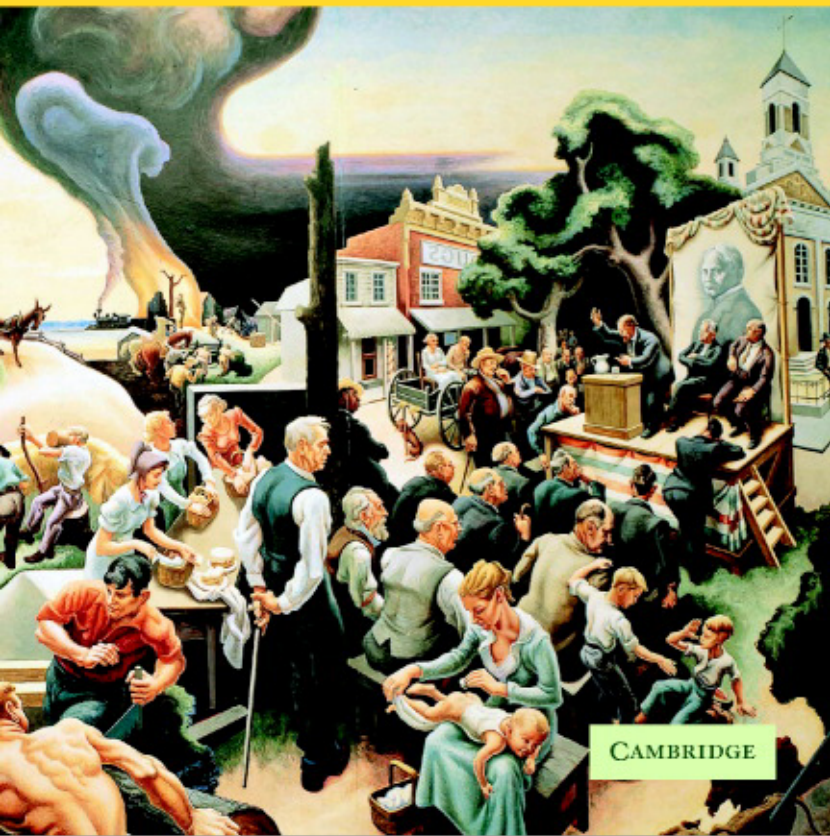


# Is There a Right of Freedom of Expression?

Larry Alexander



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## Is There a Right of Freedom of Expression?

In this provocative book, Larry Alexander offers a skeptical appraisal of the claim that freedom of expression is a human right. He examines the various contexts in which a right of freedom of expression might be asserted and concludes that such a right cannot be supported in any of these contexts. He argues that some legal protection of freedom of expression is surely valuable, though the form such protection will take will vary with historical and cultural circumstances and is not a matter of human right.

Written in a clear and accessible style, this book will appeal to students and professionals in political philosophy, law, political science, and human rights.

Larry Alexander is Warren Distinguished Professor at the University of San Diego School of Law.



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Larry Alexander  
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# Contents

<i>Acknowledgments</i>	page ix
<i>Introduction</i>	xi
PART ONE DEFINING HUMAN RIGHTS AND DELIMITING THE SCOPE OF FREEDOM OF EXPRESSION	
1 Preliminaries: What Is a Human Right, and What Activities Implicate Freedom of Expression?	3
2 Freedom of Expression and Regulations that Affect Messages But are Not Enacted for That Reason	13
3 The Puzzles of Governmental Purpose	38
PART TWO THE CORE OF FREEDOM OF EXPRESSION: GOVERNMENT REGULATIONS AND ACTS TAKEN TO AFFECT MESSAGES	
4 The Core of Freedom of Expression: Regulations of Conduct for the Purpose of Affecting Messages Received	55
5 Track Three: Government Speech and Subsidies of Speech	82
6 Miscellaneous Regulations of Expression	103
PART THREE THEORETICAL PERSPECTIVES ON FREEDOM OF EXPRESSION	
7 General Justifying Theories of Freedom of Expression	127
8 The Paradoxes of Liberalism and the Failure of Theories Justifying a Right of Freedom of Expression	147

