political and other speech.[6] What was that if not content discrimination?

Q: I am not sure where you are going, but it seems to me that you will have difficulty locating your horizontalism in the mind of a man who was simply ap-

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[3] Benno Schmidt's excellent little book provides a good summary.

> First Amendment theory has long been the preserve of laissez-faire thinking. The premise has been that "a multitude of tongues," protected by the First Amendment from governmental interference, would naturally tend to produce diversity of expression in which all shades of opinion could compete for political or cultural acceptance. The Bill of Rights generally reflects a conception of liberty as a collection of negative controls on official power. Consequently, the First Amendment has been viewed in negative terms: a constitutional prohibition on official interference with the free play of ideas.

B. SCHMIDT, FREEDOM OF THE PRESS VS. PUBLIC ACCESS 29 (1976). While this passage surely does capture the essence of traditional theory, it is important, and only fair, to note that even those who have embraced verticalist thinking most fervently have occasionally remarked on its shortcomings in dealing with the problem of concentration of control within the communications media. Professor Chafee concluded his great work with a warning that in times to come it might not be sufficient protection for free speech merely to put obstacles in the way of government censorship. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 559 (1941) [hereinafter cited as Z. CHAFEE, FREE SPEECH]. A half dozen years later, Chafee served as reporter for an extensive investigation of the mass media undertaken by the Commission on Freedom of the Press. Although the resulting report concluded that for the most part governmental action to *encourage* free speech was fraught with too many risks, the two-volume study first examined a wide range of issues that now concern horizontalists. Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947) [hereinafter cited as Z. CHAFEE, GOVERNMENT]. *See also* M. ERNST, THE FIRST FREEDOM (1946) (focusing upon the evils of monopoly). More recently, Professor Emerson's equally important book devoted a full chapter to the "affirmative promotion" of free expression. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 627-73 (1970) [hereinafter cited as T. EMERSON, THE SYSTEM].

[4] Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting),

> 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.

Id. at 630.

[5] *See* notes 82-86 and accompanying text *infra*.

[6] A. MEIKLEJOHN, POLITICAL FREEDOM 29-50 (1965).

plying *laissez-faire* economics to the realm of free speech.[7] Surely you will agree that Holmes thought his marketplace would function without significant government oversight.

A: You are quite correct. I cannot recruit Holmes to my view retrospectively, though I insist that his opinions recognized, at least implicitly, that the first amendment has something to do with a prohibition on content discrimination.

Q: Take, if you will, the *Chaplinsky*[8] dictum. I would contend that it contemplated content discrimination.

A: I would agree, but I would hasten to add that, with the exception of obscenity[9] it appears that the forms of expression listed in *Chaplinsky* have now been accorded first amendment protection.[10] That, I think, reflects the Court's growing concern for horizontalism. There are other examples, of course. I find it difficult to distinguish between a first amendment overbreadth analysis[11] and one examining a legislative classification for over-inclusiveness.[12] Similarly, the test for reviewing government action that burdens the right of association[13] or symbolic speech[14] is, to my mind, indistinguishable from the standard used by the Warren

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[7] *Id.* at 51-77 (identifying Holmes as an excessive individualist who read into the first amendment his own "bad man" theory of law). *See* Holmes, *The Path of the Law,* 10 HARV. L. REV. 457 (1897).

[8] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942),

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. 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 (footnote omitted).

Id. at 571-72.

[9] *See* Miller v. California, 413 U.S. 15 (1973).

[10] *See, e.g.,* Cohen v. California, 403 U.S. 15 (1971) (profanity); New York Times v. Sullivan, 376 U.S. 254 (1964) (libel). *Cf.* Lewis v. New Orleans, 415 U.S. 130 (1974) (striking down as overbroad a statute attempting to punish fighting words while arguably reaffirming the exclusion of fighting words from first amendment protection).

[11] *E.g.,* NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964),

> This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep *unnecessarily* broadly and thereby invade the area of protected freedoms.

Id. at 307 (emphasis added). *See* Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844 (1970).

[12] *E.g.,* Kahn v. Shevin, 416 U.S. 351 (1974) (Brennan, J., dissenting),

> The statute . . . fails to satisfy the requirements of equal protection, since the State has not borne its burden of proving that its *compelling interest* could not be achieved by a more precisely tailored statute or by use of feasible, *less drastic means* . . . . [The statute] is plainly over-inclusive . . . .

Id. at 360 (emphasis added).

[13] *E.g.,* Shelton v. Tucker, 364 U.S. 479 (1960),

> In a series of decisions this Court has held that, even though the governmental purpose be *legitimate and substantial,* that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of *less drastic means* for achieving the same basic purpose.

Id. at 488 (footnote omitted) (emphasis added).

[14] *E.g.,* United States v. O'Brien, 391 U.S. 367 (1968),

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an *important or substantial* governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is *no greater than is essential* to the furtherance of that interest.

Id. at 377 (emphasis added).

I hasten to concede that, while the test in *O'Brien* is literally similar to the standards reported in notes 11-15, the Court's apparent *impression* of it is something else again. The compelling-interest/least-restrictive-alternative test is plainly thought to be the most stringent test available in right of association, equal protection, and overbreadth cases. In *O'Brien,* however, it was understood to be a

Court in upper-tier equal protection cases.[15]

Q: I am beginning to follow. Am I correct in assuming that you find a horizontal focus in the public forum cases?[16]

A: Yes. My present question whether the focus of the first amendment is vertical or horizontal is in some respects merely another way of putting the more familiar question whether speakers are entitled to "minimum" or "equal" access to public places.[17]

Q: I take it you embrace the "equal" access view?

A: After a fashion. I certainly do not propose, as equal access adherents have at times suggested, that equal treatment can be provided by imposing a blanket prohibition on speech in public areas. Here I agree with Kenneth Karst. Since some speakers, notably the poor and others who lack access to alternative means of communication, depend upon some forums to make themselves heard, however feebly, government action that closes those areas, even to all expression, is *not* content

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diluted standard—to be distinguished from the test used in *real* speech cases. *E.g.*, Elrod v. Burns, 427 U.S. 347, 363 n.17 (1976); Spence v. Washington, 418 U.S. 405, 414 n.8 (1974). Indeed, *O'Brien* has rarely been relied upon by the Court for a *holding* since its appearance at the height of the Vietnam War. *Compare* Procunier v. Martinez, 416 U.S. 396 (1974) *with* Young v. American Mini Theaters, 427 U.S. 50 (1976) (Powell, J., concurring). The case has enjoyed acceptance primarily in the Court of Appeals for the District of Columbia, where it has served as the point of departure for decisions later overturned by the Supreme Court. *See, e.g.*, Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975), *rev'd*, 424 U.S. 1 (1976); Business Executives Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), *rev'd*, 412 U.S. 94 (1973). In both instances, the Court of Appeals opinion bears the mark of Judge Skelly Wright, whose understanding of the first amendment approaches my own horizontalism. *See* note 71 *infra*. Of course, verticalists have condemned *O'Brien* as a "serious setback," T. EMERSON, THE SYSTEM, *supra* note 3, at 83, and it appears that it may no longer be viable at all after the recent round of decisions emphasizing inquiries into legislative motive. *See* notes 54-56 and accompanying text *infra*. For my part, *O'Brien*'s mindless disregard for reality was objectionable, but no more so than the imposition of enormous problems of proof in the new cases. Like Professor Emerson, I find the *decision* in *O'Brien* outrageous. On the other hand, like Judge Wright, I find the standard of review the Court purported to apply familiar and altogether serviceable, particularly in judging the validity of governmental attempts to *promote* expression and expression-related activity.

[15] *E.g.*, Kramer v. Union Free School District, 395 U.S. 621 (1969),

> [T]he issue is not whether the legislative judgments are rational. A more exacting standard obtains. The issue is whether the . . . requirements do in fact sufficiently further a *compelling* state interest to justify denying the franchise to appellant and members of his class . . . . [T]he classifications must be tailored so that the exclusion of appellant and members of his class is *necessary* to achieve the articulated state goal.

Id. at 632-33 (footnote omitted) (emphasis added); McLaughlin v. Florida, 379 U.S. 184 (1964),

> But we deal here with a classification based upon the race of the participants . . . .
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> . . . .
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> Our inquiry, therefore, is whether there clearly appears in the relevant materials some *overriding* statutory purpose requiring the proscription of the specified conduct . . . .
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> . . . Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is *necessary*, and not merely rationally related, to the accomplishment of a permissible state policy.

Id. at 191-94 (emphasis added). *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

[16] *See* the cases cited in Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1 [hereinafter cited as Kalven, *Public Forum*].

[17] *See* Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117 (1975).

neutral.[18] It favors the speech of those who can go elsewhere, to CBS or the *New York Times*.[19] If government is to be truly content neutral it must make at least some forums available for expression. The remaining difficulty lies in determining which places or structures must be open for such use.[20]

Q: How would you do that?

A: The problem is far from easy. Of course, any forum government chooses to open must be available to all, but I have already said that I would not limit public forums to those that government volunteers. Similarly, I would not be satisfied with the suggestion in *Hague* that only *traditional* forums must be open.[21] If history is allowed to control, speakers may be routed to streets and parks and away from public buildings and other places where speech can be effective. Indeed, if speech is to be meaningful at all in this age, it must have access to newspapers and the broadcast and cable media. If I am pressed, I will settle upon the approach suggested in Justice Douglas' *Adderley* dissent.[22] Analysis should begin with a predisposition in favor of speech and should ask in every case whether the potential

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[18] Karst, *supra* note 2, at 40-41 (explaining how content discrimination can be hidden behind facially neutral blanket prohibitions). *See* Kalven, *Public Forum, supra* note 16.

> In the Jehovah's Witness cases, the Court had been outspokenly sensitive "to the poor man's printing press" theme. Labor picketing apart, perhaps, the parade, the picket, the leaflet, the sound truck, have been the media of communication exploited by those with little access to the more genteel means of communication. We would do well to avoid the occasion for any new epigrams about the majestic equality of the law prohibiting the rich man, too, from distributing leaflets or picketing.

Id. at 30.

[19] Karst, *supra* note 2, at 41 (recognizing that "the content of messages carried by leafleters and pickets is apt to differ significantly from the content of the daily press and the broadcast media"). *See, e.g.*, Albany Welfare Rights Organization v. Wyman, 493 F.2d 1319 (2d Cir. 1974) (invalidating an absolute ban on distributing leaflets in a welfare office waiting room), *cert. denied*, 419 U.S. 838 (1974).

[20] There is, of course, one more matter—determining the consequences of a finding that a place is *not* a public forum. On first blush, one would assume that the answer is self-evident. If a place is not a public forum, government can close it absolutely to expression-related activity. The cases, however, suggest something quite different. In Greer v. Spock, 424 U.S. 828 (1976), discussed in note 32 *infra*, the Court decided that a street running through a military installation was not a forum, and, accordingly, that Dr. Spock could be barred from campaigning there. Yet it was clear from the record that the authorities permitted other speakers and entertainers to appear. Only political candidates were excluded —a clear case of content discrimination. In dissent, Justice Brennan contended unremarkably that, whatever might have been true in the abstract, by allowing some speakers to use the base the authorities had voluntarily opened a forum and could not thereafter discriminate among speakers and messages. The majority's rejection of that view suggests that the Court may recognize a class of places, not public forums, where government is free to discriminate on the basis of the content of speech. *Cf.* Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (indicating that the effect of finding a place not to be a public forum is to dilute the standard of review brought to bear upon content discrimination to a relaxed search for "rationality"). To my mind, all this illustrates intellectual sloppiness, if not dishonesty. Government simply cannot discriminate between speech it likes and speech it dislikes in public forums that must be, or voluntarily are, opened for speech. In the rare case in which government is permitted to withhold a potential forum from duty, the withdrawal must be complete. If once a favored speaker is permitted to appear on previously forbidden turf, a forum is created and all comers must be given their turn.

[21] Hague v. CIO, 307 U.S. 496 (1939).

> Wherever the title of streets and parks may rest, they have *immemorially* been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

Id. at 515-16 (emphasis added). *Accord*, Schneider v. State, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

[22] Adderley v. Florida, 385 U.S. 39 (1966). Justice Black held for the Court that a demonstration outside the door of a jail could be suppressed because the state "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* at 47. In dissent, Justice Douglas insisted that in the absence of evidence that the demonstration interfered significantly with the operation of the jail, the picketing must be protected as a petition for redress of grievances. *Id.* at 51-52.

forum can be opened for expression-related activity without unduly disrupting its use for other legitimate purposes. Some places may be so committed to other purposes that their use for speech would be anomalous;[23] others may lend themselves to speech only on occasion.[24] The task in every case is to put government to its proof of good reasons for denying access for speech. To use a familiar phrase, government should be made to show that its policy with regard to a potential forum is the least restrictive alternative—denying access for expression-related activity only when the forum's legitimate devotion to other purposes makes it necessary.[25] Of course, reasonable time, place, and manner regulations can be invoked to reduce disruption of other activities.[26] At bottom, government should succeed in withholding a potential forum only if it is shown that no reasonable rules can accommodate all legitimate interests.

Q: How do you appraise the Court's record to date?

A: It is a mixed bag. Viewed realistically, most of the demonstration and sit-in cases that came to the Warren Court a decade or more ago demanded neither more nor less than a recognition that the first amendment has a horizontal focus, and in retrospect I think the Court did a fair job of responding to the legitimate demands of Blacks for meaningful forums from which to challenge American racism.[27] *Adderley*[28] and, in some respects, *Brown*[29] were disappointing, but the *Cox* cases[30] better represent the period. The ground gained for horizontalism there led naturally enough to the high watermark thus far—the *Mosley* case[31] in 1972. More recently, however, there has been some slippage. The *Spock* case [32] embraces the very his-

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[23] Justice Douglas conceded that the Senate gallery might be such a place. *Id.* at 54. I would add the Court's own courtroom or a law school classroom. Such places are public in the sense that they are publicly owned, but they are not proper forums for public speech because that expression cannot be accommodated without disrupting their use for the purposes to which they are dedicated.

[24] Justice Douglas' examples were the familiar street demonstration cases. It is one thing to propose that the streets must be open for parades and quite another to maintain that a busy thoroughfare must be made available during rush hour.

[25] I recognize that the Court has encountered difficulty with this analysis, *see* Note, *Less Drastic Means and the First Amendment,* 78 YALE L.J. 464 (1969), but it seems to me that, as in other first amendment contexts, the matter comes down to simply requiring government to carry a heavy burden of proof.

[26] Cox v. Louisiana, 379 U.S. 559 (1965).

[27] *See generally* H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1966).

[28] Adderley v. Florida, 385 U.S. 39 (1966), discussed in notes 22-24 and accompanying text *supra.*

[29] Brown v. Louisiana, 383 U.S. 131 (1966) (holding that a peaceful sit-in at a library was protected by the first amendment).

[30] Cox v. Louisiana, 379 U.S. 559 (1965) *(Cox II);* Cox v. Louisiana, 379 U.S. 536 (1965) *(Cox I)* (holding that a peaceful parade and demonstration was protected by the first amendment).

[31] Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (invalidating on its face an ordinance prohibiting demonstrations near school buildings but exempting labor picketing from the ban). Although Justice Marshall's opinion for the Court relied heavily upon the equal protection reasoning in Justice Black's dissent in *Cox II,* he made it clear that the equal protection claim was "closely intertwined with First Amendment interests." *Id.* at 95.

[32] Greer v. Spock, 424 U.S. 828 (1976). In an opinion by Justice Stewart, the Court upheld a ban on partisan speeches at Fort Dix in New Jersey. At the outset, Stewart distinguished Flower v. United States, 407 U.S. 197 (1972), a per curiam decision that had summarily reversed a conviction for distributing leaflets on a street within a military installation in San Antonio. In *Flower,* said Justice Stewart, the military authorities had abandoned any claim of special interest in the street where the leafletting occurred and thus had transformed it into a *traditional* forum for expression like any other public street. In *Greer,* however, Fort Dix had not abandoned the area where Dr. Spock wished to distribute literature. In distinguishing *Flower* in that way and choosing to rely instead upon "the historically unquestioned power of [a] commanding officer summarily to exclude civilians from the area of his command," 424 U.S. at 838 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 893 (1961)), Stewart plainly embraced *Hague*'s proposition that the definition of a public forum turns on

torical approach I have condemned, the best language in *Southeastern Promotions*[33] is only dicta, and, of course, there is *Shaker Heights*.[34] Again I concur with Professor Karst. That was an easy case, wrongly decided.[35] Cases such as *Shaker Heights* cause me concern for the new minorities who are even now demanding access to meaningful avenues of communication to put their case to society at large. The obvious example is gay liberation. How, may I ask, are gays to assert their rightful place in this society without access to meaningful public forums?[36]

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the use to which a potential forum has been put in the past. *See* Zillman & Imwinkelried, *The Legacy of* Greer v. Spock: *The Public Forum Doctrine and the Principle of the Military's Poiltical Neutrality*, 65 GEO. L.J. 773 (1977).

[33] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). Billed as the case that would decide whether the stage production of "Hair" was obscene, *Southeastern* proved disappointing to some. Perhaps because Henry Monaghan handled the Supreme Court argument, the Court decided only that the directors of the Chattanooga Memorial Auditorium had imposed an invalid prior restraint when they summarily rejected an application to perform the play without so much as reading the script. *See* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970). *Cf.* Freedman v. Maryland, 380 U.S. 51 (1965) (overturning a state censorship statute for failure to provide adequate procedural safeguards against unjustified inhibition of protected expression). Nevertheless, Justice Blackmun's opinion for the Court did find that municipal theaters are public forums, "designed for and dedicated to expressive activities." 420 U.S. at 555. And Blackmun did emphasize that the applicant "was not seeking to use a facility primarily serving a competing use." *Id.* On the latter point, he cited *Adderley*. Still, given the resolution of the case on the prior restraint ground, any disparaging comments about the "classificatory aspects of the board's decision" were "unessential" to the decision. 420 U.S. at 556 n.8 (citing Interstate Circuit v. Dallas, 390 U.S. 676 (1968) (the decision invalidating an administrative board's system of classifying films as "suitable" or not for young people)).

[34] Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). The case called for a straightforward public forum analysis. The city had voluntarily offered card space on public buses for paid commercial advertisements but had refused to sell space to political candidates. The resulting content discrimination was apparent. 418 U.S. at 310 (Brennan, J., dissenting) (contending that having opened a forum for communication the city was barred from "discriminating among forum users solely on the basis of message content"). A plurality opinion by Justice Blackmun, however, managed to view the case differently. Reasoning that the sale of card space to commercial interests was merely part of a "commercial venture," Blackmun insisted that no public forum was "here to be found." *Id.* at 303-04. Accordingly, the Court held that only a relaxed standard of review for rationality was appropriate, and that the exclusion of political advertisements had to be approved. Justice Douglas cast the deciding vote. Remembering, perhaps too vividly in this case, the troubling experience with piped-in music in Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952) (in which Justice Douglas dissented), he declared himself unwilling to approve *any* advertising forced upon the captive audience using public transportation. Passing over the content discrimination issue, Justice Douglas said simply that the validity of the commercial advertising program was not before the Court. *Id.* at 308 (Douglas, J., concurring). It seems fair to assume that if it had been, Justice Douglas would have struck it down; and with all messages removed from the cards a horizontalist might be satisfied (at least so long as the resulting absolute bar did not hide content discrimination of its own). *See* text at notes 18-20 *supra*. The difficulty in *Shaker Heights* was that Justice Douglas was unable to eliminate all messages at once, and his vote left standing the most invidious content discrimination imaginable—discrimination *against* political expression.

[35] Karst, *supra* note 2, at 36.

[36] I do not speak here of the question whether sexual preferences and behavior are themselves forms of expression protected by the first amendment or the cluster of constitutionally grounded interests collectively denominated as the right of privacy. *Compare* Roe v. Wade, 410 U.S. 113 (1973) (the abortion case) *and* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (recognizing special protection for family relationships) *with* Hollenbaugh v. Carnegie Free Library, ... U.S. ...., 99 S. Ct. 734 (1978) (denying certiorari in a case regarding loss of public employment because of living arrangements not shown to affect job performance); Gaylord v. Tacoma School District, 434 U.S. 879 (1977) (denying certiorari in a case concerning penalties upon the *status* of homosexuality); *and* Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976) (summarily affirming a criminal conviction for homosexual *conduct*). I consider it only sensible that sexual preferences and behavior receive substantive protection. *Compare* Carey v. Population Servs. Int'l, 431 U.S. 678, 694 n.17 (1977) (plurality opinion by Brennan, J.) (suggesting that the Court has not yet settled these questions) *with id.* at 718 n.2 (Rehnquist, J., dissenting) (insisting that most issues were resolved in *Doe*). It seems to me equally important that gays have an opportunity to *speak* in the ordinary sense about their views and feelings. It is through speech and more speech, the free trade in ideas, that any minority will finally win the majority's tolerance and understanding. This was and is true for racial and ethnic minorities. *E.g.*, F. LEWELS, THE USES OF THE MEDIA BY THE CHICANO MOVEMENT (1974); R. WOLSELEY, THE BLACK PRESS, USA (1971). And it is certainly true for gays. *See* Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976),

Q: Does your scorn for *Shaker Heights* bespeak a general dissatisfaction with the work of the Burger Court?