EPILOGUE

9	Muddling Through: Freedom of Expression in the Absence of a Human Right	185
	<i>Index</i>	195

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Much of the material in this book was anticipated in my prior writings. Chapter Two draws heavily from “Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory,” 44 *Hastings L. J.* 921 (1993). Chapter Three draws heavily from “Rules, Rights, Options, and Time,” 6 *Legal Theory* 337 (2000). Chapter Four is drawn in part from “Freedom of Expression as a Human Right,” in *Protecting Human Rights*, T. Campbell, J. Goldsworthy, & A. Stone, eds. (2003). Chapter Seven expands on sections of “The Impossibility of a Free Speech Principle” (co-authored with Paul Horton), 78 *Northwestern University Law Review* 1319 (1983), and “Freedom of Speech” in R. Chadwick, ed., *Encyclopedia of Applied Ethics* (1997). Chapter Eight draws heavily from “Liberalism, Religion, and the Unity of Epistemology,” 30 *San Diego L. Rev.* 763 (1993), and “Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism,” 12 *Journal of Contemporary Legal Issues* 625 (2002). I thank the publishers for their permission to draw liberally from these pieces.

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# Introduction

The title of this book asks a question. The aim of the book is to answer it.

Part One, the first three chapters, lays the foundation for the inquiry. Chapter One takes up two questions: What kind of thing is a “human right” and what kinds of activities come within the scope of freedom of expression? It provides an answer to the first question, and it eliminates some possible answers to the second.

Chapter Two focuses entirely on the second question. Its task is to exclude from freedom of expression all laws that incidentally affect what gets said, by whom, to whom, and with what effect – that is, laws that have “message effects” but that are not enacted *because* of their message effects, so-called Track Two laws. I conclude that the scope of freedom of expression is confined to laws passed with the purpose of affecting messages.

In Chapter Three, I digress somewhat to point out some curious consequences that follow from a jurisprudence focused on government’s purposes in enacting laws rather than on those laws’ effects. In particular, a focus on purpose may invalidate laws whose message effects are more benign than those of laws not enacted for their message effects and thus untouched by a right of freedom of expression.

Part Two is primarily concerned with laws enacted for the purpose of affecting messages. Chapter Four takes up laws intended to suppress messages that cause harms that the government is otherwise permitted to attempt to prevent (Track One laws). Some laws are aimed at messages that cause such harms immediately upon the messages’ receipt by the audience – for example, laws penalizing revelations of secrets, breaches of confidences and contracts not to disclose, publication of “private” facts, infringements of copyrights and other intellectual property rights, threats of illegal action, and inflictions of offense or other emotional upsets. Other laws are aimed at messages that cause harm through inducing the audience to act in ways harmful to others or to itself – for example, laws against fraud, misrepresentation, libel, “fighting words,” incitement, and solicitation. I conclude that with respect to all the Track One laws, no

principled lines exist to demarcate areas where a right of freedom of expression might apply – short of the extreme and unpalatable position of exempting all of Track One from regulation.

Chapter Five takes up another class of laws enacted to affect messages, namely, those that represent government speech or private speech that the government wishes to promote through monetary or regulatory subsidies (Track Three laws). The difficulty here is that once it is admitted, as it surely must be, that government must be permitted to speak on behalf of its policies, it becomes difficult to locate any line that would limit government speech or speech subsidies.

Chapter Six takes up some miscellaneous areas of freedom of expression: the expression and affiliations of governmental employees; protection of speakers from audience reprisals; regulation of broadcasting; freedom of expressive association, anonymous speech; and private regulation of speech. Each of these areas turns out to be analyzable in terms of one of the “tracks” identified in Chapters Two, Four, and Five.

Part Three takes up theoretical perspectives on freedom of expression. Chapter Seven surveys the standard theories, both consequentialist and deontological, that are offered to justify a right of freedom of expression – theories invoking the pursuit of truth, the maximization of autonomy, the promotion of certain virtues, a putative deontological right to assess reasons, and the requirements of democratic decision-making. I find all of the standard theories inadequate to the task.

Chapter Eight then analyzes and diagnoses the cause of the previous chapters’ failures to justify a right of freedom of expression. The problem at the heart of the enterprise is that a human right of freedom of expression demands “evaluative neutrality” by the government. But evaluative neutrality cannot be normatively justified without producing a paradox: no normative theory can be evaluatively neutral regarding its own demands. It cannot be epistemically “abstinent” and thus fail to know what it otherwise must claim to know. I show how this paradox applies, not only to freedom of expression, but also to two other pillars of liberal theory, freedom of religion and freedom of association.

In the Epilogue, Chapter Nine, I conclude the book by asking what freedom of expression might look like if we were to abandon any attempt to ground it in some pre-political human right. I argue that there are always good consequentialist reasons to be wary of government suppression of expression, particularly those forms of Track One suppression aimed at expression that causes harm only when the audience acts harmfully in response to the message. Particular rights against such laws can be given indirect-consequentialist justifications; but such justifications and therefore the specific content of those rights will vary from place to place and from time to time. This is the most we can justify in terms of a right of freedom of expression.

PART ONE

DEFINING HUMAN RIGHTS AND  
DELIMITING THE SCOPE OF  
FREEDOM OF EXPRESSION





## Preliminaries

### What Is a Human Right, and What Activities Implicate Freedom of Expression?

#### I. What Are Human Rights?

As the title of this book reveals, my project is to ascertain whether freedom of expression, properly conceived, is appropriately regarded as a “right,” or more precisely, as a “human right.” Most of the book will be devoted to asking which of various conceptions of freedom of expression is the most eligible for that status and what range of activities will it protect. This chapter, however, takes up, albeit briefly, the question of what makes anything a “human right.” In other words, what is the conception of a human right that frames my inquiry regarding freedom of expression?

##### A. *Human Rights as Moral Rights*

When one claims a “human right,” what kind of claim is one making, and how might one justify it? The kind of human rights claim I am interested in is one that equates a human right with a moral right that exists apart from any particular legal or institutional arrangement, national, ethnic, or religious identity, tradition, or historical circumstance. Allen Buchanan and David Golove put it this way:

By definition, human rights are those moral entitlements that accrue to all persons, regardless of whether they are members of this or that particular polity, race, ethnicity, religion, or other social grouping.<sup>1</sup>

Put succinctly, a human right is a moral right that can be validly invoked by any person<sup>2</sup> at any time or place.

<sup>1</sup> Allen Buchanan and David Golove, “The Philosophy of International Law,” in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (J. Coleman and S. Shapiro, eds., 2002): 868–934, 888. See also Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* 85 n. 27 (1970); Joel Feinberg, *Social Philosophy* 84 (1973).

<sup>2</sup> I leave aside the question of whether minors, the insane, and the feeble-minded and senile have the same panoply of human rights as ordinary adults.

Human rights as moral rights entail obligations on others. The obligations can be negative ones – obligations to forbear from actions that impede a liberty protected by the moral right or that threaten some good, such as life or property, protected by the right. Alternatively, the obligations can be positive ones requiring those subject to them to provide others with specific goods or services. A right to freedom of expression is normally thought at its core to entail the negative obligation that *government* not penalize the exercise of a certain liberty or set of liberties. (Which liberty or liberties are protected by the moral right will be explored throughout the remainder of the book.) Nevertheless, the right of freedom of expression is sometimes deemed to place negative obligations on at least some non-governmental actors.<sup>3</sup> And it is sometimes invoked to support positive obligations (almost always on governments) to provide persons with means (for example, media outlets) and capacities (for example, information and education) for expressing themselves.<sup>4</sup>

Some might argue that I have mischaracterized human rights by deeming them to be moral rights. They would contend that human rights are legal rights established by international treaties and conventions or by customary international law. Thus, Article 19 of The Universal Declaration of Human Rights provides that “Everyone has the right to freedom of opinion and expression.”<sup>5</sup> And Article 19 of the International Covenant on Civil and Political Rights, section 2, declares that “Everyone shall have the right to freedom of expression.”<sup>6</sup> As this argument would put the matter, it is these international conventions, and the subscription thereto by the nations of the world, that create and define the right of freedom of expression. The human right of freedom of expression is a posited, dateable legal right, not a timeless moral right that preexists the instruments of international law.

<sup>3</sup> Buchanan and Golove assert that some private actors are potential violators of human rights, although, in making that assertion, they do not have freedom of expression specifically in mind. See Buchanan and Golove, *supra* note 1, at 888.

<sup>4</sup> See Owen M. Fiss, “Free Speech and Social Structure,” 71 *Iowa L. Rev.* 1405 (1986); Cass R. Sunstein, “Free Speech Now,” 59 *U. Chi. L. Rev.* 255 (1992).