A: Again, I think the record is uneven. Painting with the broadest of brushes, it seems to me that this Court's individual liberty decisions across the board reflect a fundamental lack of sensitivity to the grave matters at stake.[37] But in the first amendment field, the decisions are often surprisingly good. Of course, the obscenity cases are an exception,[38] but *Erznoznik*,[39] *Stuart*,[40] and certainly *Wooley*[41] are most encouraging. It remains to be seen what the Court will make of its equally encouraging interest in commercial expression.[42] By acknowledging that commercial speech has first amendment protection the Court rejects one form of content discrimination, but by promptly suggesting that speech that merely proposes a bargain is entitled only to diluted protection it embraces yet another.[43] I detest toothpaste advertisements as much as anyone, but I cannot justify a hierarchy of protected speech, with political debate at the top and commercial expression, and perhaps non-

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cert. denied, 430 U.S. 982 (1977) (denying gays access to a college newspaper); Alaska Gay Coalition v. Sullivan, 578 P.2d 951 (Alaska 1978) (guaranteeing access to an official directory of community organizations).

[37] *See* L. LEVY, AGAINST THE LAW (1974).

[38] Even the Court's feeble attempts in Miller v. California, 413 U.S. 15 (1973), to limit prosecutions by tightening obscenity statutes have failed. Prosecutions continue apace. *Project: An Empirical Inquiry into the Effects of* Miller v. California *on the Control of Obscenity*, 52 N.Y.U. L. REV. 810 (1977).

[39] Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (striking down a ban on the exhibition of nude scenes from a drive-in theater screen visible from the street).

[40] Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (invalidating a "gag order" imposed upon the press).

[41] Wooley v. Maynard, 430 U.S. 705 (1977) (enjoining enforcement of a New Hampshire statute requiring motorists to display a license plate bearing the state motto against persons who find the ideological message implicit in the motto inconsistent with their moral beliefs).

[42] *See* Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Linmark Associates v. Township of Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975). *But see* Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973) (rejecting a first amendment claim in part on the theory that the activity referred to in an advertisement was unlawful).

[43] In an important footnote in *Virginia State Bd. of Pharmacy*, the Court insisted that while commercial expression is protected under the first amendment there are "commonsense differences between speech that does 'no more than propose a commercial transaction' and other varieties," and that, accordingly, "a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." 425 U.S. at 721 n.24 (citation omitted). In addition, since its accuracy may be more easily verified and its connection with profit-making is sufficiently close, commercial speech may be hardier than other expression and thus better able to bear the burden of regulation. *Id.* It is plain enough that the Court is laying the groundwork for approving familiar forms of regulation, notwithstanding commercial expression's newly found constitutional footing. There is every indication, for example, that the Court will continue to uphold restrictions on false or misleading advertising. *See* Friedman v. Rogers, ... U.S. ...., 99 S. Ct. 887 (1979); Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977). Similarly, regulation designed to promote interests unrelated to expression may be approved even though it indirectly burdens commercial speech. *See* Linmark Associates v. Township of Willingboro, 431 U.S. 85, 93-94 (1977) (avoiding a decision on the validity of zoning regulations banning or restricting the placement of *all* signs). *Compare In re* Primus, 436 U.S. 412 (1978) (protecting an attorney's non-commercial solicitation of clients for public interest litigation) *with* Ohralik v. Ohio, 436 U.S. 447 (1978) (approving a penalty for in-person commercial solicitations). There is even evidence that some Justices will take a special interest in advertising directed to children. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 711-12 (1977) (Powell, J., concurring) (indicating that he would approve narrowly drawn restrictions responding to legitimate concerns about the effect of advertising on the young). *See* notes 124-28 and accompanying text *infra*. Finally, it appears that the Court may not employ its most protective techniques in aid of commercial expression. *E.g.*, Bates v. State Bar of Arizona, 433 U.S. at 380-81 (declining to hear an overbreadth challenge). *See generally* Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976).

obscene pornography, near the bottom.[44] I do not believe that the Court can draw such lines.

Q: Do other recent decisions suggest how this Court sees the first amendment's focus?

A: Turning to them I find only confusion, traceable to a consistent failure to recognize the two competing views I have described. A few examples will do. In *Healy*,[45] decided early on, the Court recognized that ideas must have a forum.[46] I count that case as one of this Court's best. Yet, on other occasions when a similar solicitude has been called for, the Court has seemed oddly insensitive. I have mentioned *Spock*, but *Madison School District*[47] provides another example. The Court recognized the content discrimination issue and, in fact, decided the case on that ground.[48] In disturbing dicta, however, both the majority opinion and the concurrences made it clear that the Constitution would not require the forum to be open in the first instance.[49] Two inferences may be drawn. One is that this Court may see horizontalism as a convenient and preferred ground of decision when it is troubled by the consequences of a verticalist approach.[50] The other is that when the Court once chooses a horizontal focus in a case, it is all too quick to assume that the only constitutional difficulty lies in content discrimination on the face of governmental action and that, accordingly, an absolute bar to speech would be sufficiently neutral to pass muster. I have already told you what I would do with that.[51] In

[44] *See* Young v. American Mini Theaters, Inc., 427 U.S. 50, 70 (1976) (proposing that the first amendment interest in protecting erotic but nonobscene materials is "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate"). *Cf.* Carey v. Population Servs. Int'l, 431 U.S. 678, 716-17 (1977) (Stevens, J., concurring) (suggesting that even protected speech may be regulated to reduce its "offensiveness").

[45] Healy v. James, 408 U.S. 169 (1972) (decided with *Mosley*).

[46] The dispute in *Healy* was over the refusal of a state college to recognize a local chapter of the Students for a Democratic Society. The Court, in an opinion by Justice Powell, went immediately to the crux of things.

> The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes. The practical effect of nonrecognition was demonstrated in this case when, several days after the President's decision was announced, petitioners were not allowed to hold a meeting in the campus coffee shop because they were not an approved group.

Id. at 181. When the college suggested that the organization was free to meet off campus, the Court insisted that the Constitution protects against indirect as well as frontal attacks on protected rights. "We are not free," said Justice Powell, "to disregard the practical realities." *Id.* at 183.

[47] City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976).

[48] Indeed, the Court relied on *Mosley* for the proposition that "when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech." *Id.* at 176.

[49] The majority made clear its view that "public bodies may confine their meetings to specified subject matter and may hold nonpublic sessions to transact business." *Id.* at 175 n.8. Justice Brennan's concurrence was even more forceful, insisting that "the First Amendment plainly does not prohibit Wisconsin from limiting attendance at a collective-bargaining session to school board and union bargaining representatives and denying [an individual teacher] the right to attend and speak at the session." *Id.* at 178. If, as seems likely, Justice Brennan's view in *Madison* was nourished by a concern that union bargaining might be upset by according access to individual members, his effective acceptance of a blanket prohibition may not be imported into other first amendment cases. There is hope for that, at least. At any rate, we may take encouragement from his agreement that, whatever may be the fate of closed meetings by government agencies, once an agency decides to conduct an open session it may not discriminate among speakers "on the basis of what they intend to say." *Id.* at 179.

[50] *But see* Elrod v. Burns, 427 U.S. 347 (1976). The political patronage system under attack in *Elrod* might have been struck down for discriminating on the basis of employees' political affiliations. Instead, a plurality opinion by Justice Brennan chose a more vertical focus and found the system to burden substantive freedoms of belief and association, irrespective of the effect upon others.

[51] *See* notes 18-20 and accompanying text *supra*.

Madison I would ask whether disenchanted school teachers would be denied a meaningful opportunity to express themselves by closed board meetings. The answer is, I think, plain enough. There *is* a constitutional dimension to open meeting laws.[52]

Q: Are those inferences supported by other decisions?

A: Perhaps, but I am not prepared to argue that they are. Again, I find confusion in the cases. Take *Doyle*,[53] a case that has caused consternation among those who must now *prove* that the suppression of speech was the "motivating factor" behind a dismissal from public employment.[54] The importation of analysis born in equal protection cases into the first amendment field suggests a horizontal focus. Indeed, as I think of it, *Doyle* may suggest that the old problem of preventing government from suppressing speech that it disapproves[55] may best be treated by prohibiting purposeful discrimination, not only in employment and housing but in expression as well. There is a comment in *Young* that suggests as much.[56] On the other hand, nothing in Justice Rehnquist's opinion in *Doyle* squarely embraces that view. Other Burger Court cases are plainly schizophrenic. In *Buckley*[57] the Court's approval of campaign contribution limitations suggests a horizontal focus. The Court applied a stringent standard of review, but upheld government's decision to become involved in expression-related activity in order to equalize the ability of supporters to register their support for the candidates of their choice. Limitations on contributions are valid, perhaps in part because they are content neutral.[58] Yet, restrictions on expenditures were struck down in *Buckley*. While the per curiam opinion gives a plausible rationale for the distinction,[59] I have to think that the real

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[52] *See* T. EMERSON, THE SYSTEM, *supra* note 3, at 671-73; Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1204 (1962). *But see* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (Holmes, J.) (stating that the "Constitution does not require all public acts to be done in town meeting or an assembly of the whole."). I would argue, for example, that if Congress had not enacted the Freedom of Information Act as a matter of policy, substantially the same result would have been reached under the Constitution of its own force. *Cf.* W. MARNELL, THE RIGHT TO KNOW 34 (1973) (proposing a government newspaper). I recognize, of course, the potential conflict with individual privacy, but it seems to me that the danger can be mitigated by restrictions on government's authority to collect and retain information, which the Court has thus far declined to impose. *See, e.g.*, Whalen v. Roe, 429 U.S. 589 (1977).

[53] Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

[54] Justice Rehnquist's majority opinion was clear that a public employee who challenges a dismissal must prove not only that his or her conduct is constitutionally protected but that it was a "motivating factor" in the dismissal decision. *Id.* at 287. With a vague citation to Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270-71 n.8 (1977), *see* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. at 287 n.2, Justice Rehnquist appears to have imported emphasis upon legislative purpose or motivation, only recently born in an employment case, Washington v. Davis, 426 U.S. 229 (1976), and nurtured in a housing case, *Arlington Heights*, into the first amendment field.

[55] *See* Dennis v. United States, 341 U.S. 494, 580 (1951) (Black, J., dissenting) (pointing out that the expression of orthodox views rarely needs protection); Stromberg v. California, 283 U.S. 359 (1931) (the red flag case). Another problem is demanding speech that government *does* approve. *See* Wooley v. Maynard, 430 U.S. 705 (1977) (holding that an individual cannot be forced to become "an instrument for fostering public adherence to an ideological point of view he finds unacceptable"); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (the flag salute case).

[56] Young v. American Mini Theaters, Inc., 427 U.S. 50, 64 (1976) (reiterating that the "sovereign's agreement or disagreement with the content of what a speaker has to say may not affect the regulation of the time, place, or manner of presenting the speech.").

[57] *See* Buckley v. Valeo, 424 U.S. 1 (1975).

[58] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 803 (1977).

[59] While a contribution is a "general expression of support for the candidate," the effectiveness of that communication "does not increase perceptibly with the size of [the] contribution" 424 U.S. at 21. A limitation on the amount that can be contributed thus does not greatly impinge upon the *contributor's* speech. The *candidate* may use the contribution to spread his or her campaign message, but "the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.*

explanation is a sudden shift in focus to verticalism. Now the Court resists the congressional attempt to equalize the influence of the poor and the wealthy upon the outcome of elections. The notorious imbalance in wealth in American society is something to be accepted as a given by the first amendment, and governmental manipulation of expenditures in an attempt to counter its invidious effects is disapproved as a direct burden upon the individual's speech. That the restrictions fall, like rain, upon Republicans, Democrats, and Communists is, on this vertical focus, irrelevant.[60] Of course, the tension between verticalism and horizontalism comes to the fore most obviously in the mass media cases—*Red Lion*,[61] *CBS*,[62] *Tornillo*,[63] and, most recently, *Pacifica*.[64]

Q: Let me interrupt. I mean to question you at some length on those cases, but first let me ask whether individual Justices or perhaps commentators have come to grips with the focus problem and dealt with it more precisely than the Court's collegial opinions.

A: In the main, I find most opinions to be verticalist but there are exceptions. Although I will criticize it when you give me the opportunity, Justice White's opinion in *Red Lion* marked a departure,[65] and only Justice Douglas failed to join it.[66] Justice Marshall's opinion in *Mosley* was also unanimous.[67] More recently, the

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Expenditures, on the other hand, do go to the reach of the individual's views, and a limitation on independent spending in aid of a candidate is a direct and significant burden upon expression. *Id.* at 19.

[60] *See* Nicholson, Buckley v. Valeo: *The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323, 337-38 (comparing the Court's treatment of expenditure limitations to its principal verticalist decisions); L. TRIBE, *supra* note 58, at 1134-35 (viewing the *Buckley* decision as indicative of the Court's commitment to existing wealth distributions).

[61] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding the "personal attack" and "political editorial" aspects of the "fairness doctrine").

[62] Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (declining to require broadcasters to sell time for political advertisements).

[63] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating a state "right of reply" statute).

[64] FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (approving an FCC order stating that a radio station might have been sanctioned for broadcasting a "filthy words" dialogue by George Carlin at an inappropriate hour).

[65] Relying in the main upon the scarcity rationale for broadcast regulation, *see* text at notes 129-39 *infra*, White said,

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.
>
> . . . No one has a First Amendment right to a license or to monopolize a radio frequency. . . .
>
> By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.
>
> . . . .
>
> Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions.

395 U.S. at 388-90, 394.

[66] Justice Douglas did not hear oral argument and, evidently for that reason alone, took no part in the decision. *Id.* at 401. *See* Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 154 (Douglas, J., concurring) (stating that he would not support the *Red Lion* decision today).

[67] Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972). Justices Blackmun and Rehnquist concurred in the result without opinion, and the Chief Justice concurred separately only to make clear that "the First Amendment does not literally mean that we 'are guaranteed the right to express any thought, free from government censorship.' " *Id.* at 103. He mentioned, for example, the obscenity cases.

Brennan and Marshall opinion in *CBS* shows horizontalist leanings.[68] Then again, I suspect that Justice Brennan was the principal author of the *Buckley* per curiam,[69] and I have already said what I think of that case.

Q: Commentators?

A: They are now rapidly choosing up sides. To name only a few, Kenneth Karst,[70] Judge Skelly Wright,[71] and, of course, Jerome Barron[72] look toward horizontalism. Benno Schmidt,[73] Thomas Emerson,[74] and Paul Freund,[75] it appears,

[68] 412 U.S. at 170. Although the opinion ranges broadly into matters not essential to horizontalist analysis, to the extent that it complains that broadcasters gladly accept commercial advertisements but exclude political messages, it focuses upon the content discrimination that concerns the horizontalist most deeply. *Id.* at 200-01.

[69] I assume that none of the Justices who wrote separately took primary responsibility for the collegial opinion, and that alone eliminates the Chief Justice and Justices White, Marshall, Rehnquist, and Blackmun. Since Stevens did not participate, only Brennan, Powell, and Stewart are left. Judging, then, from the number of Brennan opinions cited in the per curiam, *e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the equation of fifth amendment due process with fourteenth amendment equal protection analysis, 424 U.S. at 93 (citing Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (another Brennan opinion)), and the reliance upon a two-rung, compelling interest standard of review instead of ad hoc balancing, Justice Brennan is the likely author.

[70] Karst, *supra* note 2. I do not propose that Professor Karst would agree with me in every particular of my approach. Indeed, he is quite clear that in his judgment "the equality principle's prohibition on government control of speech content is of limited use when the problem is one of censorship by private broadcasters and newspapers." *Id.* at 51. He assumes that something like a statute would be necessary to accomplish access to the print media, and he is not at all sure that he would approve any such statute in any event. I take the view that a statute is unnecessary, indeed undesirable in most cases. *See* text at note 93 *infra.*

[71] Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976). Here again I do not suggest that Judge Wright and I would agree completely. I only point out that, like Karst, he views content discrimination as the "main evil against which rigorous First Amendment scrutiny is designed to guard." *Id.* at 1009. In addition, Judge Wright wrote the court of appeals opinion, overturned by the Supreme Court, which would have required broadcasters to sell time for political advertisements. Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), *rev'd*, 412 U.S. 94 (1973). I also suspect Judge Wright of principal responsibility for the court of appeals' per curiam in the campaign finance case. Buckley v. Valeo, 519 F.2d 821 (D.C. Cir.), *rev'd in part*, 424 U.S. 1 (1975). The opinion's tenor, coupled with Judge Wright's vigorous criticism of the Supreme Court's decision, *see* Wright, *supra*, at 1001 (expressing concern that the Supreme Court's treatment of the issues "distort[s] our understanding of ourselves and our government"), lead me to conclude that he was the primary author.

[72] J. BARRON, FREEDOM OF THE PRESS FOR WHOM? (1973) [hereinafter cited as J. BARRON, FREEDOM]; Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) [hereinafter cited as Barron, *Access*]. For my departures from Professor Barron, see text at notes 81-93 *infra.*

[73] B. SCHMIDT, *supra* note 3. While Professor Schmidt fairly reports the advantages of access, his book in full is critical of thinking I consider horizontalist. *Accord*, Lange, *The Role of Access in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C. L. REV. 1 (1973).

[74] Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737 (1977) [hereinafter cited as Emerson, *Colonial Intentions*]. I rely for my rough appraisal on Professor Emerson's insistence that the system of free speech "must remain essentially *laissez faire*," and, to a lesser extent, upon his assumption that the first amendment permits regulation of broadcasting only because of the spectrum's physical limitations. *Id.* at 751-52. On the other hand, Emerson has long recognized the shortcomings of verticalism, *see* T. EMERSON, THE SYSTEM, *supra* note 3, at 627-73, and, even in his most recent paper, has endorsed the use of antitrust laws to "break up media monopolies." Emerson, *Colonial Intentions, supra*, at 752. I count his grudging acceptance of the fairness doctrine as ambivalent. *Id.* at 753. At bottom, he is frankly, and understandably, worried.

> Like other institutions in our society, the system of freedom of expression does not function in precisely the way the colonists intended. As we have grown older, bigger, and more complex, the system has developed flaws, distortions, and malfunctionings. In such a situation the citizenry, acting through the government, is normally called upon to make adjustments and lend support. In the case of freedom of expression, however, such intervention by government entails unusual risks. The paradox of looking to government for regulation of a system that, by definition, is immune from government control presents one of the most difficult problems of our age.

Id. at 756.

[75] Freund, *The Great Disorder of Speech*, 44 AMER. SCHOLAR 541 (1975). The evidence is slim, to be sure, but to the extent Professor Freund is content to retain the fairness doctrine, so long as the physical scarcity argument remains respectable, but resists "government's entering wedge" with regard to "journals of opinion," I think it fair to view him as a verticalist. *Id.* at 556-58.

prefer the relative security of verticalism for the present. I place Judge Bazelon somewhere between the two camps.[76] Both sides pick and choose from among the writings of others to find support for their positions. Holmes,[77] Chafee,[78] Meiklejohn,[79] and Kalven[80] are cited in and out of context.

Q: I thought you would come to Barron. Have you now stepped into line behind him?

A: Not entirely. I must say I admire his courage to propose that we take our first amendment theory in hand and alter it to address changed circumstances. Less intrepid men would blindly trust more familiar principles to somehow see us through. Yet, there are matters upon which Barron and I disagree. To begin, he leans too heavily upon the revisionist notion that the real value protected by the first amendment is not that speakers be permitted to speak but that listeners be

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[76] On the one hand, Judge Bazelon has long insisted that the Commission's regulation of broadcasting is at best suspicious. When in the name of the "public interest" the Commission failed to renew Reverend McIntyre's license, Bazelon lamented that, whatever we may think of right-wing propaganda, the Commission's action had "dealt a death blow to the licensee's freedoms of speech and press." Brandywine—Main Line Radio v. FCC, 473 F.2d 16, 64 (D.C. Cir. 1972) (Bazelon, C.J., dissenting). His doubts about the physical scarcity rationale for broadcasting regulation, *see* text at notes 129-42 *infra*, have led him to suggest that any governmental tampering with the content of programming must be invalid. Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 278 (D.C. Cir. 1974) (Bazelon, J., concurring). On the other hand, he is well aware of the problems associated with concentration of control and the far-reaching issues that now face the nation. He has flirted with limited access and urged governmental attempts to maintain diversity through content-neutral attacks upon monopoly. *See* Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213. *See also* National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977), *modified*, 436 U.S. 775 (1978).