<sup>5</sup> The full text of Article 19 is as follows:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

<sup>6</sup> The full text of Article 19 is as follows:

1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in the foregoing paragraph carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be such only as are provided by law and are necessary, (1) for respect of the rights or reputations of others, (2) for the protection of national security or of public order (“*ordre public*”), or of public health or morals.

I do not find this argument persuasive. It is true that the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights are legal instruments, at least when nations subscribe to them, or when they become norms of customary international law. That point conceded, however, examination of the language of these documents reveals that they assume a preexisting right of freedom of expression to which they refer and declare to be henceforth a right under international law. In that respect, they are similar to the First Amendment of the United States Constitution, which itself refers to “the freedom of speech” as if the content and scope of that freedom is independent of and preexists the First Amendment itself.<sup>7</sup>

In any event, I am interested in determining whether there is, in fact, a universal moral right of freedom of expression to which these international and domestic legal instruments could be referring when they announce a legal right to freedom of expression, and if so, what its content and scope are. For if there is no such moral right, or if the moral right has a content and scope far different from what people imagine, this may have far-reaching consequences for how legal documents referring to freedom of expression or freedom of speech should be interpreted and for how we regard states whose treatment of expression differs from our own.

Interestingly, moral philosophers who have addressed this issue are divided. John Rawls, for example, who believes that freedom of expression is a liberty that a just *liberal* society must grant,<sup>8</sup> does not list it among the human rights that the international community must honor.<sup>9</sup> On the other hand, others argue that the human rights Rawls does recognize depend as an empirical matter on government’s being democratic, which in turn they argue requires freedom of expression.<sup>10</sup>

### B. The Grounding of Human Rights

If human rights are moral rights that impose obligations on others, how does one establish that a claimed moral right and its correlative obligations actually

<sup>7</sup> The First Amendment of the United States Constitution reads in pertinent part: “Congress shall make no law . . . abridging the freedom of speech. . . .”

<sup>8</sup> See John Rawls, *A Theory of Justice* 222–5 (1971). Rawls’s elaboration of the right of liberty of expression and its limits is quite sketchy, and he does not provide a rigorous derivation of it from his “original position” construct. He appears to regard it as primarily an aspect of political liberty. And see John Rawls, *Political Liberalism* 340–56 (1993), where Rawls is much more explicit about the liberty’s of expression being a liberty of *political* expression and adjunct to the right of democratic self-rule. Rawls’s case for the liberty is highly pragmatic.

<sup>9</sup> See John Rawls, *The Law of Peoples* 65 (1999). The human rights Rawls lists are the right to the means of subsistence and security, the right to freedom of conscience (freedom of religion and thought), the right to personal property, and the right to formal equality.

<sup>10</sup> See, e.g., Allen Buchanan, “Justice, Legitimacy, and Human Rights,” in V. Davion and C. Wolf, eds., *The Idea of a Political Liberalism: Essays on Rawls* (2000), 73, 87–8; Fernando Teson, *A Philosophy of International Law* 118–20 (1998).

exist? For my purposes here, the following existence condition for a moral right should suffice: A has a moral right to X if there is a valid (correct) moral principle such that A has a valid claim that others provide A with X. If the moral right is a negative right, then X is forbearance from impeding or penalizing A's liberty or forbearance from transgressing or endangering A's life, property, or other interests. If the moral right is a positive one, then X is some good or service.

If the core of a right of freedom of expression consists of a negative liberty right against the government, then A has a moral right of freedom of expression if there is a valid moral principle such that A has a valid claim that government not penalize or impede in certain ways A's exercise of expressive liberty, appropriately defined. This moral principle, and the liberty right it generates, might be grounded on some feature of A, such as A's autonomy. Alternatively, the right might be grounded on the more general good consequences (for A and for others) that flow from its recognition and observance. The former grounding produces the type of right characteristic of deontological moral theories, whereas the latter produces the type characteristic of (indirect) consequentialist moral theories.

Buchanan and Golove survey what they regard as the most prominent justifications for human rights, remarking that the justifications are diverse but at the same time tend to converge.

Individual human rights are presented as (1) principles whose effective institutionalization maximizes overall utility, (2) as required for the effectiveness of other important rights, (3) as needed to satisfy basic needs that are universal to all human beings, (4) as needed to nurture fundamental human capacities that constitute or are instrumentally valuable for well-being or human flourishing, (5) as required by respect for human dignity, (6) as the institutional embodiment of a "common good conception of justice" according to which each member of society's good counts, (7) as required by the most fundamental principle of morality, the principle of equal concern and respect for persons, (8) as principles that would be chosen by parties representing individuals in a "global original position" behind a "veil of ignorance", and (9) as necessary conditions for the intersubjective justification of political principles and hence as a requirement for political legitimacy.<sup>11</sup>

Some of Buchanan and Golove's human rights' justifications are clearly consequentialist in nature ((1) and (2)), others deontological ((5)), and the remainder could be either, depending upon their elaboration.

Prospects for establishing a human right of freedom of expression are best if the moral right is a negative liberty right of a deontological, not indirect consequentialist, nature. Indirect consequentialist arguments supporting freedom of expression are likely to be successful only in limited and particularistic ways

<sup>11</sup> Buchanan and Golove, *supra* note 1, at 889 (footnotes omitted).

that fail to establish a human right as I have defined it. This is a point I shall come back to at various places in the book.

I shall also briefly consider in Chapter **Two** and again in Chapter **Six** the proposal that the moral right underpinning freedom of expression imposes positive obligations on government to provide minimal or equal means to communicate. My consideration is brief because I believe that a positive moral right to the means for (effective) communication can be quickly dismissed as implausible, if not incoherent. Moreover, devastating criticisms of such a vision of freedom of expression have been well presented by others.<sup>12</sup>

For most of the book I shall assume that the duty-bearer of the obligation correlative to the right of freedom of expression is the government. For freedom of expression is almost always invoked – especially in human rights arguments – against governmental actions, not actions taken by nongovernmental actors. Government, however, is merely the agent of those who have delegated to it the authority to interfere with others’ liberties, so that government qua government is just a shorthand for those natural persons whose policies are being effected. That might suggest that the human right of freedom of expression is a right against natural persons rather than a right against the government. Nonetheless, although I endorse the reductionist view of the government that this suggestion reflects, I do think that government as the producer and alterer of laws and legal statuses is central to the right of freedom of expression. I shall therefore throughout the book treat freedom of expression as a right that the government not pass and enforce certain laws or take certain actions qua government. In Chapter **Six**, however, I shall consider specifically how freedom of expression claims might apply to the acts of nongovernmental actors.

## **II. What Activities Implicate Freedom of Expression?**

In this section I shall make the following points: First, freedom of expression covers all media of communication. Second, a human right of freedom of expression is most plausibly a right of the potential audience of the expression, not a right of the speaker. And third, freedom of expression is implicated by government’s purposes in suppressing expression rather than by the effects of suppression. This last point will merely be introduced here but defended fully in Chapter **Two**.

### *A. Freedom of Expression and the Variety of Media of Expression*

Freedom of speech, which is often used synonymously with freedom of expression, has always been thought to cover more than what is literally speech, that is, spoken language. For example, no one disputes that it covers written

<sup>12</sup> See, e.g., Martin H. Redish, *Money Talks* (2001).

language as well as spoken language. Moreover, it is difficult to see how it could be withheld from sign language, pictographs, pictures, movies, plays, and so forth; and, indeed, the legal protection afforded freedom of speech in countries such as the United States has been extended to all of these media of communication and expression, as well as to abstract artistic and musical performances. Usually, then, freedom of *speech* refers to – and is frequently referred to as – freedom of expression or freedom of communication.

It is commonplace to distinguish between “speech” and “symbolic speech.” As the previous paragraph should make clear, however, that distinction is illusory. All speech employs symbols, whether they be sounds, shapes, gestures, pictures, or any other medium. There is thus no such thing as nonsymbolic speech; there is only speech that employs symbols that are less or more conventional. The same point also applies to any purported distinction between speech or expression and “conduct” or “action.” All expression requires conduct of some sort, and any conduct can be communicative. The conclusions to be drawn are that freedom of speech or expression should be thought of as freedom of communication, and that there are no a priori limits on the media of communication that such freedom encompasses.<sup>13</sup>

### *B. Freedom of Expression as the Right of the Audience*

It is most natural to think that if there is a right of freedom of expression, it must be the right of the speaker. Thus, when the government threatens speaker S with punishment if he attempts to give certain information or express certain opinions to audience A, we are tempted to regard this as a violation of S’s right to freedom of expression.