[77] I have already argued that Holmes' marketplace metaphor has about it a distaste for content discrimination. *See* text at notes 4-7 *supra*. Judge Wright, too, finds the *Abrams* dissent useful in building a case for horizontalism. Wright, *supra* note 71, at 1004 n.17. On the other hand, Schmidt assumes that the "free marketplace of ideas" captures what I have characterized as the verticalist tradition. B. SCHMIDT, *supra* note 3, at 29.

[78] I have also mentioned Professor Chafee's prescient examination of the problems presented by concentrated control of the media. *See* note 3 *supra*. When, however, the Court struck down the newspaper "right of reply" statute, it found important support in the same work. Said Chafee, "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." Z. CHAFEE, GOVERNMENT, *supra* note 3, at 633, *quoted in* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 n.24 (1974). While I find the statute under attack in *Tornillo* to be far short of an adequate horizontalist response to the monopoly power of newspapers, *see* text at notes 90-91 *infra*, the statement lifted from Chafee to strike it down plainly reflects a verticalist focus.

[79] Barron takes key language from Meiklejohn as his point of departure. *See* text at note 82 *infra*. Yet, as I have noted, the cornerstone of Meiklejohn's theory, the proposition that the first amendment protects only speech associated in some way with the political process, contemplates obvious content discrimination. *See* text at notes 5-6 *supra*. In addition, I have to find a vertical focus in his refusal to recognize protection for advertising and broadcasting. In the first edition of his great essay, he insisted that radio had no first amendment protection because it was "not engaged in the task of enlarging and enriching human communication" but rather "in making money." A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 104 (1948). Introducing the second edition, he lamented that in the intervening years television had "proved to be even more deadly." A. MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 6, at xvi. While I must agree that "those business controls of communication are, day by day, year by year, destroying and degrading our intelligence and our taste by the use of instruments which should be employed in educating and uplifting them," *id.*, I hardly conclude that the interests of free expression can be served by denying commercial speech constitutional protection.

[80] It was Professor Kalven, of course, who turned our attention to what was to him "a classic distinction in speech theory . . . the distinction between regulations like Robert's Rules of Order and regulation of content." Kalven, *Public Forum*, *supra* note 16, at 23. Similarly, it was Kalven who, while insisting that the question of government control of broadcasting would be a long time dying, looked further and perhaps more profitably into the real challenge of mass media regulation. Kalven, *Broadcasting, Public Policy, and the First Amendment*, 10 J. LAW & ECON. 15 (1967) [hereinafter cited as Kalven, *Broadcasting*]. His contributions to the development of horizontalist thinking cannot be overestimated. *See* Karst, *supra* note 2, at 22 (conceding a substantial debt to Kalven's writings).

allowed to hear.[81] The emphasis upon correlative rights is adapted from Alexander Meiklejohn's famous comment that "what is essential is not that everyone shall speak, but that everything worth saying shall be said."[82] This meant to Meiklejohn that self-governing men and women require a free flow of information in order to cast intelligent votes.[83] To Barron, it holds a different meaning. It identifies the fundamental purpose of the first amendment, obscured by its language and the times in which it was written. In Barron's view, the first amendment was never intended to protect a right to speak, but rather to ensure the public's right to know.[84] In 1791, the means of communication were dispersed, and the most efficient way to protect any particular message was to protect the person who spoke it. Now, however, control of the mass media is concentrated in the few, and protecting those few does nothing to ensure that the public will hear the messages of those not fortunate enough to have newspapers and broadcast stations at their disposal. It is necessary, then, to install new constitutional doctrine that forces the media managers to share their great power with outsiders.[85]

Q: You disagree?

A: Yes, with both. Meiklejohn's insistence that free speech provides voters with the information they need to cast intelligent votes misconceives the way in which a modern democracy operates. To be sure, ballots are cast at periodic elections, and occasionally the rascals are turned out. Yet the real voting is carried on between elections—by lobbyists, pressure groups, and anyone else who has a complaint about or a suggestion for the local representative. It is not on those comparatively rare Tuesdays in the fall that Americans most influence their government. They register their views much more effectively in the push and pull of political wrangling over issues as they arise.[86] Free speech, then, is not a means to intelligent

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[81] Barron, *Access, supra* note 72, at 1663-66. Barron originally relied on then-Judge Burger's opinion in Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), finding in that "standing" case an implicit recognition of the public's *constitutional* right to know. Of course, *Red Lion, see* note 65 *supra,* and a number of other cases decided since Barron's original article are now more appropriate citations. *E.g.,* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976) (explicitly resting consumers' standing to challenge restrictions on advertising upon their first amendment rights as "recipients of the information").

[82] A. MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 6, at 26, *cited in* Barron, *Access, supra* note 72, at 1653.

[83] In his famous description of a town meeting, he said,

> Now, in that method of political self-government, the point of ultimate interest is not the words of the speakers, but the minds of the hearers. The final aim of the meeting is the voting of wise decisions. The voters, therefore, must be made as wise as possible. The welfare of the community requires that those who decide issues shall understand them. They must know what they are voting about. And this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented to the meeting. Both facts and interests must be given in such a way that all the alternative lines of action can be wisely measured in relation to one another. As the self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens. If they fail, it fails. *That is why freedom of discussion for those minds may not be abridged.*

A. MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 6, at 26 (emphasis added).

[84] I suspect, for example, that Professor Barron would agree with the Fifth Circuit that speech directed to a single public official in private correspondence and not shared with the world is unprotected. Givhan, v. Western Line Consol. Sch. Dist., 555 F.2d 1309 (5th Cir. 1977), *vacated,* .... U.S. ...., 99 S. Ct. 693 (1979).

[85] Barron, *Access, supra* note 72, at 1641-47 (labeling the laissez-faire underpinnings of Holmes' marketplace metaphor mere romanticism).

[86] *See* Linde, *Due Process of Lawmaking,* 55 NEB. L. REV. 197 (1976) (criticizing the assumption implicit in some recent writing that legislation is "instrumental" and rationally pursues some identifiable objective). In fairness, I hasten to concede that Meiklejohn and others writing by his lead have recog-

voting; it *is* voting. Once this is understood, the protection offered by the first amendment can be placed where it must rest—with the individual speaker.

Q: And Barron?

A: I am as concerned as he is about the monopoly power of the mass communications industry. The problem can be met, however, without denying that the first amendment establishes a right of free *speech*. Barron adopts a horizontalist approach and demands that the media be open to all views. But since he is concerned only for the right of the public to hear, he is satisfied with theoretically troublesome measures like the fairness doctrine.[87] So long as conflicting messages are heard, he cares little who speaks them. To my mind, it is critical that those who genuinely hold views be permitted to express them in their own words. Surrogates fail to capture the full force of original speech. Something is lost, and it may often be the something that determines whether the speech will be believed by its ultimate audience.[88]

Q: Would you argue that straining speech through the minds of others may frustrate the individual self-fulfillment and safety valve functions of free expression?[89]

A: Yes, and I would add this about Professor Barron's views. His idea of access is, I think, unjustifiably negative. He insists, for example, that in a case like *Tornillo* a person who has been attacked in the press must in fairness be permitted to respond.[90] Such a responsive view of access is, in my view, inadequate. It con-

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nized that *any* speech "that participates in the processes of democracy" should have first amendment protection. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 302 (1978). *Accord*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). The great difficulty with Professor Bork is that, unlike Meiklejohn, he seems unable to grasp the vital connection between political speech and other forms of expression that contribute, however indirectly, to democratic self-government. *Compare* Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 257 (insisting that art and literature inform political judgment and thus are protected) *with* Bork, *supra*, at 27 (denying such protection). My views, particularly regarding access to the print media, may startle some. But rest assured I will have no part of a first amendment theory that places no constitutional value on the expression apparent in painting, sculpture, and poetry. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977) (recognizing that "expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—" is entitled to first amendment protection).

[87] *Compare*, Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, 37 U. COLO. L. REV. 31 (1964) *and* Barron, *The Federal Communications Commission's Fairness Doctrine: An Evaluation*, 30 GEO. WASH. L. REV. 1 (1961) *with* text at notes 95-111 *infra*.

[88] Mill put the argument best.

> 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.

J. MILL, ON LIBERTY 32 (McCallum ed. 1947), *quoted in* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 n.18 (1969) (perhaps suggesting that fairness doctrine responsibilities can and should be met by offering direct access to outsiders or, perhaps again, simply defending approval of "personal attack" rules, which demand such access). *Cf.* Canby, *Programming in Response to the Community: The Broadcast Consumer and the First Amendment*, 55 TEX. L. REV. 67, 81-83 (1976) (contending that recognition of a right to hear may lead to "consumer sovereignty" and a regime in which there is a right to say only what the public wants to hear).

[89] *See* T. EMERSON, THE SYSTEM, *supra* note 3, at 6-7; Karst, *supra* note 2, at 23-26 (contending that the equality principle is vital to the protection of these and other values).

[90] Brief for Appellee, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Professor Barron made the argument in the Supreme Court. *Id.* at 242.

templates that stronger voices will speak first and loudest—that they will not only choose the issues to be discussed but ensure that they have their say whether or not dissenters are ever heard in response.[91] Finally, Barron is intentionally elusive about whether his right of access is based upon statute or the first amendment itself.[92] It is one thing to contend merely that the first amendment will permit government to take affirmative action to equalize access to the media and that, accordingly, such things as "right of reply" statutes are constitutional. It is quite another to argue that the first amendment of its own force demands that meaningful access be provided, with or without the aid of a statute. The latter is my position.[93] I do not know that Professor Barron shares it.

Q: You think a statute is unnecessary?

A: That is precisely my view. I think the focus of the first amendment is horizontal, that it mandates an opportunity for all to speak and speak meaningfully.

Q: Do you find positive statutory enactments designed to establish access invalid?

A: Not in all cases. I have already said that I find "right of reply" statutes misconceived. Similarly, the Commission's "personal attack" and "equal time" rules depend upon an initial attack or appearance to trigger access.[94]

Q: That is not true of the fairness doctrine.[95]

A: No. But it raises still more troubling matters. The fairness doctrine is the

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[91] *Cf.* Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 123 (1973) (opinion of Burger, C.J.) (noting that negative mechanisms such as the fairness doctrine leave the greatest power in the hands of the advertiser who first gains access to the airways for his or her slant on important issues). *See also* Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access,* 85 HARV. L. REV. 768, 775 (1972) (pointing out that "it is sheer chance that any individual who has heard one side of a controversial broadcast will be in his chair to hear the required reply."). *But see* Wilderness Soc'y and Friends of the Earth, 31 F.C.C.2d 729, 742 (1971) (Johnson, C., dissenting in part) (contending that the same audience can be reached by requiring licensees to broadcast response messages at the same hours and with the same force and regularity as the original programs).

On another level, of course, there is the difficulty of paying for replies. If those seeking to respond can afford the going rate, the broadcaster (or newspaper in a case such as *Tornillo*) can only complain that unpopular replies may offend customers and distract attention from adjacent offerings. *See* Jaffe, *supra,* at 780. All things considered, that seems a small matter and perhaps need not concern us. On the other hand, if those who wish to respond cannot pay all or even part of the standard charge, and a "submarket rate system" must be established to avoid obvious wealth discrimination, Note, 85 HARV. L. REV. 689, 695 (1972), enormous administrative difficulties appear.

[92] *See* J. BARRON, FREEDOM, *supra* note 72, at 66-74 (toying with arguments put forth by others that the Bill of Rights should be reinterpreted to reach ostensibly private monopoly power, but turning promptly to various bases for federal legislative action); Barron, *Access, supra* note 72, at 1669 (recognizing that the former proposition contemplates a "rabid theory of state action").

[93] *See* text at notes 182-207 *infra.*

[94] Roughly, the "personal attack" rule requires broadcasters to offer access time to identified persons or groups whose "honesty, character, integrity or like personal qualities" are attacked on the air during the presentation of views on a "controversial issue of public importance." 47 C.F.R. § 73.123 (1978). *See* Straus Communications, Inc. v. FCC, 530 F.2d 1001 (D.C. Cir. 1976) (opinion of Wright, J.); *Personal Attacks: Political Editorials,* 8 F.C.C.2d 721 (1967). The "equal time" rule is codified in § 315 of the 1934 Act. 47 U.S.C. § 315 (1976). With some notable exceptions, the rule requires any licensee that permits one legally qualified candidate use of the station to afford "equal opportunities" to all other qualified candidates for that office. *See* Chisholm v. FCC, 538 F.2d 349 (D.C. Cir. 1976); *Use of Broadcast Facilities by Candidates for Public Office,* 24 F.C.C.2d 832 (1970). *But see* 47 U.S.C. § 312(a)(7) (1976) (permitting the Commission to revoke a broadcasting license for willful or repeated failure to afford reasonable access to legally qualified candidates for federal office).

[95] *See The Handling of Public Issues Under the Fairness Doctrine and Public Interest Standards of the Communications Act,* 48 F.C.C.2d 1 (1974) [hereinafter cited as *Fairness Report*] (retaining the two elements of the doctrine—to treat issues of public importance and to afford an opportunity for conflicting views to be heard).

Commission's principal response to the tension between the vertical and horizontal approaches. As such, it is plainly inadequate. Indeed, in practical application it can snuff out rather than enhance free speech.[96] At the outset, the Commission senses the shortcomings of verticalist theory in coping with mass communications. If broadcast licensees are allowed complete freedom to present what programming they choose, the views of broadcasters, or perhaps their advertising clients, will dominate the airways.[97] In order to avoid offending viewers, broadcasters will tend to limit treatment of public issues to those about which there is little controversy.[98] To prevent that happening, the fairness doctrine departs from verticalism and demands that the airways be open to other issues and views. Yet rather than adopting the horizontalist position, which contemplates a right of access for outsiders, the fairness doctrine strikes a rough compromise. It demands that issues of concern to others be treated and that all sides be heard, but it rests responsibility for that treatment entirely with licensees. Broadcasters are told that they must devote reasonable time to the coverage of controversial public issues and that they must afford an opportunity for contrasting views to be heard. Nothing is said, however, about permitting outsiders access to the microphone to express their opinions in their own way.[99] This is theoretical nonsense. To begin, it censors broadcasters. It not only deters them from stating their own views in the first instance but compounds the error by coercing them into expressing views they may find abhorent. A governmental demand that a citizen speak is no less objectionable than a requirement that he or she remain silent,[100] and, of course, by relying on the presentation of dissenting views by broadcasters instead of those who hold those opinions, it discounts the value of speech by those who truly believe in what they say. Again, this

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[96] *See* Brandywine-Main Line Radio v. FCC, 473 F.2d 16, 63 (D.C. Cir. 1972) (Bazelon, C.J., dissenting). *See generally* Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on* Red Lion, 29 S.C. L. REV. 539 (1978).

[97] It is well-documented that the content of television programming is in large measure dictated by the advertisers who bid for scarce time. M. WEINBERG, TV IN AMERICA: THE MORALITY OF HARD CASH (1962). *See* G. SELDES, FREEDOM OF THE PRESS (1935) (dealing with the print media). Advertisers, in turn, bid highest for network programming that appeals to the largest audience, even at the expense of sizable minorities. R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 10, 49-50 (1973) [hereinafter cited as NOLL, PECK & MCGOWAN]. *See* M. SEIDEN, WHO CONTROLS THE MASS MEDIA? 160-62 (1974) (describing network reliance upon Nielsen measurements).

[98] *See, e.g.*, Patsy Mink, 59 F.C.C.2d 987 (1976) (reviewing a West Virginia station's policy of virtually ignoring the debate over strip-mining).

[99] On the contrary, "the format and the choice of a spokesman for the competing views are left to the licensee's discretion." Straus Communications, Inc. v. FCC, 530 F.2d 1001, 1007 (D.C. Cir. 1976). While the Commission has said that licensees should make reasonable efforts to allow presentations by "genuine partisans who actually believe in what they are saying," *Fairness Report, supra* note 95, at 15, the only requirement under the fairness doctrine is a good faith offer to present opposing views in a fashion determined by the licensee.

> This does not mean, however that the Commission intends to dictate the selection of a particular spokesman or particular format or indeed that partisan spokesmen must be presented in every instance. We do not believe that it is either appropriate or feasible for a governmental agency to make decisions as to what is desirable in each situation. In cases involving personal attacks and political campaigns, the natural opposing spokesmen are relatively easy to identify. This is not the case, however, with the majority of public controversies. Ordinarily, there are a variety [*sic*] of spokesmen and formats which could reasonably be deemed to be appropriate. We believe that the public is best served by a system which allows individual broadcasters considerable discretion in selecting the manner of coverage, the appropriate spokesmen, and the techniques of production and presentation.

Id. at 16. *See also Obligations of Broadcast Licensees Under the Fairness Doctrine,* 23 F.C.C.2d 27 (1970) (requiring licensees to notify specific individuals of an opportunity to present opposing views but still failing to demand that those individuals be allowed to speak for themselves over the air).

[100] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), and cases cited in note 55 *supra.*

is Barron's mistake—the assumption that it is unimportant that some speakers are silenced so long as others are permitted to state the same views.[101] Most fundamentally, the fairness doctrine is not content neutral. Government selects the topics for discussion and simply presents them to both willing and unwilling speakers.[102]

Q: You deny, then, that the fairness doctrine is horizontalist?

A: I think it merely reflects the Commission's vague suspicion that traditional, verticalist theory is inadequate in the face of concentration of control of the mass media and that government may legitimately become involved in expression in order to open important forums to the discussion of competing views. It is not, however, a content-neutral policy that merely structures the use of a public forum for the expression of all. As a horizontalist, I will permit, even demand, that government play the role of referee. I object, however, to orders from government that in the name of equal opportunity some speakers will be required to voice views they do not hold, but in the name of frugality others will be silenced. It is no answer that the doctrine only requires that outsiders' views be heard and that it is the broadcasters who choose to comply by themselves mouthing the words of their detractors. For the fact is that the Commission contemplates nothing else. Its long-standing acceptance of industry practices can only indicate that the usual means of compliance is precisely what is expected.[103]

Q: Is fairness better than nothing?[104]

A: Quite the contrary. Theoretical objections to one side, the fairness doctrine contributes to the mindless banality of broadcast journalism.[105] The initial requirement that public issues be treated is enforced only rarely. Attention is usually

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[101] *See* note 88 and accompanying text *supra*. *Cf.* A. MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 6, at 26 (suggesting that a town meeting moderator should not waste time by permitting each of twenty like-minded citizens an opportunity to deliver the same message).

[102] Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation,* 52 MINN. L. REV. 67, 148-49 (1967).

[103] To be sure, it can be argued that by forcing a broadcaster to devote time to an outsider's message, even an access doctrine would suppress the licensee's speech to the extent alternative expression is pre-empted. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256-57 (1974). The argument, however, ignores the facts. Both broadcasters and newspapers now have plenty of room for the offerings of outsiders. *See* note 173 *infra*. In any event, the burden is slight and, most important, content neutral. Kenneth Karst offers a simple illustration.

> Consider, for example, a law requiring newspapers to accept paid editorial advertising. The burden on the newspaper's production would be minimal, and more than offset by advertising revenue. The publisher would be commanded by law to publish something it chose not to print. But: (a) the government would not identify subjects worth discussing; that choice would be left to those who seek to advertise; (b) there would be no government supervision to assure "fair" coverage of any issue; (c) there would be no regulation of message content; and (d) the publisher could dissociate itself from any advertising message, both by marginal notations and by editorial statements.

Karst, *supra* note 2, at 52 n.165.

[104] *See* Emerson, *Colonial Intentions, supra* note 74, at 753 (expressing dissatisfaction with the doctrine but urging its retention nevertheless); Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation: Implications of Technological Change,* 37 U. CIN. L. REV. 550, 557 (1968) (suggesting that present doctrines be retained because they "do not do great harm and they may do some good").