On the most plausible accounts of why freedom of expression should be protected, however, it is A whose right is violated whether or not S’s freedom of expression is also violated. For assume that S is the author of a book and is now dead. He has no freedom of expression now. If A’s government is violating anyone’s rights by prohibiting the dissemination of S’s book, it is A’s (the audience’s) rights. Or if one imagines that S possesses a right of freedom of expression during his lifetime, which right extends to acts of suppression of his works after he dies, imagine that S is a young child, or better yet, the thousand monkeys on typewriters, who manage (accidentally, of course) to bang out *Das Kapital*, which government wishes to suppress because of its subversive potential. In such a case, the only moral objectors – the only possible victims of a moral rights violation – would be A. Likewise, if A’s government prohibited A from watching sunsets because it feared A would be inspired to have subversive

<sup>13</sup> For a similar conclusion, see Jed Rubenfeld, “The First Amendment’s Purpose,” 53 *Stan. L. Rev.* 767, 788 (2001).

thoughts, freedom of expression would arguably be implicated, *even though there is no speaker of any sort*.<sup>14</sup>

*C. Freedom of Expression As Implicated By the Purposes Behind, Rather Than the Effects of, Suppression*

Let me elaborate on this last point – namely, that government’s *purpose* for regulating, not *what* it regulates, is central to freedom of expression – for it is crucial. As I see it, there are the following possible principles for determining the scope of freedom of expression:

- (1) Freedom of expression is implicated whenever “expressive conduct” is suppressed or penalized.
- (2) Freedom of expression is implicated whenever conduct that is *intended* to communicate a message is suppressed or penalized.
- (3) Freedom of expression is implicated whenever an audience is prevented from receiving a message.
- (4) Freedom of expression is implicated whenever conduct intended to communicate a message is suppressed or penalized with the result that an audience is prevented from receiving the message.
- (5) Freedom of expression is implicated whenever an activity is suppressed or penalized for the purpose of preventing a message from being received.

Now it is easy to see that principle (1) cannot possibly be true. Any conduct can “express” ideas, even if the one engaging in it does not so intend. Those observing or hearing about the conduct may form certain ideas as a result. If

<sup>14</sup> In suggesting that the right to freedom of expression is best thought of as belonging to the audience, I do not mean to imply that people have a right against the government or anyone else that they be spoken to or provided with information. If the right of freedom of speech ultimately belongs to the audience, it is in the form of a right not to be prevented from obtaining information or ideas that are available to it without coercing unwilling speakers.

In saying that freedom of expression is best thought of as a right of the audience, I also am not saying that speakers have no standing to object to having their speech suppressed. Frequently it will best serve the audience’s right to hear if speakers are given a derivative right to speak. Indeed, in most cases where government interdicts a communication between a willing speaker and her audience, the speaker will be in the best position to assert the right to freedom of speech, both because the audience may be unaware of the attempted communication and because the audience’s right depends upon the speaker’s being willing to speak. (The right is not a claim right against the speaker that she speak.)

For a recent criticism of the proposition that freedom of expression is primarily a right of the audience and only derivatively a right of the speaker, see Roger A. Shiner, *Freedom of Commercial Expression* 203–10 (2003). Shiner, however, has a difficult time explaining away three United States Supreme Court opinions – *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); and *Stanley v. Georgia*, 394 U.S. 557 (1969) – in which it was clear that the *speakers* had no right of freedom of expression. And he is justifiably troubled by such cases as *Martin v. City of Struthers*, 319 U.S. 141 (1943), and *Board of Educ. v. Pico*, 457 U.S. 853 (1982), both of which imply that the rights of speakers are derived from the rights of the audience to receive the speech.

principle (1) were true, then freedom of expression would be implicated by all laws and thus by both the laws that currently exist and all alternatives to those laws.

Principle (2), which focuses on the intent to communicate a message, is also implausible. I have already mentioned a counterexample, the dead author. But perhaps this example is unconvincing. One might argue, for example, that the dead author does have a right of freedom of expression that survives his death and prevents the suppression of his work.

So let us move beyond these examples and focus on a speaker who is alive, who is within whatever jurisdiction is relevant, and who intends to express an idea through the conduct that is suppressed. Let us suppose that Alan has the apartment next to Bertha. Bertha is ill and quite sensitive to noise, which impedes her recovery. Alan is rehearsing for a role in a play. Sometimes he reads his lines in a booming voice to practice projecting. He pays no attention to the ideas he is expressing, only to the quality of his vocalizations. At other times he practices his swordplay, also required for his part, by clanging a sword against a metal fixture. Both his reading and his swordplay disturb Bertha, who hears them only as noise, and who seeks to have Alan legally enjoined from rehearsing in these ways.

Now if Bertha succeeds in enjoining Alan's clanging his sword, surely Alan's freedom of expression is not implicated. The fact that he is rehearsing for a play is of no importance; he could have been training for a jousting tournament or just enjoying the sound of metal on metal.

Is Alan's reading his lines relevantly different from his clanging his sword? Even if he were intending to express some message, his only audience is Bertha, who neither hears the message nor cares about it. She hears only noise. From her perspective – and from Alan's – the line reading and the sword clanging are on a par. Therefore, if freedom of expression is not implicated by suppressing the swordplay, it is not implicated by suppressing the line reading. Freedom of expression would appear to require the presence of an audience capable of understanding the ideas the speaker intends to express.<sup>15</sup>

Now if Alan himself were formulating ideas in reading his lines aloud – if he were, in essence, his own audience – things might look different. That brings us to principle (3), which posits that freedom of expression is implicated whenever an audience is prevented from receiving a message. But principle (3) has the same vice as principle (1), namely, that it is virtually limitless. For people can derive ideas from almost anything. If the law prohibits driving 100 miles per

<sup>15</sup> Cf. Jed Rubenfeld, "The Freedom of Imagination: Copyright's Constitutionality," 112 *Yale L. J.* 1, 35 (2002): "[o]ne of the things the First Amendment centrally prohibits is a law that criminalizes the reading of books, including dead writers' books, and including the reading of books by persons for whom such reading is not an act of self-expression or self-realization. The expressive autonomy position does not do a very good job of telling us why the reading of a book should be paradigmatically – not secondarily – constitutionally protected."



hour, then we are not going to be able to form the idea of what it is like to drive that fast. If the law protects freedom of expression, we are not going to be able to form the idea of what the absence of legally protected freedom of expression would be like. All laws preclude certain courses of conduct and experiences. As a consequence, people will have different ideas in different legal regimes, and any legal regime will suppress some ideas, spawn others, and color all.

Before concluding that principle (5) – which focuses not on what is being regulated nor on the effect of the regulation, but on the purpose behind it – is the proper principle for delimiting the scope of freedom of expression, let us consider an alternative principle that combines principles (2) and (3). This principle – (4) – would hold that freedom of expression is implicated whenever conduct that is intended to communicate a message is suppressed or penalized with the result that an audience is prevented from receiving the message, even if the reason for suppressing or penalizing the conduct has nothing to do with the message(s) intended or received. This principle is definitive of what Laurence Tribe calls Track Two freedom of speech cases,<sup>16</sup> and it is the subject of Chapter Two.

#### *D. The Core of Any Conception of Freedom of Expression: Evaluative Neutrality*

To make my case that principle (4) is untenable and that principle (5) is correct, I need to assume something about the meaning of freedom of expression, namely, that at its core it requires regulators to abstain from acting on the basis of their own assessments of a message's truth or value. Whether that requirement is in the final analysis possible is a subject I leave for Chapter Eight. Here, however, it must be taken to be both possible and necessary. For we would not credit a regime with honoring freedom of expression if it announces that any ideas can be freely expressed so long as the government believes the ideas to be true and valuable. In other words, anything recognizable as a conception of freedom of expression must entail a requirement that government, at least in its capacity as regulator, maintain a stance of evaluative neutrality vis-à-vis messages. As Justice Robert Jackson put this point in *West Virginia State Board of Education v. Barnette*: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion. . . ."<sup>17</sup> In Chapter Eight I shall ask whether Justice Jackson's "fixed star" is illusory, but here I assume that any recognizable conception of freedom of expression requires it.

I wish to emphasize that I am not begging any questions by placing evaluative neutrality at the core of all conceptions of freedom of expression. For any inquiry

<sup>16</sup> Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) § 12–2, at 792.