[105] *See* Geller, *Does* Red Lion *Square With* Tornillo? 29 U. MIAMI L. REV. 477 (1975) (proposing that the doctrine's leveling effect be mitigated by deferring complaints for consideration en masse at renewal time).

focused on the second requirement that contrasting views be presented.[106] It is permissible, of course, for broadcasters to pursue one side of a question in one program and then deal with opposing views in a later broadcast. But in practice broadcasters attempt to avoid fairness doctrine complaints by spending time in every program on the opinions of others.[107] The result is an endless stream of bland programming and commentary, studded with the familiar "on the one hand . . . on the other hand" form of reporting.[108] No argument is presented thoroughly or persuasively; all are set forth in a matter-of-fact fashion without distinction. Every witness is refuted by a competing witness, and in the end the viewer is abandoned. Every argument and idea is as good as the next one, one side of a debate appears no more engaging than another, and the only course is bewildered ambivalence—the frustration that feeds an apathetic populace. I would prefer, and I believe the first amendment demands, the vigor and excitement of hard-hitting investigative journalism and strong-minded commentary—the sort of expression that *says* something and leaves it to the viewer to compare what is said in one program with what appears in another. Of course, I do not suggest that broadcasters should mislead viewers by withholding evidence or neglecting important perspectives. I rely on professional journalists to report upon events with clarity and integrity. My judgment is simply that they cannot do that meaningfully if government requires them to report all possible sides and viewpoints.[109] In the broadcast world I would establish, people with something to say would have an opportunity to say it—for themselves. This is what the first amendment means—what it must mean.

Q: What if the Commission were to substitute an access doctrine for fairness?[110]

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[106] Simmons, *The Problem of "Issue" in the Administration of the Fairness Doctrine,* 65 CALIF. L. REV. 546, 548 (1977); Comment, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine,* 10 HARV. C.R.—C.L. L. REV. 137 (1975). *But see* Patsy Mink, 59 F.C.C.2d 987 (1976) (holding that strip mining is a matter of such local importance that a station serving a West Virginia community must treat it in some fashion); Gary Soucie, 24 F.C.C.2d 743, 750-51 (1970) (commenting that some national issues may be so important that they cannot be completely ignored).

[107] *See, e.g.,* Accuracy in Media, Inc., 40 F.C.C.2d 958 (1973), *application for review denied,* 44 F.C.C.2d 1045 (1974), *rev'd sub nom.* National Broadcasting Co. v. FCC, 516 F.2d 1101, *reversal vacated,* 516 F.2d 1156, *second reversal vacated,* 516 F.2d 1180 (D.C. Cir. 1974) (reviewing Edwin Newman's attempts to "balance" an account of private pension programs by concluding his documentary with the caveat that some such programs are not so bad as others). *See* Simmons, *supra* note 106, at 570-78 (examining the *NBC* case).

[108] The recently retired Eric Sevareid was a master at constructing commentary to avoid second-rung fairness obligations. *See* R. CIRINO, DON'T BLAME THE PEOPLE 76-77 (1971) (accusing Sevareid of skillfully "covering up editorial viewpoint and personal attack").

[109] Of course, it is hardly necessary for the Commission to take discrete action against a licensee. Indeed, the Commission has only once relied on the fairness doctrine to refuse a license renewal, and then it found make weight arguments to mitigate the first amendment sting. Brandywine-Main Line Radio, 24 F.C.C.2d 18 (1970), *petition for reconsideration denied,* 27 F.C.C.2d 565 (1971), *aff'd,* 473 F.2d 16 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 922 (1973). Regulation by "lifted eyebrow" is enormously more effective. Kalven, *Broadcasting, supra* note 80, at 19-23 (providing illustrations of the "dossier technique"); Robinson, *supra* note 102, at 119-21 (describing the "*in terrorem* aspect of periodic renewal").

[110] The Court held in *CBS* only that the first amendment and the 1934 Act do not now require broadcasters to sell time to outsiders. Indeed, the Chief Justice suggested that in the future "Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable." Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 131 (1973). Model statutes have been proposed, *e.g.,* Comment, *A Proposed Statutory Right to Respond to Environmental Advertisements: Access to the Airways After* CBS v. Democratic National Committee, 69 NW. L. REV. 234 (1974); Comment, *Right of Access to the Broadcast Media for Paid Editorial Advertising—A Plea to Congress,* 22 U.C.L.A. L. REV. 258 (1974); but to date the Commission has remained doubtful. *But see* National Citizens Comm. for Broadcasting v. FCC, 567 F.2d 1095 (D.C. Cir. 1977) (remanding for further consideration of an access scheme).

A: I would be pessimistic. Of course, I cannot say that an access scheme that avoids the pitfalls of present law cannot be established. Inasmuch as I propose that the first amendment itself mandates access, it would be illogical to contend that the Commission, the Congress, or even state legislatures cannot assist in the effort. The commerce clause, section five of the fourteenth amendment, and, in the case of state legislatures, the police power are ready sources of legislative authority.[111] My only concern is that the Court, charged with interpreting the constitutional mandate, should not defer to administrative or legislative decision-making. Rules or statutes can be helpful, particularly in drawing lines,[112] but they cannot control. The first amendment itself controls, and, consequently, responsibility for determining what access is necessary and sufficient is lodged firmly with the Court.[113]

Q: Perhaps that is as it should be. For it is the Court that has assumed responsibility for individual liberty generally—at least since the 1937 realignment.[114]

A: I agree. The fate of individual liberty cannot be left in the hands of a majoritarian will that can so easily become a tyranny to stamp out dissent. Only the judicial department can withstand the weight of majoritarian power.[115] I do not discount the difficulty of the task; it is enormous. But there is simply no place else to turn but to the Court.

Q: I think it may be time to turn your attention to the mass media cases. I gather from what you have said that you would have the Court fashion an access doctrine from the first amendment of its own force. While access to places such as parks and the public streets might provide some minimal protection for minority views, I suspect you would demand access to more meaningful forums. If I am correct and you mean to contend for access to the mass media, then perhaps we should begin with a familiar question—whether there is some satisfying basis for distinguishing broadcasting from the print media.

A: An adequate answer demands an historical perspective. I am sure you

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[111] *See* Head v. Mexico Bd. of Examiners, 374 U.S. 424 (1963) (rejecting an argument that the Communications Act preempts state regulation of broadcasting); J. BARRON, FREEDOM, *supra* note 72, at 67-68 (proposing that section five of the fourteenth amendment would be a more forthright basis); Address by Commissioner Cox, ABA Section on Individual Rights and Responsibilities Annual Meeting (August 1969) (assuming that the commerce clause provides the necessary authority).

[112] *See* note 167 and accompanying text *infra*. It may be recalled that when Judge Wright first held that broadcasters must sell time to political advertisers he remanded to the Commission for the development of workable standards and procedures. Business Executives' Move for Vietnam Peace, 450 F.2d 642, 663-65 (D.C. Cir. 1971), *rev'd*, 412 U.S. 94 (1973).

[113] Judge Bazelon's opinion in the diversification case approaches what I have in mind. Inasmuch as the Commission decision under review rested upon policy judgment rather than fact-finding, and touched upon first amendment rights, he merely paid lip service to a relaxed standard of review and went on to a "searching" examination. National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977), *modified*, 436 U.S. 775 (1978). *See also* Yale Broadcasting Co. v. FCC, 478 F.2d 594, 603 (D.C. Cir. 1973) (Bazelon, C.J., dissenting) (recognizing that the Commission has no special expertise in constitutional interpretation), *cert. denied*, 414 U.S. 914 (1973).

[114] *See* C. BLACK, THE PEOPLE AND THE COURT (1960).

[115] Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952). Fred Friendly's unnerving description of the way in which the fairness doctrine has been manipulated for political advantage is proof enough that freedom of speech requires perpetual judicial protection. F. FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT (1976) (reporting that the doctrine might never have developed as it did if the Roosevelts had not needed a weapon against George A. Richards and the Kennedy Administration had not used it to counter opposition to the nuclear test-ban treaty). *See also* Bazelon, *supra* note 76 (expressing concern over Nixon staffers' attempts to best the media).

understand that when broadcasting was introduced early in this century no one considered it to be a vehicle for protected expression.[116] It had its military and commercial uses, and most importantly it soon became one of our chief sources of entertainment.[117] The very existence of the federal government's licensing scheme, established as early as 1912,[118] proves the point. If broadcasting had been thought to be speech, such a system would have been condemned as an invalid previous restraint.[119] This is the intellectual history of broadcasting. At least until recently, it has combined with the commercial speech "exception"[120] to deprive broadcasting of significant first amendment protection. It accounts for our collective tolerance of government censorship, which is apparent now in the statute prohibiting the use of profanity on the air[121] and the ban on cigarette advertisements,[122] and which is threatened anew in various proposals to restrict or eliminate advertising addressed to children.[123]

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[116] Bazelon, *supra* note 76, at 219-20 (recalling that prior to 1960 news reporting on the air consisted of rebroadcasting materials prepared for the print media); Kalven, *Broadcasting, supra* note 80, at 15-18 (suggesting that if broadcasting had had its own *Zenger* case, a separate tradition for the electronic media might not have developed). *See generally* F. FRIENDLY, DUE TO CIRCUMSTANCES BEYOND OUR CONTROL (1967) (describing the growth of television news programs).

[117] *See generally* E. BARNOUW, A TOWER OF BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES (1961); W. EMERY, BROADCASTING AND GOVERNMENT: RESPONSIBILITIES AND REGULATIONS (1971).

[118] *See* L. SCHMECKEBIER, THE FEDERAL RADIO COMMISSION (1932).

[119] B. SCHMIDT, *supra* note 3, at 125-26. *See* Comment, *Power in the Marketplace of Ideas: The Fairness Doctrine and the First Amendment,* 52 TEX. L. REV. 727, 733-40 (1974) (apparently proposing that the licensing scheme should even now be declared invalid as a prior restraint).

[120] *E.g.,* Valentine v. Chrestensen, 316 U.S. 52 (1942). *See generally* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression,* 39 GEO. WASH. L. REV. 429 (1971).

[121] 18 U.S.C. § 1464 (1976); FCC v. Pacifica Foundation, 438 U.S. 726 (1978). *See* Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards,* 84 HARV. L. REV. 664 (1971); Note, *Filthy Words, The FCC, and the First Amendment: Regulating Broadcast Obscenity,* 61 VA. L. REV. 579 (1975); Note, *Offensive Speech and the FCC,* 79 YALE L.J. 1343 (1970).

[122] 15 U.S.C. § 1335 (1976). The ban was upheld in Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd mem. sub. nom.* Capital Broadcasting Co. v. Acting Att'y Gen., 405 U.S. 1000 (1972). Now that the Court has accorded commercial expression a greater measure of first amendment protection, *see* notes 42-43 *supra,* it may be argued that one of the grounds for the decision has been cut away, and it now can stand, if at all, solely on the supposed distinction between broadcasting and the print media. *Cf.* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 774 (1976) (citing *Capital Broadcasting* but commenting that "the special problems of the electronic broadcast media" were not in issue). *Accord,* Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977); Bigelow v. Virginia, 421 U.S. 809, 825 n.10 (1975). *But see* Carey v. Population Servs. Int'l, 431 U.S. 678, 712 n.6 (1977) (Powell, J., concurring) (suggesting that restrictions on commercial advertising may be "especially appropriate" when the electronic media are used to carry the message). On the other hand, there are indications that the Court considers commercial advertising less valuable than other forms of protected expression and, for that reason, it may be regulated in a manner that would be invalid in the case of, for example, a political speech. If the Court should determine that the dangers posed by cigarette ads warrant special treatment, particularly when they are addressed to children, the ban might conceivably withstand scrutiny even under the more recent commercial speech cases. P. Kurland & D. Polsby, An Opinion as to the Validity of a Proposed Federal Trade Commission Ban on Children's Television Advertising 26-29 (submitted to Toy Manufacturers of America, Inc.) (on file with the *Kansas Law Review*). My own view, of course, is that it constitutes unconstitutional censorship. Indeed, I should have thought that the tobacco industry's foes would agree. It must be recalled that tobacco interests actively *supported* the outright ban on their ads—on the theory that complete silence from all sides was preferable to the Commission's previous policy of applying the fairness doctrine to cigarette commercials. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968). Dissenting in *Capital Broadcasting,* Judge Wright pointed out that, after *Banzhaf,* further tobacco industry ads served only to trigger antismoking messages tending to reduce cigarette consumption. 333 F. Supp. at 587-88. The industry was only too glad to take its ads off the air in order to shut up antismoking forces. While I have my doubts about the fairness doctrine, I do look upon the experience with cigarette advertisements as solid proof that an access doctrine is vital to the free discussion of public issues.

[123] *E.g.,* Children's Television Report & Policy Statement, 50 F.C.C.2d 1 (1974) (surveying broadcasters' "self-regulation"), *aff'd,* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977) (examining the more restrictive controls one organization of parents would establish). *See also* Notice of

Q: Will you defend profanity in the presence of impressionable youth?[124]

A: Certainly not. Parents can and should teach their children to express themselves without sordid allusions.

Q: Advertisements pushing cancer sticks and sugary, tooth-decaying sweets?[125]

A: I find such commercial practices loathsome. At best, they teach children the art of nagging—a technique that is far too effective in most American households.[126] At worst, they bring death at an early age.[127] Yet, like fascist and communist harangues, the most abhorrent ads are protected by the first amendment. Any effort to restrict advertising out of fear for its consequences must fail as content discrimination. We can hardly snuff out speech we disapprove. The answer to bad speech is more speech. Of course, the regulation of false or misleading advertising is another matter. I think fraud in advertising can be punished in much the same way we penalize it in other commercial transactions and in the law of contract.[128]

Q: I am afraid it is not so simple as that. You must concede that government originally established its regulatory scheme in order to reduce frequency interference. The critical fact is that the electromagnetic spectrum has physical limits.[129] It is not available to all but must be divided among competing users. As Justice Frankfurter put it in the *NBC* case thirty-five years ago, "[r]egulation of radio was . . . as vital to its development as traffic control was to the development of the automobile."[130] Government was forced to intervene to eliminate the chaos of interference. "With everybody on the air, nobody could be heard."[131] That is the conventional wisdom.[132] Do you mean to reject it?

Proposed Rulemaking, 43 Fed. Reg. 17,967 (1978); FEDERAL TRADE COMMISSION STAFF REPORT ON TELEVISION ADVERTISING TO CHILDREN (1978) (proposing an absolute ban on advertising addressed to children).

[124] *Cf.* Ginsberg v. New York, 390 U.S. 629 (1968) (permitting the suppression of materials sold to children that would not be obscene if distributed to adults).

[125] Concurring in Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), Justice Powell saw "no reason to cast any doubt on the authority of the State to impose carefully tailored restrictions designed to serve legitimate governmental concerns as to the effect of commercial advertising on the young." *Id.* at 712.

[126] *See* Ward & Wackman, *Television Advertising and Intrafamily Influence: Children's Purchase Influence Attempts and Parental Yielding,* in IV U.S. DEP'T OF HEALTH, EDUC. & WELFARE, TELEVISION AND SOCIAL BEHAVIOR 516 (1972).

[127] *See* Larus & Brother Co. v. FCC, 447 F.2d 876 (4th Cir. 1971) (approving the Commission's judgment that the detrimental effects of cigarette smoking have been sufficiently established that a licensee may consider the matter "beyond controversy"). *But see* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 588 (D.D.C. 1971) (Wright, J., dissenting) (pointing out that cigarette advertisements are successful only in promoting brand loyalty and not in encouraging smoking in general).

[128] *See* Young v. American Mini Theaters, Inc., 427 U.S. 50, 68-69 n.31 (1976) (dicta) (commenting that FTC regulation of advertising has "long been recognized"). Jacob Siegel Co. v. FCC, 327 U.S. 608 (1946); Warner-Lambert v. FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950 (1978) (approving an order for corrective advertising); FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485 (7th Cir. 1975), *cert. denied,* 426 U.S. 919 (1976) (holding that the first amendment does not protect false or misleading advertisements). Memorandum from Albert H. Kramer, Director of the United States Bureau of Consumer Research, to the Board of Directors of the American Civil Liberties Union (October 4, 1978) (defending FTC proposals regarding advertising judged to be misleading to children) (on file with the *Kansas Law Review*). *See generally Developments in the Law—Deceptive Advertising,* 80 HARV. L. REV. 1005 (1967).

[129] Two standard casebooks contain brief explanations of the spectrum's physical characteristics and related allocation issues. M. FRANKLIN, MASS MEDIA LAW 536-54 (1977); H. JONES, REGULATED INDUSTRIES, 926-32 (2d ed. 1976).

[130] National Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943).

[131] *Id.* at 212.

[132] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). More recently, the Commission has put it this way:

A: I do. That is, I reject the physical scarcity rationale as a justification for the regulation of broadcasting as distinguished from other media in which control is concentrated. I deny that it is any longer the conventional wisdom. On the contrary, those who have examined the issue in recent years have uniformly dismissed the scarcity rationale out of hand.[133] I am thinking not only of economists, who view scarcity of spectrum space as no different from scarcity of other valuable resources such as printing presses and trees.[134] Others have identified the real problem as concentration of control and recognized that concentration occurs in all communications media and not simply broadcasting.[135] There are, for example, many more broadcasting stations than daily newspapers in major communications markets and the influence of the three broadcast networks exceeds even that of the great wire services.[136] In broadcasting the physical limits of the spectrum surely contribute to concentration, though I would not minimize the influence of Commission regulations that tend to restrict the availability of spectrum space to the media that most need it.[137] In the newspaper business economic barriers play the largest role.[138] Still, the inevitable consequence in both fields is concentration of control. I fail to see the basis for attaching constitutional significance to the cause of that concentration.[139]

> This scarcity principle is not predicated upon a comparison between the number of broadcast stations and the number of daily newspapers in a given market. The true measure of scarcity is in terms of the number of persons who wish to broadcast and, in Justice White's language, there are still "substantially more individuals who want to broadcast than there are frequencies to allocate."

Fairness Report, supra note 95, at 4 n.4 (citation omitted).

[133] Indeed, even the *Red Lion* briefs made a persuasive case against *physical* scarcity as a justification for broadcast regulation. The Court acknowledged the facts but decided on balance that the prudent course was to embrace the scarcity rationale until it becomes untenable. 395 U.S. at 396-401. *Accord,* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978).

[134] *E.g.,* H. LEVIN, THE INVISIBLE RESOURCE (1971); B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION 91 (1975); Coase, *Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues,* 41 J. LAND & PUB. UTIL. ECON. 161 (1965) [hereinafter cited as Coase, *Economic Issues*]. *See also* Coase, *The Federal Communications Commission,* 2 J. LAW & ECON. 1 (1959).

[135] *E.g.,* Bazelon, *supra* note 76, at 238 (insisting that the "problem" is not "scarcity" but "simple, old-fashioned concentration of economic power").

[136] R. NIXON, TRENDS IN NEWSPAPER OWNERSHIP (1968). *See* NOLL, PECK & MCGOWAN, *supra* note 97, at 15-16, 49-53; Blake & Blum, *Network Television Rate Practices: A Case Study in the Failure of Social Control of Price Discrimination,* 74 YALE L.J. 1339 (1965); Bryant, *Historical and Social Aspects of Concentration of Program Control in Television,* 34 LAW & CONTEMP. PROB. 610 (1969).

[137] *See* Geller, *A Modest Proposal for Modest Reform of the Federal Communications Commission,* 63 GEO. L.J. 705 (1975) (describing the Commission's short-sighted decision to assign television to the inadequate VHF band and subsequent hesitancy to shift to the more adequate UHF band). *See also* Barrow & Manelli, *Communications Technology—A Forecast of Change, Part I,* 34 LAW & CONTEMP. PROB. 205 (1969).

[138] B. OWEN, *supra* note 134, at 34-37 (concluding that even with an expenditure of millions it is virtually impossible to establish a daily newspaper that can compete with the existing giants). *But see* Daniel, *Right of Access to Mass Media—Government Obligation to Enforce First Amendment,* 48 TEX. L. REV. 783, 789 (1970) (recalling that Norman Mailer and Edwin Facher established the *Village Voice* with $10,000 between them).

[139] A former Commissioner has made the following unremarkable point:

> The arguments usually made to distinguish broadcasting scarcity from newspaper scarcity are that broadcasting is limited by the electromagnetic spectrum, whereas the number of newspapers is not limited by any natural phenomenon, and that broadcasting facilities are licensed by the government while newspapers are not. These arguments are based on differences between the media but not on differences that are necessarily significant with respect to the first amendment and the right of the public to free expression. So far as the opportunity for utterance of all views is concerned, it does not make any difference whether facilities are limited by natural forces or economic forces.

Loevinger, *Free Speech, Fairness, and Fiduciary Duty in Broadcasting,* 34 LAW & CONTEMP. PROB. 278, 295-96 (1969).

Q: I suspected you would take the position you have regarding scarcity, but can you as easily dismiss other rationales offered for distinguishing broadcasting from the print media?

A: Let me take them in turn. To begin, I certainly *can* dismiss the argument that an assertion of government ownership of the spectrum somehow makes expression over the airways unique and therefore regulable.[140] I will concede that the Communications Act expressly avoids creating property interests in broadcast licenses and accordingly retains the spectrum as a government preserve.[141] But the concession leads nowhere. Broadcasters use a public resource to send their signals. Can it be denied that newspaper delivery trucks use the public streets? If use of public property, the radio spectrum, or social overhead capital somehow justifies governmental intervention, then it seems to me that newspapers can be regulated just as can broadcasters. Now, I do not wish to be misunderstood. I am prepared to argue that the airways are a public forum and that government is very much responsible for keeping them open for free expression. I simply reject the notion that a theory of public ownership of the electromagnetic spectrum can justify regulation of broadcasters that would be unconstitutional if applied to newspapers.[142]

Q: I want to explore that last comment in a moment, but first I would like you to deal with other rationales offered for broadcast regulation. For example, is there no basis for singling out broadcasting because its signals may reach a captive audience?

A: I know that Judge Bazelon once proposed that,[143] but I really think it proves too much. Certainly it may be easier for readers to pass over offensive articles and advertisements in a newspaper purchased at the corner drugstore than it is for television viewers to avoid disturbing material thrust upon them from a screen fixed in the living room.[144] And only the deaf escape what comes from a radio dangling from the neck of a passing workman. But I would limit the captive audience argument to cases in which the victim of offensive expression has no retreat at all. We must realize that freedom of expression for us all necessarily contemplates self-protection for the weak of heart.[145]

Q: But television invades the privacy of the home. You may reasonably insist

[140] Robinson, *supra* note 102, at 152 (labeling the spectrum itself as an "artificial construct" not capable of being "owned" by anyone).

[141] 47 U.S.C. § 304 (1976). *See* Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) (holding that no broadcaster has a vested interest in a license).

[142] *Cf.* Home Box Office, Inc. v. FCC, 567 F.2d 9, 45 n.80 (D.C. Cir.) (summarily rejecting the "ownership" rationale), *cert. denied,* 434 U.S. 829 (1977).

[143] Banzhaf v. FCC, 405 F.2d 1082, 1100 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969).

[144] *See* Note, *Illusion or Deception: The Use of "Props" and "Mock-ups" in Television Advertising,* 72 YALE L.J. 145 (1962).

[145] *Cf.* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Cohen v. California, 403 U.S. 15 (1971) (holding that in a pluralistic society citizens are necessarily the captives of many disturbing messages and that in the ordinary case the burden falls on the individual to avoid further difficulty by diverting his or her eyes). Even when the privacy of the home is at stake, the ability of government to restrict expression must be closely circumscribed. It is one thing to hold, as the Court did in Rowan v. Post Office Dep't, 397 U.S. 728 (1970), that government can validly assist individuals in maintaining the privacy of their homes by removing names from the mailing lists of offensive publications *on the request of the addressee,* and quite another to propose that government can take the initiative and prevent materials deemed on some objective standard to be offensive from ever reaching an audience for acceptance or rejection. In the latter case, the individual viewer can protect himself or herself simply by changing channels.

that adults who wish to avoid offensive programming turn the dial or leave the room, but you must consider children who cannot choose for themselves. Television is viewed incessantly by children and program schedules are often unreliable and misleading. Even if they were not, parents would be unable to restrict their children to programs thought to be safe. Indeed, some parents use the boob tube as an electronic babysitter.[146]

A: My response is predictable. For my part, parents can fairly be expected to police their own children. Government can hardly be asked to lift that traditional burden from them.

Q: You said the captive audience argument proves too much.

A: It does. It recognizes that broadcasting can be something more than the routine of silly police drama, game shows, movie reruns, and bland news reporting and political commentary. It can be amusing, informative, distressing, stimulating, and even outrageous. I should have thought that sound public policy under the first amendment would foster "robust" expression rather than suppress it in the name of protection for those who do not wish to know. Yes, the captive audience argument proves too much. It proves that broadcasting is invested with the very first amendment values we want most to preserve.

Q: There is at least one further argument.

A: I know. I have left it for last not because it is least important but because it is the most persuasive of all. I take it you are thinking of the so-called "power" theory,[147] which posits that regulation of broadcasting is justified because of the nature of television as a "cool" medium,[148] the enormous amount of time Americans spend in front of the screen,[149] and our growing dependence upon it for communication with the larger society.[150] Put most bluntly, the effects of television viewing from infancy run deep. We do not yet know how deep.[151] The safest course at present may be benign regulation in order to maintain control when the human consequences of dependence upon broadcasting begin to appear. This is the real reason so many of us tolerate the regulation of television and cable, which shares broadcasting's power if not its physical characteristics.[152]

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[146] *See* Lyle, *Television in Daily Life: Patterns of Use (Overview)*, in IV U.S. DEP'T OF HEALTH, EDUC. & WELFARE, TELEVISION AND SOCIAL BEHAVIOR 1 (1972) (reporting that most television viewing is opportunistic and unplanned, that sixth graders are in the audience through most of the prime viewing hours, and that a majority of mothers may make no effort to restrict the viewing of first graders). *But see* Butler v. Michigan, 352 U.S. 380 (1957) (striking down a statute banning from all readers books considered inappropriate for children).

[147] *See* Freund, *supra* note 75, at 556-59; Bazelon, *supra* note 76, at 220-21.

[148] M. MCLUHAN, UNDERSTANDING MEDIA—THE EXTENSIONS OF MAN (1965).

[149] LoSciuto, *A National Inventory of Television Viewing Behavior*, in IV U.S. DEP'T OF HEALTH, EDUC. & WELFARE, TELEVISION AND SOCIAL BEHAVIOR 33 (1972) (reporting that virtually every American has access to a television set and that by one account the median viewing period is just under three hours per day).

[150] *See* B. ROPER, A TEN-YEAR VIEW OF PUBLIC ATTITUDES TOWARD TELEVISION AND OTHER MASS MEDIA 2 (1968), *cited in* Stone, *Sources of Most News: Evidence and Inference*, 14 J. BROADCASTING 1 (1969) (reporting that more than half the Americans surveyed said they depended upon television for most of their news).

[151] *See* Baran, *On the Impact of the New Communications Media Upon Social Values*, 34 LAW & CONTEMP. PROB. 244 (1969); Bazelon, *supra* note 76, at 221.

[152] *But see* Robinson, *Introduction and General Background*, in DEREGULATION OF CABLE TELEVISION 1, 5 (P. McAvoy ed. 1977) (recognizing that federal regulation of cable has "grown in scope and

Q: It is more than that. Television may twist the events it reports to us and thus distort the only picture of reality we have.[153] In addition, it tends to influence events themselves. There are obvious examples. Cameras in the courtroom may mean the difference between conviction and acquittal.[154]

A: I understand the concerns, but have they not always been with us—in another form, perhaps? The idea of free speech is dangerous. There is nothing new in that. All this comes down to an undirected fear that broadcasting will make too great a difference too soon. Yet it is hardly a purpose of the first amendment to preserve the status quo. I will concede that I am troubled by what changes the age of mass communications may bring, but I am not so satisfied with the world as it is that I am prepared to place controls on a medium of expression in order to dilute its effectiveness. In this perhaps I am a traditionalist after all. I believe that the answer lies in more speech, not less. Of course, we can legitimately recognize the difference cameras make and justify excluding them from some trials; but we cannot, on the same reasoning, attempt to prevent political posturing by excluding them from legislative chambers.

Q: Am I to understand that you find no justification for distinguishing between broadcasting and the print media and that, accordingly, the 1934 Communications Act is unconstitutional?

A: I need not go so far or, indeed, in that direction. The Communications Act is unobjectionable to the extent it assigns frequencies to avoid interference. If Justice Frankfurter had stopped there in *NBC,*[155] I would have had no quarrel with him.

Q: But he could not stop there. Once it is granted that government will license, attention must turn to the criteria of choice between competing applicants, all of whom have the technical capacity to operate a broadcasting station. The problem is the familiar one of allocating scarce resources. What would you have government do? Auction licenses to the highest bidder?[156] Offer them to the first applicants to appear? Draw lots?[157] Given the extraordinary import of the licensing decision, it seems only sane to propose that licenses should issue to applicants who, judged by

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intensity in direct proportion to the threat, perceived or actual, which cable services pose to established over-the-air broadcasters"). Of course, since CATV relies on coaxial cables to deliver signals to its subscribers, and the channel capacity of such cables is enormous, the physical scarcity rationale asserted for regulating broadcasting would seem inapposite with respect to the control of cable. Home Box Office, Inc. v. FCC, 567 F.2d 9, 44-46 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977). Nevertheless, the Commission has launched a number of regulatory forays into the cable field. *Compare* United States v. Midwest Video Corp., 406 U.S. 649 (1972) *and* United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968) (approving regulation "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting") *with* National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) (disapproving certain rate-fixing). *See generally* S. RIVKIN, CABLE TELEVISION: A GUIDE TO FEDERAL REGULATIONS (1973). Recently, new legislation, emphasizing access, has been proposed. *See* Note, *The Proposed Cable Communications Act of 1975: A Recommendation for Comprehensive Regulation,* 1975 DUKE L.J. 93.

[153] *See, e.g.,* ASPEN NOTEBOOK ON GOVERNMENT AND THE MEDIA 12-50 (W. Rivers & M. Nyhan eds. 1973) [hereinafter cited as ASPEN NOTEBOOK]. *See also* Wood, *Television As Dream,* in TELEVISION AS A CULTURAL FORCE 17 (R. Adler & D. Cater eds. 1976).

[154] *See* Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965).

[155] Nat'l Broadcasting Corp. v. United States, 319 U.S. 190 (1943).

[156] Coase, *Economic Issues, supra* note 134.

[157] Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings,* 24 STAN. L. REV. 1 (1971); Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs,* 64 VA. L. REV. 169, 240 (1978) [hereinafter cited as Robinson, *Essay*].

objectively determinable factors, promise to operate in the public interest. This is the way Congress solved the allocation problem in the 1934 Act, and Justice Frankfurter, who fully understood that the Commission *had* to inquire about programming content to make its decisions, simply approved the inevitable.

A: You are correct only to a point. I agree, of course, that it is necessary to allocate licenses, and like you I shrink from throwing the matter to the selfishness of the market or the sheer chance of a lottery. I have no objection to a system that judges applicants according to their appraisal of the programming needs of the community they wish to serve, their intended response to those needs, and the broadcast time they expect to devote to commercial profit-making.[158] Indeed, I applaud efforts to use the licensing process as a vehicle for diversifying the communications industry[159] and enforcing other public policies, such as the elimination of employment discrimination.[160] If inquiries into such matters raise free speech questions, like Professor Kalven I am prepared to live with them as necessary evils to be tolerated when shown to be essential to the allocation decision.[161] Outright prohibitions and such things as the fairness doctrine are, however, indefensible. The various arguments for extending those controls on content to broadcasting, while at the same time leaving newspapers entirely free, do not withstand scrutiny. This ground has been covered before. But most of those who come this far insist

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[158] *Accord,* Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 279-80 (D.C. Cir. 1974) (rehearing en banc) (Bazelon, C.J., concurring in the result) (allowing that choosing between competing applicants for a broadcast license on the basis of such content neutral standards as financial stability, experience, and diversification effect "is analogous to choosing a relief pitcher on the basis of his criminal record and off-season earnings"). Of course, technical matters must play a role. *E.g.,* United Broadcasting Co. v. FCC, 565 F.2d 699 (D.C. Cir. 1977) (approving the Commission's refusal to renew a license in light of the applicant's "long history of persistent violations" of the rules governing technical operation).

[159] *See, e.g.,* Second Report and Order, 50 F.C.C.2d 1046 (1974), *reconsidered,* 53 F.C.C.2d 589 (1975), *aff'd in part,* National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977), *modified,* 436 U.S. 775 (1978).

[160] *E.g., In re* Nondiscrimination in Employment Policies and Practices of Broadcast Licensees, 60 F.C.C.2d 226 (1976), *aff'd,* Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529 (2d Cir. 1977); Alabama Educ. Television Comm'n, 50 F.C.C.2d 461 (1975) (refusing to renew eight educational stations because of pervasive race discrimination in employment and programming practices). *See* UNITED STATES CIVIL RIGHTS COMMISSION, WINDOW DRESSING ON THE SET: WOMEN AND MINORITIES IN TELEVISION (1977).

[161] Kalven, *Broadcasting, supra* note 80, at 37. Of course, I do not propose that the potential for abuse does not exist. Anyone who peruses the Commission's renewal decisions is aware that unpopular speakers and messages may be forced off the air under the guise of regulation in the public interest. The leading cases are familiar. *E.g.,* Yale Broadcasting Co. v. FCC, 478 F.2d 594 (D.C. Cir.), *cert. denied,* 414 U.S. 914 (1973) (the drug-related lyric case); Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16 (D.C. Cir. 1973) (the Carl McIntire case); KFKB Broadcasting Ass'n v. FRC, 47 F.2d 670 (D.C. Cir. 1931) (the Brinkley case). Nor do I mean to disregard the problems inherent in the cases on change of format, *e.g.,* Citizens Comm. to Keep Progressive Rock v. FCC, 478 F.2d 926 (D.C. Cir. 1973), or the very real threats to freedom posed by such things as the Commission's "ascertainment" requirements. Ascertainment of Community Problems by Broadcast Applicants Primer, 57 F.C.C.2d 418 (1976) (dealing with renewal applicants); Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971) (pertaining to original applicants). *See* Bamford v. FCC, 535 F.2d 78 (D.C. Cir. 1976) (approving refusal of a license because the applicant had not consulted with the poor). It is obvious that there is in such schemes the potential for the most egregious, though subtle, censorship. I insist, accordingly, that the Commission exercise judgment with the greatest sensitivity. *See* Memorandum from the Subcommittee on Radio Regulation to the Communications Media Committee of the American Civil Liberties Union (January 3, 1979) (urging retention of the ACLU policy supporting ascertainment requirements) (on file with the *Kansas Law Review*). Of course, the introduction of meaningful access would reduce substantially the *need* to examine the content of offerings and a licensee's effort to address local concerns. *See* Canby, *supra* note 88 (contending that ascertainment is only a backdoor means of access for local groups in any event).

in the name of equality that broadcast regulation must cease.[162] I take a different view. Much of the content regulation in present law must go, but I would replace it with an access doctrine grounded in the first amendment and applicable to newspapers and broadcasters alike.

Q: I daresay I can accept everything you have said and *still* defend different treatment for broadcasting. A broadcast station can send only one signal at a time. At any given moment, viewers are offered only that single message. Advertisers who underwrite such messages see their interest in reaching the largest possible audience. The result, I think you will agree, is a built-in economic incentive to groom every moment of the broadcast day to a loosely defined majority of viewers. Programming that appeals to minorities is less profitable and, for that reason alone, is unlikely to be afforded significant time, particularly during peak viewing hours.[163] In order to counter the pressure from commercial interests and make a place for the treatment of such matters, the fairness doctrine, or perhaps your access plan, may be necessary. Turning to the print media, however, an entirely different case is presented. In a single edition, a newspaper can include a great number of diverse reports, features, editorials, columns, and commercial advertisements. There is room even for cartoons and an occasional crossword puzzle. Thus, all at once, a newspaper offers the public a range of materials to peruse, and there is less need for governmentally imposed access. Indeed, newspapers have an incentive to make their issues as diverse as possible, perhaps to tempt some readers to purchase a full edition just to read *Doonesbury*.[164]

A: I can only suggest that you put your case to Professor Barron and others who value the public's interest in hearing more than the individual's interest in speaking.[165] I come at the problem the other way. You will have a hard time persuading me that it is enough if the editors of a newspaper cover diverse topics and present a variety of views. For my part, the first amendment demands that those who genuinely hold those views have an opportunity to speak for themselves. Speech is simply not free when it must be strained through the lips and pens of others.

Q: The terrain in this strange country is treacherous. Do you draw no distinctions? It is one thing to propose access to the *New York Times* but quite another to demand that a limited-circulation Sierra Club bulletin must be open to the views of strip miners.

A: Your hypothetical is a common one. It is troubling, of course, but it seems to me there is an answer—which lies in an investigation of the reasons why the

[162] *E.g.*, NATIONAL ASS'N OF BROADCASTERS, BROADCASTING AND THE BILL OF RIGHTS (1947); Emerson, *Colonial Intentions, supra* note 74, at 752; Powe, *"Or of the [Broadcast] Press,"* 55 TEX. L. REV. 39 (1976). Professor Bollinger is an exception. While he rejects, as I do, the standard justifications for distinguishing broadcasting from the print media, he nonetheless justifies treating the two differently on alternative grounds. In his view, access regulation is both a needed response to the peril of concentrated control and a dangerous departure from traditional free speech doctrine. In order to have its benefits while avoiding its dangers, he would establish a system of "partial regulation," which permits access regulation but restricts it to only part of the mass media. The decision whether to impose it upon broadcasters or newspapers, or for that matter CATV, should be left to the Congress. Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1977).

[163] *See* note 97 *supra.*

[164] *See* Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 714 (1964).

[165] *See* notes 81-88 and accompanying text *supra.*

Sierra Club, the ACLU, or the KKK are relegated to limited-circulation tabloids in the first place. It is because they have no ready access to more meaningful forums, like the *Times*.

Q: The fact remains that such publications do exist and, if you are to be realistic, you must deal with them. It strikes me that the introduction of any view different from that of the editors will take the edge off the editor's speech. Indeed, in a small publication you may be faced with the very sort of mixture that disturbs you so much in fairness doctrine cases.[166] I should have thought that everyone's speech would be more effective if small publications were permitted to take principled stands, unclouded by competing views tacked on by those who disagree. Surely many small voices coming at us independently can be more meaningful than the same voices tied together in a single, incongruous collage.

A: I quite agree, and I certainly do not wish to be understood as proposing anything of the kind. I *do* condemn the fairness doctrine approach, which confuses conflicting views in what amounts to the same message. Small publications are troubling. I have conceded that much. They are troubling because my horizontalist theory is groomed to the vexing problems arising from the concentration of control of mass communications in our day. Your question points up the difficulty of applying it to a system of numerous independent pamphleteers—the sort of system we had when Tom Paine was alive but, for good or ill, we have no more. I want small publications to be independent, free to express what opinions they will without regard for the positions taken by others. Perhaps a line can be drawn. Perhaps small publications, identified by their purpose and range of circulation, can be exempted from access responsibilities without jeopardizing logical consistency.[167] I am at a loss to decide that without some concrete cases to inform my judgment. The only statement I can make with confidence is that, at all events, the Court will judge the time and space to be devoted to others' views. It would make no sense to demand so much room for access that editors' messages are lost among those of their competitors.

Q: You would not make common carriers of all the mass media?

A: Not necessarily. I do not see that locating a right of access to the media in the first amendment logically must lead to limiting the speech of all comers to what a referee allows.[168] To be specific, I do not contend that every inch of the *New York Times* must be open for use by anyone, with the editors of the *Times* restricted to the space they can command as individuals competing for space with the world. I merely propose that some substantial space in the *Times*, and time in the broadcast day, must be made available for the speech of those who do not con-

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[166] *See* text at notes 106-08 *supra*.

[167] For example, the Commission's cross-ownership rules apply only to "daily newspapers." Limited circulation print media published fewer than four times per week or in a language other than English are excepted. 47 C.F.R. § 73.636 n.10 (1978). *See* ASPEN NOTEBOOK, *supra* note 153, at 132 (comments of Professor Pool) (distinguishing between oligopolistic and competitive newspapers).

[168] *Contra*, Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139-40 (1973) (Stewart, J., concurring).

trol the newspaper or the broadcast station. Just how much space and time must be open can, in my judgment, be determined by the Court.[169]

Q: You are inconsistent. You insist that the focus of the first amendment is horizontal and that the key in any case is to draw rational, content-neutral lines. But then you concede that some speakers are to have special privileges. The holders of broadcast licenses and city desk chairs may command more than their fair share of time and space, presumably to express their own views at the expense of other messages.

A: I am only being practical. Someone must maintain the mass media or we will have no meaningful expression at all. I am content to rely on private editors rather than public bureaucracy for the chore.[170]

Q: I am not finished. Aside from the problem of dividing time in the broadcast day and space in a newspaper between editors and outsiders, you must devise some criteria for choice among those competing for the room allotted to the latter. The demand exceeds the supply.

A: The problem is the familiar one of allocating scarce resources—on a different level.[171] If time or space is sold to the highest bidder, meaningful speech will be limited to those who can pay for it—the antithesis of horizontalism. A lottery leaves it all to chance. A first come, first served system avoids the corruption of economics but introduces new worries. It takes no account of repetitive requests by the same groups to state their views on the same issues, or the special need of some messages to be heard immediately, as, for example, when on the night before an election the leading candidate is found to be a horse thief.[172] Here again, I must tell you that I do not have a really good answer for your question. I concede that criteria of selection must be identified, but I would leave it to the Court to take up the burden after appraising the competition that in fact develops under an access doctrine, not what we may guess will occur.[173] I will say, however, that you are quite wrong if

[169] I am aware that the American Civil Liberties Union advocates that CATV systems be treated for the most part as common carriers, with system owners limited to the use of one channel for their own cablecasting. *See* American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975). A good case can be made for separating the program *creation* function in mass communications from the program *transmission* function. *E.g.*, Verrill, *CATV's Emerging Role: Cablecaster or Common Carrier?*, 34 LAW & CONTEMP. PROB. 586 (1969). Nothing I have said is inconsistent with such a course. The ACLU merely goes a step further and *decides* how much space (or, rather, how many channels) a cable operator should retain for its own use.

[170] *See* Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1086-87 (5th Cir. 1976) (Goldberg, J., dissenting) (arguing that even public newspaper editors must be permitted to edit), *cert. denied*, 430 U.S. 982 (1977). *Cf.* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 105-14 (1973) (opinion of Burger, C.J.) (emphasizing the American tradition of "private" control of the press).

[171] *See* text at notes 156-57 *supra*.

[172] *See* Note, 85 HARV. L. REV. 689, 697 (1972). I do not mean by this last comment to undercut Justice Black's opinion in Mills v. Alabama, 384 U.S. 214 (1966). It is one thing to ban election day editorials because they may be *too* effective, and quite another to recognize the need of some messages for immediate expression—thus *enhancing* their effectiveness. While any focus upon the content of speech is troublesome, I cannot say that when content is considered in an effort to *promote* effective expression it is unacceptable. Just as facially neutral blanket prohibitions can discriminate against messages that have no alternative medium, criteria of selection that blindly consider all messages alike can discriminate against those likely to become stale as they wait their turn.

[173] I will concede that if the media receive requests approaching the letters to the editor filed with the *New York Times*, severe administrative problems will arise. *See* Daniel, *supra* note 138, at 785 (reporting that in 1969 the *Times* received enough such letters to fill 135 complete weekday issues). On the other hand, most broadcast stations and newspapers are nothing like the *Times*. Their audiences are much more limited, their present offerings much less valuable. A glance at the inside pages of the average

you think I would deny access to a speaker on the ground that someone else has already made the same point. Although such speech by hypothesis adds nothing to the public's information, it surely does serve first amendment values even as cumulative expression.[174]

Q: Your theory seems to falter a bit in practical application. How do you respond to the bad experience we have had with access to date—the Commission's abortive attempt to require cable companies to set aside at least four channels for the free use of individuals and community groups?[175] If I am not mistaken, most viewers prefer entertainment formats and tune access channels out. They are left to club notes, church services, and an occasional school play.

A: The record is not good. Perhaps access channels will prove to be modern day cornfields, where anyone is free to speak to those willing to hike some distance from the beaten path to listen. If viewers insist upon limiting their selection to a few entertainment channels, then unlimited access to others will do nothing to enhance the effectiveness of expression. If my primary interest were to ensure that all views are *heard,* I would be most upset at the prospect. However, inasmuch as my chief concern is rather that all speakers have a meaningful opportunity to *speak,* I am less disturbed. In the short run, the opportunity to use an access CATV channel may seem inadequate. But I believe that in the long run it will make all the difference. You see, cable falls roughly between broadcasting and the print media. Like broadcasting, cable brings picture messages into the home with the flick of a dial. Yet, like newspapers, it can offer a good deal of variety simultaneously. While under the present regulatory regime and economic conditions broadcast stations are generally limited to the stock fare of the three networks, cable companies can offer scores of channels with all manner of programming. If that extraordinary capacity for diversity is exploited and viewers still decline cable's many offerings in favor of a few entertainment channels, then nothing more need be said or done. The horse will have refused to drink. There will be little call to impose access upon entertainment channels.[176] The great advantage of access theory is that it does not water down or detract from existing programming but only pits spirited expression against opposing views in a content-neutral fashion.[177] But let me be

daily reveals ample room for access. Powe, *supra* note 162, at 44 (pointing out that, after a fair amount of advertising, most newspapers contain only "the sports pages with their rehash of the last game and promotion of the next one, the gossip columnists, the horoscopes, and the comic strips"). Editors may insist that every inch devoted to access must be stolen from their own messages, but it just is not so. In most instances access would merely reduce the filler copy editors now offer when they have nothing else to say.

[174] *See* note 88 and accompanying text *supra.*

[175] 47 C.F.R. § 76.254 (1978), *vacated,* FCC v. Midwest Video, ... U.S. ...., 99 S. Ct. 1435 (1979).

[176] *Cf.* Jorgenson, Schwartz & Woods, *Programming Diversity in Proposals for New Broadcast Licenses,* 32 GEO. WASH. L. REV. 769 (1964) (questioning the Commission's insistence upon "balanced" programming from each station when contrasting views may in fact be available to an audience that takes advantage of the offerings of all stations in the market). I am aware that some have condemned my view as naive. Most notably, Professor Canby has argued that those who seek access to the mass media do so not merely to offer their opinions to those willing to listen but to *persuade* as many viewers as can be reached. Access cable channels, then, are inadequate. Most viewers are addicted to network programming, and if they are to be reached and *persuaded* access to the popular entertainment channels is necessary. Canby, *The First Amendment Right to Persuade: Access to Radio and Television,* 19 U.C.L.A. L. REV. 723 (1972). As much as I understand and appreciate Canby's insight, I must reject it in favor of my own "idealism."

[177] I am thus in flat-footed disagreement with Professor Barrow, who contends that diversification may increase the need for something like the fairness doctrine to ensure that fragmented audiences do not

clear. There is reason for hope. When cable technology makes possible the presentation of great diversity at all times, I believe Americans will respond with alacrity, and the numbing banality of standard entertainment programming will lose its iron grip on the public. When everyone with ideas has access to a channel, when every turn of the dial permits another voice to be raised, then cable will be not a cornfield but a twentieth century soap box.[178] On that day the first amendment will mean something in the United States. I have just enough faith in the public to think that most speakers will have an audience.[179]

Q: Perhaps I should ask a more fundamental question. In traditional analysis, the first question in any constitutional case is whether responsibility for the conduct under attack can fairly be ascribed to the state. If you were to rest your access doctrine upon a legislative enactment or even an administrative rule or regulation, the requisite governmental responsibility would be apparent. But I understand you to rely upon the first amendment of its own force, and for that you must locate governmental action in the policies of broadcasters and newspapers. That will be difficult. A plurality of the Justices said in the *CBS* case that broadcasters do not act for the state,[180] and certainly *Tornillo* can be cited for the proposition that news-

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habitually tune in only one side of vital issues and make decisions without benefit of a "balanced" presentation. Responding to the argument that viewers will recognize bias and turn periodically to conflicting opinion, he declares that "the public cannot evaluate whether sophisticated programming is fair and decide whether to turn the dial unless the listeners hear both sides." Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CIN. L. REV. 447, 491-92 (1968). That sort of paternalism has no place in the system of freedom of expression we have or ought to have. Here again the emphasis on the correlative interests of viewers distorts the meaning of free speech. Barrow's first amendment guarantees "balanced" programming whether viewers want it or not. Access CATV channels, on the other hand, provide an opportunity for effective speech by multiple tongues to be embraced or disregarded at the discretion of listeners. This is what free speech means. I trust Americans to examine critically what is offered to them from a soap box or television screen and to test the validity of what they are told against arguments found on alternative channels. To be sure, in this country we have been hoodwinked from time to time by flim-flam artists selling everything from vacuum sweepers to fascism. But we have survived them all. If in the future we are put to stiffer tests by more "sophisticated programming," I prefer to trust individual perspicacity, rather than government-imposed "balance," to distill truth from propaganda. *See* Jaffe, *supra* note 91, at 769 (suggesting that even the most persuasive broadcasting will not convince a five-star general that war is wicked); Lyle & Hoffman, *Children's Use of Television and Other Media*, in IV U.S. DEP'T OF HEALTH, EDUC. & WELFARE, TELEVISION AND SOCIAL BEHAVIOR 129, 177 (1972) (reporting that a majority of sixth graders tested stated that commercials "never tell the truth" or at best do so only "some of the time").

[178] I take the term, and to some lesser extent the idea, from Johnson & Westen, *A Twentieth Century Soapbox: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574 (1971). *See* R. KLETTER, CABLE TELEVISION: MAKING PUBLIC ACCESS EFFECTIVE (1973) (surveying the success stories under the Commission's access rules).

[179] If the ruling in the *Home Box Office* case, discussed in note 152 *supra*, stands up, and CATV is exempted from many of the responsibilities imposed upon broadcasting, it is quite possible that in a short time the American public may be served by a nationwide wire-TV system that in many respects will be superior to over-the-air commercial broadcasting. Of course, the establishment of such a system will depend upon an array of economic factors too complex for consideration here. *See* Gordon, *The Economics of Cable Television*, in CABLE TELEVISION—TAPPING THE POTENTIAL (R. COLL & M. BOTEIN ed. 1972); NOLL, PECK & MCGOWAN, *supra* note 97, at 197 (suggesting that a complete shift to cable would be infeasible) (surveying the possibilities); Barnett & Greenberg, *Regulating CATV Systems: An Analysis of FCC Policy and an Alternative*, 34 LAW & CONTEMP. PROB. 562 (1969) (urging toleration of competition); Barrow, *The New CATV Rules: Proceed on Delayed Yellow*, 25 VAND. L. REV. 681 (1972) (appraising the Commission's attitude toward its development as an alternative to broadcasting); Greenberg, *Wire Television and the FCC's Second Report and Order on CATV Systems*, 10 J. LAW & ECON. 181 (1967) (emphasizing the advantages of cable); Robinson, *Essay*, *supra* note 157 (characterizing the Commission's work as a "classic example of a watchdog out of control"). *See generally* D. LE DUC, CABLE TELEVISION AND THE FCC (1973).

[180] Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 119 (1973) (opinion of Burger, C.J.); *id.* at 148 (Douglas, J., concurring). In separate concurring opinions, Justices White, Powell, and Blackmun took the position that, assuming *arguendo* that the Constitution could be brought

papers are so far from the actions of government that they are indeed protected from it.[181]

A: To my mind, the search for state action in the wooden sense of discrete government involvement with the defendant in a lawsuit is at best misleading and at worst naive.[182] For too long the threshold state action analysis has been a convenient escape from important constitutional analysis. But let me be clear. I do not propose that the first amendment *applies* to broadcasters because they use a public resource, serve a public function, or hold a public trust.[183] Nor do I think that the Commission's extensive regulatory controls amount to sufficient contacts between government and broadcasters to establish a "symbiotic relationship" warranting constitutional review.[184] I reject even the more fashionable argument that the fairness doctrine serves as a nexus between the Commission and broadcasters' access policies,[185] and I certainly do not agree that the first amendment's application turns on a conclusion that broadcasters *are* government.[186]

Q: What ground have you left uncovered?

A: The state action requirement in constitutional law can be approached from different perspectives. On the one hand, the question can be understood as whether the conduct of some apparently private entity is sufficiently connected with government to justify ascribing responsibility for its actions to government and subjecting them to constitutional scrutiny. That is the way most of the familiar state action cases have come at it.[187] On the other hand, the same cases can be understood from the perspective of government officials who are alleged to have ties to the private action under challenge, and the question may be reframed as whether the maintenance of such ties violates the Constitution.

Q: Can you give me an example?

A: Take the *Mississippi Gay Alliance* case[188]—one the Supreme Court decided not to decide. Relying on the line of cases holding that state-operated newspapers

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into play in an attack on broadcasters' policies, the first amendment does not mandate access. Accordingly, the government action issue did not need to be decided. *Id.* at 146-48. Only Justices Brennan and Marshall would have employed a first amendment analysis. *Id.* at 170.

[181] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

[182] *See* Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment,* 30 S. CAL. L. REV. 208 (1957).

[183] *Compare* Johnson & Westen, *supra* note 178, at 587-91 (relying on these arguments to find government action) *with* Jaffe, *supra* note 91, at 782-84 (rejecting them).

[184] *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). I recognize, however, that the Chief Justice's attempt in *CBS* to distinguish *Burton* and, certainly, Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952), is less than satisfying. Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. at 179-80 (Brennan, J., dissenting).

[185] *Compare* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) *with* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 115 (1973) (opinion of Burger, C.J.). Here again, Justice Brennan would have found a sufficient nexus. *Id.* at 177. *See* Kuczo v. Western Conn. Broadcasting Co., 566 F.2d 384 (2d Cir. 1977) (suggesting that the fairness doctrine "nexus" puts the strongest case for "governmental action").

[186] *Compare* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 138-40 (1973) (Stewart, J., concurring) (insisting that a finding of government action would have made common carriers of licensees) *with id.* at 181 n.12 (Brennan, J., dissenting) (finding Stewart's view to reflect "a complete misunderstanding of the nature of the governmental involvement in these cases").

[187] *See, e.g.,* cases cited in note 184 *supra.*

[188] Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), *cert. denied,* 430 U.S. 982 (1977).

are public forums and cannot discriminate on the basis of speech content,[189] the Alliance sued the editor of *The Reflector,* a student newspaper at Mississippi State University, for refusing to accept for publication advertisements and announcements pertaining to gays. Finding "not the slightest whisper that the University authorities had anything to do with the rejection of this material,"[190] the Court of Appeals for the Fifth Circuit held for the defendant.[191] The first amendment, said Judge Coleman for the majority, "interdicts judicial interference" in such a case.[192] On my analysis the opposite is true. Not only does the first amendment permit the courts to intervene, it mandates intervention to ensure that minority views are not stifled by the intolerance of editors. If I had been counsel to the Alliance, I would have sued the university officials rather than the student editor. I would have found constitutional fault not in the student's insensitive action but in the university policy permitting content discrimination by the newspaper.

Q: Surely you cannot wish the state action problem away simply by changing defendants. The court still must appraise the connection between the officials and the newspaper—indeed, between the officials and the particular editorial decision under attack.[193]

A: To be sure. Since, however, state authorities are named as defendants for performance of their official duties, the issue is no longer whether there is state action to bring the Constitution into play but whether the admittedly official policy violates the first amendment.[194] If it does not, then the Alliance loses on the merits of its first amendment claim. If it does, then the university officials must permit reasonable access to the newspaper, under standards fixed by the court.

Q: Is there no other possibility? It seems to me that what you are really talking about is remedy. In any case in which a court finds state action in violation of the Constitution, the offending party has a choice. The practice found to be invalid can be altered to conform to the Constitution, or all ties to the state can be severed. For example, the Eagle Coffee Shoppe in the *Burton* case[195] was not forced to desegregate. It might rather have bought up its lease and moved into a private building across the street. To mention a case in which government officials are sued directly, the IRS Commissioner may choose between coercing a tax-exempt organization into integration or simply withdrawing the exemption.[196] Why, then,

[189] *E.g.,* Lee v. Board of Regents, 441 F.2d 1257 (7th Cir. 1971), *aff'g* 306 F. Supp. 1097 (W.D. Wis. 1969).

[190] 536 F.2d at 1075.

[191] Judge Goldberg dissented in an opinion that grappled at some length with the troubling constitutional values at stake. While his opinion is instructive on a number of issues, its examination of the threshold state action question is at best inadequate. Insisting that it was unnecessary to find affirmative involvement of university officials in the decision under attack, Judge Goldberg rested his finding of state action primarily on public funding of *The Reflector. Id.* at 1084-85.

[192] *Id.* at 1075.

[193] *Cf.* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (holding that state regulation of a utility is insufficient state action). *But see* Chalfant v. Wilmington Inst., 574 F.2d 739 (3d Cir. 1978) (limiting the "nexus" requirement from *Jackson* to cases involving private defendants).

[194] *See* Gilmore v. City of Montgomery, 417 U.S. 556, 581 (1974) (White, J., concurring) (recognizing that in suits against public officials arising out of transactions they enter in behalf of government "there is very plainly state action of some sort" and the real question is whether that state action violates the Constitution).

[195] Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

[196] *See* Bob Jones Univ. v. Simon, 416 U.S. 725 (1974); Jackson v. Statler Foundation, 496 F.2d 623, 636 (2d Cir. 1974) (Friendly, J., dissenting), *cert denied,* 420 U.S. 927 (1975); Green v. Connally, 330

cannot Mississippi State officials respond to a successful lawsuit by withdrawing official support from *The Reflector?*

A: Under a simplistic "equal access" approach to the public forum problem, refusing to support the newspaper *would* be a valid response. I have already told you, however, that blanket rules against speech are not always content-neutral.[197] I will concede that there are places where speech is anomalous and can be barred, but a student newspaper is clearly a public forum that must remain open.

Q: Even if you posit that by suing state officials the Alliance can avoid the state action problem, you must admit that it will be difficult to show that the authorities are responsible for a student editor's decision. I recall that Judge Coleman found "not the slightest whisper" that they had anything to do with it. At most, the Alliance must contend that the authorities' *in*action violates the first amendment. If that argument succeeds, it will make novel constitutional doctrine.[198]

A: I quite agree. But, then, I have already acknowledged that the affirmative dimension to the first amendment I propose is not supported in the cases.

Q: How you will reach broadcasters and ordinary newspapers?

A: The Communications Commission can be sued for licensing broadcasters that refuse access to outsiders. That was not done in *CBS*. In those consolidated cases the Commission was a nominal defendant only because one of its rulings was on appeal.[199] None of the parties supposed that the Commission was the primary respondent and that the outcome of the lawsuit might be the revocation of offending broadcasters' licenses.

Q: Newspapers are different, are they not?

A: Yes. But the difference should not be exaggerated. While there is no Federal Paper Commission to offer an easy target for suit, I venture to say that in many cases the Postal Service will do as well. It is common knowledge that some newspapers and most magazines depend upon special postal rates.[200] In a like manner, local governments serve up legal notices that bring in critical revenues.[201]

F. Supp. 1150 (D.D.C.) (three-judge court), *aff'd per curiam sub nom.* Coit v. Green, 404 U.S. 997 (1971).

[197] *See* text at notes 18-20 *supra.*

[198] *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164-66 (1978); Reitman v. Mulkey, 387 U.S. 369, 389 (1967) (Harlan, J., dissenting). *But see* 436 U.S. at 168-79 (Stevens, J., dissenting); Lewis, *The Meaning of State Action,* 60 COLUM. L. REV. 1083 (1960); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee,* 66 COLUM. L. REV. 855 (1966).

[199] The Commission was named as defendant pursuant to 28 U.S.C. § 2344 (1976).

[200] *See* Lewis Publishing Co. v. Morgan, 229 U.S. 288, 303-04 (1913). Ablard & Harrison, *The Post Office and Publishers' Pursestrings: A Study the Second-Class Mailing Permit,* 30 GEO. WASH. L. REV. 567 (1962). *Cf.* Hannegan v. Esquire Inc., 327 U.S. 146 (1946) (holding that low postal rates could not be denied to *Esquire*); United States *ex rel.* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407 (1921) (upholding a revocation of low rates for future issues of the *Milwaukee Leader* on the basis of findings as to past issues). Indeed, when the Postal Reorganization Act raised second-class rates in 1970, *Look* went summarily out of business, O. FRAENKEL, MEDIA AND THE FIRST AMENDMENT IN A FREE SOCIETY 48 (1973), and other, more limited circulation publications began to feel a financial pinch they had not experienced before. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 159 n.10 (1973) (Douglas, J., concurring) (mentioning *The National Review, The Nation,* and *The New Republic*). *See* Nat'l Ass'n of Greeting Card Publishers v. United States Postal Serv., 569 F.2d 570 (D.C. Cir. 1976) (reviewing the congressional objective to cease making first class mail pay part of the costs of other classes).

[201] *See* Uhlman v. Sherman, 22 Ohio N.P. 225, 31 Ohio Dec. 54 (C.P. Definance County 1919).

Various other subsidies come to mind. The Newspaper Preservation Act[202] exempts newspapers from the antitrust laws, and now Mr. Udall's proposed Independent Local Newspaper Act[203] promises to retard the growth of chains by providing estate tax relief for small independents. Any of these ties between government and the print media may serve as suitable vehicles for court action.[204]

Q: I am not so sure. I can conceive of a lawsuit against the Postal Service, contending that reduced rates for discriminating newspapers and magazines are unconstitutional, but it seems to me that such a suit would present the access argument in at best a convoluted way. Even if I give you that one, I can find no defendant at all in a case in which, for example, the allegedly invalid governmental tie is an exemption from the antitrust laws.

A: I understand and appreciate your discomfort on both counts. But, again, you must not misread what I propose. In the hypothetical suit against the Postal Service, treatment of the rate structure is secondary. It is a mere vehicle for presenting the access question to the Court. Once a proper plaintiff and official defendant are identified and the "state action" problem is resolved, the Court can turn to the real matters in issue—whether the newspaper or magazine concerned is a forum that must be open to those who do not control the presses and, if so, how much space must be made available to outsiders. The constitutional fault lies not so much in government's comparatively insignificant postal subsidy, but in its tolerance of content discrimination.

Q: That is to complain about government's *in*action again.

A: Precisely. Now, on your second point, let me say that there surely will be cases in which no ready governmental defendant can be found. As you suggest, the Newspaper Preservation Act may well work to the advantage of a newspaper, but one can hardly sue the Congress in order to get the matter before the Court. The same problem arises regarding major daily newspapers like the *Times*. It is difficult, if not impossible, to identify government subsidies when each issue is delivered by hand. I suppose the *Times'* delivery trucks use the public streets, but a lawsuit against the street commissioner would be less than satisfying.[205]

Q: You concede the point, then?

A: No, I make another one. A distinction must be drawn between the substantive principle of law I propose and possible procedural means for bringing it before the Court for consideration. The judicial power in this country is restricted to cases or controversies,[206] and accordingly, the Court can treat constitutional issues only in the context of a lawsuit between at least two identifiable parties. Often

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[202] 15 U.S.C. § 1801-1804 (1976). *See* O. FRAENKEL, *supra* note 200, at 34-37.

[203] H.R. 2770, 96th Cong., 1st Sess. (1979).

[204] *Cf.* Loevinger, *supra* note 139, at 296 (pointing out that these forms of governmental largesse "might serve as a jurisdictional basis for asserting control if the legislative and judicial branches should ever concur in seeking to do so").

[205] *But see* Philadelphia Newspapers, Inc. v. Borough Council of Swarthmore, 381 F. Supp. 228 (E.D. Pa. 1974) (invalidating as applied an ordinance construed to prohibit newspaper vending boxes on public sidewalks and in so doing implying that city government can, does, and indeed must subsidize the distribution of newspapers on the public streets).

[206] U.S. CONST. art. III, § 2.

such a lawsuit can be constructed, and I have just given some examples. Yet even when a proper defendant cannot be identified, the same principle can be advanced. A proposition is not robbed of its force as law simply because it cannot be hammered into the framework and language of a lawsuit. The inability of our judicial machinery to reach a proposition reflects no more than institutional shortcomings, not the validity of the proposition.[207]

Q: I may be getting a glimmer. If I understand correctly, you mean to leave aside the practical problem of putting the question to the Court and, instead, simply decree that the first amendment establishes a right of access to the mass media. It is not that some identifiable government agency violates the first amendment by underwriting content discrimination or even that the agency has a constitutional duty to coerce the media into content-neutral policies. Your point is that the first amendment itself creates the right of access, and the Court, as an arm of government, is charged with the responsibility of describing that right on the facts of each case.

A: I could not have put it better.

Q: You move too far too fast. You blame all the world's ills on government, which under your theory must bear responsibility not only for what it does but what it does not do. Yet the American constitutional scheme rests upon the fundamental principle of *individual* responsibility. Historically, government in this country has in most respects kept out of the media field—reflecting our collective fear that governmental support for the media would bring regulation and regulation would in turn bring censorship.[208] That, after all, is why the larger part of American television has a commercial base. I have always assumed that we put up with toothpaste commercials in order to be free of government controls. You suggest that it is all for naught, that government bears responsibility for whatever appears on the screen.

A: In a real sense, that is my view. I reject the notion that government is responsible only for identifiable actions in the traditional sense. In this age government is all-pervasive. What it does is of vital importance; what it does not do can be even more critical. For what government does not prohibit, it permits; and what it permits, it directs. There is no middle ground. At present, government is pelting the American public with a finely tuned commercial message—the message of conservatism, orthodox religion, and consumer sales. I, for one, have had enough of it.

Q: Your elitism is showing. At least if we confine our discussion to commercial television, the standard fare is notoriously bland and tasteless.[209] On the other hand,

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[207] Thus it hardly follows from the judicial unenforceability of the guaranty clause, Luther v. Borden, 48 U.S. (7 How.) 1 (1849), that the Congress has no responsibility to maintain a republican form of government in the states.

[208] Thus, recent discussions of a special role for the press in the structure of American government emphasize that governmental assistance may be just as damaging to an independent fourth estate as special burdens. *E.g.*, Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977). *See* Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631 (1975); Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761 (1977). Similar concerns emerge from the establishment clause cases. *E.g.*, Wolman v. Walter, 433 U.S. 229, 264 (1977) (Stevens, J., dissenting in part).

[209] John Macy begins his book on the potential for public broadcasting with a reference known to anyone familiar with the literature on mass communications.

that sort of pap is apparently what most Americans want. We avoid leftist harangues, threats to traditional values, and the like. At the end of the day when work is through, we want only to relax in front of *The Waltons*.[210] Who are you to insist upon something more cerebral?

A: Nonsense. I suspect relatively few people really *enjoy* the soporific fare of commercial television. Your argument that anyone does proceeds from an inaccurate premise—that broadcasters and advertisers structure their programming to appeal to people and thus to gain a larger audience for commercial messages. It just is not so. No one is much interested in appealing to audience desires. Individual tastes vary too much for that. Instead, an attempt is made to reduce programming to the lowest common denominator to avoid *offending* any more viewers than necessary.[211] It is assumed that so long as programming is tolerable viewers will continue to watch it whether they really enjoy it or not. Thus "family programming" is programming for children that adults can stand.[212]

Q: Still, that is what sells cars and toothpaste.

A: To be sure. So long as Americans tolerate the ceaseless monotony of it, the standard fare will sell anything the hucksters have to offer.

Q: Do you mean to challenge the commercial base of television in this country?

When Newton Minow delivered his first address as chairman of the Federal Communications Commission . . . in early 1961, he coined a description of the current television offerings that still aptly applies to the bulk of programming today, a dozen years later. "The vast wasteland" he painted . . . that day has continued to attract ever larger American audiences . . . . [T]he average family spends the equivalent of twelve full weeks out of the years in front of that one-eyed monster. The only activity, in fact, that occupies more time in the home is sleeping—although some would observe that the two pastimes are synonymous.

J. MACY, TO IRRIGATE A WASTELAND 1 (1974).

[210] LoSciuto, *supra* note 149, at 59 (reporting that most adults look to television viewing for relaxation rather than edification or self-improvement). *See* B. BAGDIKIAN, THE EFFETE CONSPIRACY 7 (1972) (quoting H. L. Mencken, "No one ever went broke underestimating the taste of the American public").

[211] *See* note 97 *supra*. I cannot resist the analogy to canned soup. It is bland, of course, because the introduction of seasoning would inevitably make it unpalatable to some customers. The trick is to *make* it bland, but just tasty enough to satisfy the very minimum demands of the largest possible market. The result is programming that varies little from station to station and network to network as all suppliers compete for the largest possible number of viewers. Dirlam & Kahn, *The Merits of Reserving the Cost-Savings from Domestic Communications Satellites for Support of Educational Television*, 77 YALE L.J. 494, 515-17 (1968). Indeed, when it appears to advertisers that their *viewers* are not necessarily *buyers*, they may pressure broadcasters to fashion programming designed to reach "the more gullible purchasers of the advertised product." *Id.* at 518. *See* W. SCHRAMM, RESPONSIBILITY IN MASS COMMUNICATION 270 (1957) (contending that broadcasters often cannot forecast what will appeal to viewers). *Cf.* Minasian, *Television Pricing and the Theory of Public Goods*, 7 J. LAW & ECON. 71 (1964).

[212] The experience with the so-called family viewing hour makes the point. In response to pressure from the Commission to eliminate sex and violence from programming during hours when children are viewing, the National Association of Broadcasters adopted an amendment to its Television Code prohibiting "programming inappropriate for viewing by a general family" between the hours of 7:00 and 9:00 p.m. NAB TELEVISION CODE 2-3 (18th ed. 1975). *See* Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 27 STAN. L. REV. 1527 (1975). The result was a shot in the arm for nature programming, game shows, and reruns of *Hee Haw*. Meanwhile, *All in the Family*, one of the few regular programs with significant intellectual content, was forced out of its coveted 8:00 p.m. slot. Note, *The Family Viewing Hour: An Assault on the First Amendment?*, 4 HASTINGS CONST. L.Q. 935, 937 (1977). *See* Pierce, *The Bunkers, the Critics, and the News*, in TELEVISION AS A CULTURAL FORCE 59 (R. Adler & D. Cater eds. 1976) (examining *All in the Family*). Although a federal district court enjoined the Commission from forcing the policy upon the networks, Writers Guild of America v. FCC, 423 F. Supp. 1064 (C.D. Calif. 1976), it survives today by "private" agreement. Other, "self-regulating" bodies have instituted similar controls. *E.g.*, Note, *Regulation of Comic Books*, 68 HARV. L. REV. 489 (1955) (examining the scheme used by the Comics Magazine Association of America); Note, *Private Censorship of Movies*, 22 STAN. L. REV. 618 (1970) (reviewing the Code followed by the Motion Picture Ass'n of America).

A: No. Paid commercial messages during the hours of the day when the broadcaster has control of the facility in order to make the profits may be necessary to continued operation. The rest of the time, however, commercials should compete on an equal basis with all other messages offered by outsiders.[213]

Q: What if that is not enough? What if broadcast stations cannot survive by selling advertising time only part of the day? Would you introduce direct governmental subsidies to keep them above water?

A: Accepting your question as stated, my answer must be yes. But I seriously doubt that establishing a right of access during part of the broadcast day would make broadcast stations unprofitable.[214] At all events, I see little significance in the manner of governmental involvement. I do not understand why anyone would object to a direct subsidy and prefer in its place a governmental decision to bombard the public with General Motors advertisements.

Q: You talk as though government bureaucrats perched somewhere in Washington are even now conspiring about what Americans will see and hear tomorrow. That is not the case. Even if I concede that those decisions are being made in relatively few corporate board rooms, that still is far better than governmental control.[215]

A: I can only remind you that I do not propose that some government agency should assume the task of scheduling television programming. I shudder at the thought. My point is that government so pervades the communications media that responsibility for what is expressed on the screen or, for that matter, on the printed page can be ascribed to official policy. I mean not only the governmental regulation and subsidization of the media I have mentioned but government's multifaceted command of the economics of mass communications. This is only to recognize that what government does, or does not do, in the fields of property and corporate law, and certainly economic policy, is very clearly responsible for the reins of the mass media being where they are—in the hands of relatively few corporations whose primary concern is in profitmaking through commercial advertising by other corporations.[216] That, to my mind, is sufficient governmental involvement to warrant invoking the first amendment to protect the views of outsiders, whose voices may otherwise be drowned out by those who control the media at the sufferance of government. I propose not more governmental control but less. I propose that television, radio, cable, and the print media be open for use by all manner of people

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[213] *Cf.* Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 663 (D.C. Cir. 1971) (suggesting that broadcasters may legitimately "place an outside limit on the total amount of editorial advertising they will sell").

[214] *See* R. BUNCE, TELEVISION IN THE CORPORATE INTEREST 96-103 (1976) (pointing out that the Commission assists licensees in keeping "the specifics of broadcast profiteering" confidential but that the data that are available indicate astonishing profit margins); NOLL, PECK & MCGOWAN, *supra* note 97, at 16 (reporting that television stations show a rate of return more than twice as high as other corporations).

[215] *See, e.g.*, Network Project v. Corporation for Pub. Broadcasting, 561 F.2d 963 (D.C. Cir. 1977) (reviewing allegations that the CPB, the Public Broadcasting Service, and members of the Nixon White House staff attempted to force controversial programs out of public broadcasting entirely). *See also Top of the Week*, BROADCASTING, Feb. 26, 1979, at 35 (summarizing documents on the Nixon White House released by the National Telecommunications and Information Administration).

[216] *Top of the Week*, BROADCASTING, Feb. 26, 1979, at 13-15 (emphasizing the Commission's complicity in the maintenance of powerful communications empires). There is nothing new in this. The media have been big business for a very long time. *See* H. ICKES, AMERICA'S HOUSE OF LORDS 35-37 (1939) (describing "pressure from advertisers").

with views of their own. The only governmental control I envision comes from the Court, which must oversee the division of space and time in an equitable fashion.

Q: At the very least, you ask a good bit of nine old men. Why is not the Commission a likely surrogate?

A: The Commission cannot serve this function because it lacks the constitutional independence of the Supreme Court, which as the third branch of the national government can withstand the majoritarian pressures the proposal will surely elicit. Then, too, the Commission's history does not instill confidence.[217]

Q: Your willingness to disregard totally the threshold state action issue, except to identify state responsibility in the underlying law that permits control of the media to be concentrated, is simply astonishing. In our theory, the Constitution serves essentially two functions. First, it establishes the structure of the national government by, for example, fixing the power and authority of the three branches and describing the relationship between the national government and the states. Second, it erects safeguards, both substantive and procedural, to protect the individual from governmental excesses. In both cases the Constitution speaks primarily to government. With few exceptions, it says nothing at all about the relations between private parties. Your framework blurs the distinction between the public and private spheres, and in so doing challenges the very foundation of American constitutionalism. Various questions come to mind. Up to now, we have assumed that government has no constitutional *rights,* but only *responsibilities* or *powers.* You place constitutional responsibilities upon entities I consider private. Would you grant constitutional rights, for example the right of free speech, to entities that I consider official?

A: You worry too much. I do not see that my proposal is really so radical. On the matter of state action, it is not so different from the suggestions of several others in the wake of the *Shelley* case.[218] Of course, the question there was the application of the equal protection clause to combat race discrimination, but the same sort of analysis can be used in the first amendment context. Even the Burger Court occasionally permits the state action issue to shade into a consideration of a first amendment problem on the merits.[219] Coming to your specific question, my answer may surprise you. I am not at all sure that government does *not* have first amendment rights after a fashion. There are cases on the books in which statements made

[217] Consider, for example, the new cross-ownership rules. 47 C.F.R. §§ 73.35, 73.240, 73.636. At the outset, the Commission proposed divestiture in all cases within five years, but after hundreds of parties filed objections only a prospective ban was imposed. Existing co-located combinations were thus grandfathered in, with the dissatisfying explanation that the disruptive economic effects of divestiture had been underestimated earlier. National Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938, 945-46 (D.C. Cir. 1977) *modified,* 436 U.S. 775 (1978).

[218] Shelley v. Kraemer, 334 U.S. 1 (1948). *See, e.g.,* Horowitz, *supra* note 182, at 209.

> [W]henever, and however, a state gives legal consequences to transactions between private persons there is "state action"—*i.e.,* . . . the definition by a state of legal relations between private persons is, for the purposes of the Fourteenth Amendment, a matter of "state action."

See also Van Alstyne & Karst, *State Action,* 14 STAN. L. REV. 3 (1961); Note, *State Action Reconsidered in the Light of* Shelley v. Kraemer, 48 COLUM. L. REV. 1241 (1948); Note, *The Disintegration of a Concept—State Action Under the 14th and 15th Amendments,* 96 U. PA. L. REV. 402 (1948).

[219] *E.g.,* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (blurring the threshold question whether there is sufficient state involvement in a privately owned shopping center to implicate the fourteenth amendment with the further question whether, assuming the application of the Constitution is granted, a policy restricting leafletting to sidewalks outside the mall is invalid).

in an official capacity were given first amendment protection.[220] And it remains to be seen what the Court will do when a trial judge attempts to gag the police or a prosecutor in order to avoid pretrial publicity. The effect upon newspapers' ability to get and report the news is apparent.[221] I want to be clear. I am not sure that what I have said about the application of the first amendment to the mass media turns on any particular answer to these questions. I mention them only to show that a simplistic dichotomy between government and private parties does not always provide a satisfying answer to modern first amendment problems.[222] Circumstances have changed since 1791. This is the age of mass communications, and control of the media is concentrated in the very few.

Q: I do not doubt that monopoly is your chief concern, but I find it curious that in all you have said you have not suggested that the problem might be met forthrightly with limits on the ownership of mass communications facilities.

A: I am frankly pessimistic on that score. Of course, in the broadcasting field the Commission has long recognized that diversification is in the public interest.[223] Various policies in aid of competition and antitrust objectives provide ready examples. I think of the chain-broadcasting, syndication, prime time access, duopoly, multiple-ownership, and cross-ownership rules. I find them altogether legitimate, content-neutral regulations designed to open the media to more voices. Whether the Court will agree remains to be seen.

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[220] *E.g.*, Wood v. Georgia, 370 U.S. 375 (1962).

[221] *See* Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974). *Cf.* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (striking down a local rule and an ABA rule prohibiting comments by attorneys about pending litigation); Columbia Broadcasting Sys., Inc. v. Young, 522 F.2d 234 (6th Cir. 1975) (vacating an order restraining all participants in litigation from discussing the case).

[222] *See* Tribe, *Toward a Metatheory of Free Speech*, 10 SW. U. L. REV. 237, 244 (1978) (counseling that an acceptable free speech theory cannot insist that government be an "ideological eunuch") [hereinafter cited as Tribe, *Metatheory*]. Here again the *Mississippi Gay Alliance* case provides an illustration. In aid of his decision against the Alliance, Judge Coleman insisted that, since editorial responsibility rested entirely with a student who had been elected by his classmates, the first amendment would have prohibited university officials from interferring with his decision even if they had wanted to become involved. Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1075 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977). For authority, he looked to Bazaar v. Fortune, 476 F.2d 579 (5th Cir. 1973), *aff'd as mod.*, 489 F.2d 225 (5th Cir. 1974) (en banc). To begin, that citation is hardly helpful. In *Bazaar*, officials at the University of Mississippi attempted not to force student editors to *accept* material entitled to be published but rather to *prevent* the publication of a magazine they found in poor taste. *Bazaar*, in my view, was correctly decided. I see nothing in that case that conflicts with the position I would take in *Mississippi Gay Alliance*. On the other hand, I anticipate the argument from some that if I once decide that university officials are responsible for content discrimination by student editors of *The Reflector*, when a case like *Bazaar* arises at Mississippi State University I will have difficulty permitting students to assert the first amendment against their deans. Such a concern stems from a crabbed understanding of "state action" that simply will not do service as the distinction between the public and the private increasingly evaporates in the waning years of this century. *Cf.* Mississippi Gay Alliance v. Goudelock, 536 F.2d at 1090 (Goldberg, J., dissenting) (recognizing that his opinion seemed "anomalous" to the extent it protected student editors from censorship but at the same time argued that they "may themselves be treated . . . as agents of the state in their dealings with the public").

[223] *See* 47 C.F.R. §§ 73.35, 73.240, 73.636. The Court said in United States v. RCA, 358 U.S. 334 (1958), that while the Commission does not enforce the antitrust laws, it may draw upon antitrust policies in order to implement its "public interest, convenience and necessity" standard. *See generally* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (reviewing the cases holding that the Commission *must* consider diversification in the licensing process). Of course, newspapers are subject to the antitrust laws directly. Citizens Publishing Co. v. United States, 394 U.S. 131 (1969); Associated Press v. United States, 326 U.S. 1 (1945). *See* Roberts, *Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319 (1968); Note, *Local Monopoly in the Daily Newspaper Industry*, 61 YALE L.J. 948 (1952).

Q: What is the basis of your pessimism?

A: In some cases, the cure may be worse than the disease. If, for example, the three television networks or the wire services were to come under attack, their marvelous capacity for bringing us reports on national and world events might be threatened. In others, the offending parties may be beyond the Commission's reach. The great conglomerates are even now eating up communications facilities at an accelerated rate.[224] Their existence illustrates a fundamental economic truth. Concentration of control, in communications or any other field, is merely a reflection of the vexing maldistribution of wealth and power in this country. It is deeply entrenched and will not be dislodged without a great deal more effort than the Commission and the Court are likely to summon. To be sure, concentration has led me to horizontalism, and, at least as a matter of logic, diversification might drive me from it. The baseline point, however, is that the prospect of cataclysmic change is remote. I am afraid we must resign ourselves to concentration for the foreseeable future and take what steps we can to limit its power to skew our system of freedom of expression.

Q: Are you resigned, then, to the prospect of a political process dominated by the manipulation of great corporate wealth?

A: I thought you would come sooner or later to the *First National Bank* case.[225] The four opinions offered by the Justices provide a virtual laboratory for an examination of modern free speech issues. Particles of wisdom appear in all four, but in none is the problem of first amendment focus identified and treated in any satisfying way.[226] Indeed, I find these opinions ample evidence of the intellectual price we continue to pay for the Court's analytical ambivalence. Of course, the result reached by the majority is correct; it is only that the wrong reasons are given for reaching it.

Q: Let me anticipate you. The Massachusetts statute under attack absolutely prohibited corporate contributions or expenditures for the purpose of influencing the outcome of a referendum, unless the issue to be voted upon materially affected the corporation's assets.[227] Taking the horizontalist perspective, you will no doubt find content discrimination immediately. The statute singles out certain speakers, corporations, and certain messages, those related to referenda, for special burdens. Am I right?

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[224] R. BUNCE, *supra* note 214, at 96-122 (describing the principal corporate giants heavily engaged in communications). *See* Levin, *Broadcast Structure, Technology, and the ABC-ITT Merger Decision*, 34 LAW & CONTEMP. PROB. 452 (1969) (describing the most famous attempt to dominate international communications).

[225] First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

[226] The plurality opinion by Justice Powell and Justice White's dissent, joined by Justices Brennan and Marshall, are by far the most important. The Chief Justice's concurring opinion underscores points made in the literature regarding the suggestion that the institutional press may have some structural role to play in the American scheme. *See* note 208 *supra*. Justice Rehnquist's dissent deals primarily with the wisdom of deferring to legislative judgments by the *states*. While I cannot dismiss everything in his opinion out of hand, I do believe that Rehnquist's emphasis upon federalism and deference to legislative choice is out of place in the first amendment field. *See also* 435 U.S. at 804 (White, J., dissenting) (expressing concern that the majority would substitute its judgment for that of the Massachusetts legislature).

[227] MASS. GEN. LAWS ANN. ch. 55 § 8 (West Supp. 1977-78).

A: Almost. I must quarrel, however, with the words you would put in my mouth. If it is clear, as it seems to be, that *some* corporate expression is entitled to *some* first amendment protection, and if it is clear, as again it seems to be, that expenditures of money at least affect pure speech, then this was an easy case. It was made doubly so by the state legislature's brazen insertion of a legislative determination that referenda concerning individual income taxation could not materially affect a corporation's economic interests. Even counsel for Massachusetts was forced to concede that the statute, as it emerged from the legislature for the third time, was "tailormade" to prohibit corporations from campaigning against a pending graduated income tax proposal.[228] That concession should have decided the case, for if anything is clear in this field, it is that government has no business suppressing expression of which it disapproves. Justice Powell's opinion saw the issue and, indeed, cited *Mosley*[229] for the proposition that purposeful content discrimination is invalid.[230]

Q: But you said that Powell relied on the wrong reasoning.

A: He did. Instead of saying only so much as I have suggested and stopping, Powell rambled on through an elaborate discussion of free speech values and balanced them against the articulated state interest in avoiding corporate domination of the political process and protecting dissenting shareholders.[231] To my mind, he bought trouble that he might have avoided.

Q: You cannot think that he might have avoided passing on whether corporations have a right to free speech.

A: Your question mixes matters I would hold distinct. First is the question whether corporations have any constitutional protection at all. Notwithstanding Justice Rehnquist, it seems late in the day to propose that corporations be deprived of their enviable status as *persons* within the meaning of the fourteenth amend-

[228] 435 U.S. at 793.

[229] Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

[230] 435 U.S. at 784-85.

[231] *Id.* at 786-95. On the latter point, Justice Powell distinguished the Court's recent decision in Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). Responding to Justice White, who devoted a fair part of his dissent to an analogy to *Abood,* Powell insisted that it is one thing to hold that nonunion employees cannot be forced to support political activity with which they disagree and quite another to hold that, because of the possibility of minority dissent, the expression of an organization can be suppressed. In any event, he said, shareholders are not required to purchase stock in any company. 435 U.S. at 794-95 n.34. While Justice Powell's arguments may not be completely satisfying, I must say that Justice White fares no better. At the outset, he commented, almost offhand, that the interest recognized in *Abood* was not present in *Buckley* and would not justify restrictions upon "associations, corporate or otherwise, formed for the express purpose of advancing a political or social cause." *Id.* at 777 n.12. I am not sure I follow his reasoning. It is rare, I think, that any organization is formed for the purpose of advancing any *single* point of view. There are fine distinctions and gradations of opinion in any "cause," and, accordingly, whenever such an organization acts it is likely to dissatisfy some of its members—at least in part. It seems to me, then, that the cold logic of White's position would permit those dissenters to silence the majority. Since such a result would effectively eliminate the right of association from American political affairs, it must and can be avoided. It seems fair enough to accept Justice Powell's suggestion that dissenting shareholders pursue their minority interests through the usual corporate channels or, in an appropriate case, through a stockholders' derivative suit. If those paths are impractical, then their stock may simply be sold. I do not agree with Justice White that the employees in *Abood* might have quit and found other jobs. The individual interests at stake are, in my judgment, quite different, and, applying a standard of review that is stringent but which recognizes the distinction between money and speech, I come out with Justice Powell. Indeed, I should have thought that if Justice White is serious about his compelled support argument, he must do more than tolerate the Massachusetts law. He must insist upon it. That he clearly does not do. *See* note 266 *infra.*

ment.[232] This is not to say that there is no appeal in the suggestion. In theory anyway, corporations are creatures of state law, and it has never been clear how the Federal Constitution can protect them against that same law, or why, to take an emotional example, a fetus has no similar claim to personhood.[233] It is plain, of course, that in both *Santa Clara*[234] and *Roe*[235] the Court decided as it did in order to fashion constitutional tools for its own use in contending with legislative majorities. It is only a reflection of maturing American values that in 1886 Chief Justice Waite was concerned for liberty of contract while in 1973 Justice Blackmun wished to protect a woman's decision to end an unwanted pregnancy. If *Santa Clara* had not stood in the way, the rigidity of *Lochner*[236] might have been tempered well before 1934, and, in the newer cases, the debilitating effect of great corporate wealth upon the political process might have been easily cabined.[237] On the other hand, the corporate form is the mainstay of the American economy. If constitutional safeguards are eliminated, or even seriously threatened, there is simply no telling what the repercussions might be. While some of us would not flinch at fundamental economic change in this country, it is hardly surprising that the Court is in no hurry to bring it about through constitutional adjudication.

This brings me to a second question—whether, granting that corporations are persons, they are automatically entitled to the same liberties guaranteed to individuals. In prior cases, the Court had denied corporations some liberties thought to be somehow personal[238] and never expressly held that *commercial* corporations have first amendment rights.[239] In *First National Bank* Powell had only to hold that corporations are persons and they have some measure of first amendment protection. This he did. He did not have to resolve all free speech questions regarding the corporate form. And that he, quite properly, did not do.[240]

Q: Where did he go wrong?

A: For one thing, rather than treating the scope of corporate first amendment rights at issue in the case at bar, he reworked the question presented to emphasize the contribution corporate expression on a referendum issue might make to the marketplace of ideas concerning it—that is, the interest of individuals in hearing what corporations have to say.[241] Ordinarily, I am troubled by an emphasis upon correlative first amendment interests,[242] but I suppose that in cases involving corporations this emphasis is warranted more so than in others. I have to agree with

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[232] *See* 435 U.S. at 822 (Rehnquist, J., dissenting) (recalling the summary manner in which the Court dismissed the argument at an early date).

[233] *See* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

[234] Santa Clara County v. Southern Pac. R.R. Co., 118 U.S. 394 (1886).

[235] Roe v. Wade, 410 U.S. 113 (1973).

[236] Lochner v. New York, 198 U.S. 45 (1905).

[237] *Cf.* Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85 (1938) (Black, J., dissenting).

[238] *E.g.*, California Bankers Ass'n v. Schultz, 416 U.S. 421 (1974) (holding that corporations lack the constitutional interest in privacy accorded to individuals); United States v. White, 322 U.S. 694 (1944) (holding that corporations have no fifth amendment privilege against self-incrimination).

[239] 435 U.S. at 822 (Rehnquist, J., dissenting) (pointing out that in prior cases the Court had simply failed to distinguish between artificial and natural persons).

[240] *Id.* at 777-78 n.13 (opinion of Justice Powell) (finding no occasion for considering whether there may be in other cases some basis for restricting the expression of corporations that would be invalid against individuals).

[241] *Id.* at 776 (stating the question as whether the statute abridged expression the first amendment "was meant to protect").

[242] *See* notes 87-88 and accompanying text *supra*.

Justice White. The individual speaker's interest in speaking his or her mind is difficult to locate in a corporate speech case.[243] For another, Powell continued the error of *Buckley*[244] by treating the Massachusetts regulation of expenditures as a direct restriction on speech.[245] Judge Wright has pointed out that in *Buckley* the real question was whether a regulation of *money* could be justified when there was an undoubted incidental effect on *speech*.[246] The Court asked, however, whether a supposed regulation of *pure speech* could be justified when it had some incidental effect on *money*.[247] In *Buckley*, and again in *First National Bank*, the *O'Brien*[248] case offered the most appropriate standard of review—apart, of course, from its refusal to examine legislative purpose.[249]

Q: Even if you are correct, and I am not yet ready to concede that you are, as I read Justice Powell's opinion he *did* apply something very much like the *O'Brien* test, asking whether the state interests asserted were "compelling" and whether Massachusetts had employed a means to its objectives that avoided "unnecessary abridgement."[250] Indeed, he cited cases you have mentioned as adopting essentially the *O'Brien* framework.[251]

A: Yes, but it is not the same. We get only another example of Justice Powell's ad hoc balancing approach to free speech adjudication.[252] He may speak the language of a more structured, two-prong analysis, but his citations are loose and not to be taken at face value. If you look closely, you will see that he even used what he did *not* decide about the scope of corporate speech rights as another *consideration* to be pumped into the jumble of facts and circumstances to be identified, appraised, and balanced.[253] The opinion reads much like the Court's recent commercial expression cases. It is not, we are told, that commercial speech has *no* protection; neither is it that it has all the protection of a soapbox campaign speech.[254] The Court tells us only that it will worry over the particular case and do its best to arrive at a just result that respects constitutional *values*. In the end, we get neither the consistently negative protection of the verticalist, incitement cases, nor the horizontalist focus on unjustified content discrimination. Instead, we get only analytical imprecision and the uncertainty that always accompanies case-by-case adjudication.[255]

[243] 435 U.S. at 804-05 (dissenting opinion).
[244] Buckley v. Valeo, 424 U.S. 1 (1975).
[245] *Id.* at 786 & n.23 (opinion of Powell, J.).
[246] Wright, *supra* note 71, at 1007.
[247] 424 U.S. at 16.
[248] United States v. O'Brien, 391 U.S. 367 (1968).
[249] *See* note 14 *supra*.
[250] 435 U.S. at 786.
[251] *See* notes 11-15 and accompanying text *supra*.
[252] *See* Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972); Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 MICH. L. REV. 445 (1972).
[253] *See* 435 U.S. at 786-95.
[254] *See* notes 42-44 and accompanying text *supra*.
[255] It should not be assumed, for example, that because the Court upset the Massachusetts statute, insofar as it prohibited corporate expenditures regarding referenda, it will necessarily strike down laws that reach contributions to partisan candidates. Indeed, Justice Powell offered one possible distinction—that in the latter cases the state's special interest in avoiding the creation of political debts comes to the fore. Essentially, he called to mind the line drawn in *Buckley* between campaign contributions, which carry the danger of debt creation, and independent expenditures, which may not. Buckley v. Valeo, 424 U.S. 46 (1975). *See* note 59 *supra*. I have never been impressed with that position, and I hardly suggest that the Court will rest upon it alone when, for instance, the Federal Corrupt Practices Act comes up for review. I do anticipate, however, that the Court will strike a different balance—emphasizing rather

Q: But the Court considers *O'Brien,* in name if not in analysis, to suggest a relaxed standard of review.[256] Would the Massachusetts statute not have passed muster under it?

A: I think not. The proper standard falls between the very stringent test for direct penalties upon protected expression and the diluted standard of review reserved for purely economic regulations. And, again, its focus is horizontal. I have no doubt that the absolute prohibition on corporate expenditures in this case was invalid. It was no fair attempt to prevent corporations from drowning out less wealthy opponents. Rather, it was a flagrant attempt to silence corporations entirely and to permit only those in favor of a graduated income tax to reach the public with their views.

Q: Justice White's dissent took a different tack altogether.

A: Yes, and in the process the dissent offered some important insights. White, too, allowed that corporate expression is protected in some measure by the first amendment and that expenditures of money constitute protected speech.[257] But he went on to say what surely must be obvious—that corporations owe their advantageous economic position to state policy.[258] And, most important for my purposes, he recognized that in restricting the expenditure of corporate funds to matters related to the corporation's property interests, the state of Massachusetts had responded not to just any chosen public policies but to values that themselves have first amendment significance.[259] The statute sought to prevent the speech of some to drown out the speech of others by the sheer power of the dollar.

Q: Of course, you do not disagree with that.

A: On the contrary, in my judgment White started well and then faltered. He recognized that the state is responsible for the economic power of corporations but neglected to say that much the same thing is true of individuals. To be sure, corporations put an easier case. We can readily point to the corporate charter, perpetual life, capitalization capability, and limited liability of these state-chartered entities. Yet it is only a matter of degree. Wealthy individuals and unincorporated groups, too, obtain and keep vast resources with the aid of state law that protects and gives effect to their financial arrangements. I have made the point before.[260] Everything government does must be considered—from its fiscal and monetary policy to its basic contract law. The balance of economic power, in Massachusetts and any other state, is and has been weighted in favor of the haves to the detriment of the have-

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than neglecting the corporate character of the plaintiff, finding its first amendment interests less significant, and insisting that the state's objectives are, if not different, then at least more compelling.

[256] *See* note 14 *supra.*

[257] 435 U.S. at 807-08. His support for *Buckley*'s invalidation of *expenditure* limitations was, however, backhanded, and he attempted to distinguish the case as best he could. *Id.* at 806-07 nn.6 & 7. Of course, in *Buckley* itself, White dissented on the issue. Indeed, he was the only justice on the Court to see clearly the distinction drawn by Judge Wright. 424 U.S. at 259 (dissenting opinion) (emphasizing that the campaign finance act regulated not speech but the giving and spending of money).

[258] 435 U.S. at 809 (contending that the state's interest was not in "equalizing the resources of opposing candidates or opposing positions" but in "preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process").

[259] *Id.* at 803-04.

[260] *See* text at note 216 *supra.*

nots. The ultimate responsibility for this state of affairs lies with government and when government attempts to circumscribe the effects of its policies on the system of freedom of expression it is hardly a time to insist upon a *laissez-faire* attitude toward speech that does not prevail in economics generally. Any such insistence ignores rather than identifies the true relationship between money and speech.

Q: If I understand correctly, you are suggesting that government can limit the expenditure of funds by corporations, or even individuals, but cannot absolutely prohibit it. The latter course would do more than prevent great wealth from drowning out the voices of the weak; it would silence the strong altogether. Said another way, government is already favoring the speech of the wealthy with its various economic policies and the very framework of law. An attempt to eliminate that content discrimination by restricting expenditures is valid, but government has no business overcompensating, silencing the wealthy, and establishing a new order of content discrimination in favor of the weak. The question I have is this. Why do you not urge government to arrive at neutrality by reexamining the advantages it now gives to industrial giants? If the difficulty lies in an imbalance in economic power, then perhaps the way to resolve it is not by restricting the expression of the strong but by breaking up concentrations of power. Let me be blunt. Why not tell states like Massachusetts that if they are concerned that corporations have too much influence they should eliminate the corporate form?

A: To begin, I must say that you do understand correctly. I think government must be neutral, but throttling the speech of any person, or entity, is not the way to set about it. Turning, however, to your question, I can only respond through Justice White. You will recall that he worried over the effect restrictive policies governing corporations might have on the press.[261] The *New York Times* and the television networks operate in the corporate form just as do banks. Putting the potential economic disruption to one side, junking the corporate animal would likely eviscerate the institutional press—those media giants that alone have the wherewithal to keep an eye on government and report its crimes of commission and omission to the public. Thus a blanket elimination of the corporate form would constitute the very worst form of content discrimination.[262] Government would strike a death blow against its most effective critics.

Q: Is there no way to exempt media corporations?

A: I think of no criterion that genuinely satisfies. Of course, the Massachusetts statute in *First National Bank* offered one possibility. Perhaps the expenditures of media corporations are by definition always tied to their economic interests.[263] Still, I am unpersuaded. Justice White embraces essentially that logic and ends up protecting commercial advertising by banks and suppressing their political speech.

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[261] *Compare* 435 U.S. at 808 n.8 (White, J., dissenting) (declining to decide whether newspapers have a first amendment right to operate in the corporate form) *with id.* at 781 n.17 (opinion of Powell, J.) (reading the Massachusetts statute to apply to *all* corporations).

[262] *See* text at notes 18-20 *supra*. The truth of Justice White's suggestion that denying the corporate form to the media while making it available to other concerns would constitute content discrimination is, I think, self-evident. But the issue there is of a different order.

[263] *See* 435 U.S. at 781 (opinion of Powell, J.).

Q: Yet you would allow the states to limit corporations' expenditures. If such restrictions are applied to the *Times,* the same issue will be presented.

A: I think not. Expenditure restrictions applied to the economic resources devoted to actual publishing or broadcasting come ever so close to direct limitations on speech. Even the Massachusetts court construed the statute in *First National Bank* not to apply to "in-house" newspapers and communications with shareholders.[264] I would argue that corporations that speak, even to the world, through their own publishing or broadcasting equipment are engaged in pure speech. Corporations that merely purchase space and time for advertising in media operated by others are spending money. There is a difference, and it is fundamental.[265] If a corporation's desire to be heard is strong enough to warrant the establishment of its own publishing organ, then I am content to call the product speech and not an expenditure of funds.

Q: That is ridiculous. The definitional question is the same. It makes no sense at all to distinguish vaguely between doing something and hiring it done.

A: I wish I could offer a more satisfying answer.

Q: Let me ask you, once and for all, what you would have done in *First National Bank.* You have said that the case might have been decided summarily, but I have the impression that you might have done some rambling of your own.

A: I would have done what Justice White explicitly refrained from even suggesting—that Massachusetts had a responsibility, a constitutional obligation if you will, to prevent those with great economic power, operating as corporations or not, from dominating a referendum on a graduated income tax or any other public policy-making process.[266]

Q: Again you insist upon affirmative governmental involvement in matters traditionally thought to be beyond government's authority to influence.[267]

A: What I propose is affirmative action only if you insist upon ignoring government's responsibility for the existing state of affairs. Government is already involved, indeed lined up on the side of wealth. I am suggesting only that government stop playing favorites. Since it is practically impossible in this context to counter the power of wealth by subsidizing the expression of others, the only path open to government is restricting the use of money in the marketplace of ideas.[268]

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[264] *Id.* at 773 n.7.

[265] *Id.* at 781-82 n.17 (pointing out that media corporations do not have to make "separately identifiable expenditures to communicate their views"). Of course, if a newspaper were to make an ordinary campaign contribution to a candidate, the question would be entirely different. *Accord, id.* at 825 n.4 (Rehnquist, J., dissenting) (contending that a newspaper corporation "need have no greater right than any other corporation to contribute money" to a partisan campaign); *id.* at 808 n.8 (White, J., dissenting) (assuming that the first amendment does not "immunize media corporations any more than other types of corporations from restrictions upon electoral contributions and expenditures").

[266] *Id.* at 803 (dissenting opinion) (insisting that he would not suggest "for a moment" that the first amendment "requires" a state to forbid the use of corporate funds for political purposes).

[267] *See* text at notes 198-205 *supra.*

[268] This is not a case in which a horizontalist can insist that support for dissenters must be provided. That is possible in the access cases—not so here. Then, too, this is not a case in which the Court can accomplish first amendment ends without the aid of the legislative branch. Of course, I do believe that the Constitution of its own force mandates governmental involvement to prevent domination of the political process by those with great wealth, and the inability of our adjective law to place such questions

I do not suggest that these matters are not delicate. They most certainly are. And the Court should and must examine government's actions with the greatest care. My point is simply that government is acting and must act.[269] To deny the facts, to insist upon the ancient myths of verticalism, is to condemn us all to the petty economic interests of those upon whom government has deposited great power.

before the Court for decision is simply beside the point. *See* text at note 207. However, I recognize that here, perhaps more than in the cases discussed earlier, the constitutional mandate can have practical meaning only with the assistance of the legislature.

[269] Tribe, *Metatheory, supra* note 222, at 245 (insisting that "a satisfying theory of free speech must prove adequate to the challenge of the affirmative state").