<sup>17</sup> 319 U.S. 624, 642 (1943).

such as mine into the moral foundations of freedom of expression must assume something about it. So although I cannot demonstrate that evaluative neutrality is central to freedom of expression, I cannot imagine anyone's believing that "you are free to express anything you want so long as I don't believe it to be untrue, base, or harmful" constitutes freedom of expression on *any* conception. The case for a human right of freedom of expression will prove difficult enough even if evaluative neutrality is assumed. Without such an assumption, however, the case cannot even get started.

# Freedom of Expression and Regulations that Affect Messages But are Not Enacted for That Reason

In this chapter I am going to show why any right of freedom of expression must have as its central concern government's purposes for regulating activities rather than the effects of regulations on messages intended to be conveyed by speakers or on messages received by audiences. I am going to do so by demonstrating that principle (4), the principle that freedom of expression is implicated whenever government affects an audience's ability to receive messages intended by speakers, is potentially limitless and incapable of being cabined in any internally consistent way. If principle (4) is untenable, then principle (5), whose focus is on government's purposes in regulating rather than on the effects of regulation, is the only principle defining the scope of freedom of expression left in play.

To eliminate principle (4) and secure the dominance of principle (5), I shall focus on government regulations that are not enacted to affect what messages are sent and received but that nonetheless have an impact on what messages are conveyed and received. The free speech cases generated by such regulations in American constitutional law are what Laurence Tribe calls Track Two cases,<sup>1</sup> and those cases, along with some analogous cases from other countries, shall serve as my principal positive law examples in this chapter. (The American Track Two jurisprudence is far more extensive and developed than any other jurisdiction's Track Two jurisprudence.)

## I. The Ubiquity of Track Two

Laurence Tribe's Track Two branch of American First Amendment free speech cases covers regulations of expressive conduct enacted for reasons other than to affect what messages are conveyed and received. In other words, Track Two regulations are concerned exclusively with the noncommunicative impact of the conduct regulated. (Track One regulations, about which more later, are, by

<sup>1</sup> Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) § 12-2, at 792.

contrast, those enacted precisely to affect what messages are communicated; their scope is thus defined by principle (5).)

Track Two cases have traditionally been broken into two subcategories: the public forum cases and the symbolic speech cases. The former concern access of private speakers to governmental or quasi-governmental facilities, and in some cases to private facilities that the speaker seeks to have treated like governmental facilities.<sup>2</sup> Current First Amendment jurisprudence distinguishes among traditional public fora, such as streets, sidewalks, and parks, public fora created by government designation, and nonpublic fora.<sup>3</sup> The conventional doctrine in public forum cases is that in traditional public fora and designated public fora, the government may impose narrowly drawn regulations of the time, place, and manner of speech in order to serve significant government objectives unrelated to the speaker's message. The government may not, however, bar speech entirely from such public fora and must leave adequate alternative channels of communication available.<sup>4</sup> On the other hand, if a facility is a nonpublic forum, the government may bar speech entirely or selectively, so long as it does not discriminate according to viewpoint.<sup>5</sup>

Public forum cases are more complicated, however, than the preceding account indicates. First, alternative channels of communication are never entirely adequate. All regulations of the public fora will entirely suppress speech with respect to some potential audience, and will entirely suppress speech with a particular cognitive and emotive impact. Second, the analysis leaves unresolved whether the government must make a certain quantum of traditional public fora available, whether it must construct such fora if few are available or be prevented from razing those that are available, or whether it need only maintain those available as of a certain date or those of a certain vintage.<sup>6</sup> Lastly, the United States Supreme Court has recognized that, with respect to designated public fora, the government may and often has opened fora to speech on a

<sup>2</sup> Compare *Marsh v. Alabama*, 326 U.S. 501 (1946) (proscribing regulation of speech in a company town) with *Hudgens v. NLRB*, 424 U.S. 507 (1976) (allowing ban on picketers at privately owned shopping center).

<sup>3</sup> *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985); G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. Ill. L. Rev. 949, 954. In *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 830 (1992), four Justices, Kennedy, Souter, Blackmun, and Stevens, would have held that airports, as well as other facilities, were public fora. *Id.* at 693–703 (Kennedy, J., concurring in judgment); *id.* at 709–10 (Souter, J., concurring in judgment and dissenting). For a Canadian case similar to *Lee*, see *Committee for the Commonwealth of Canada v. Canada*, [1991] 77 D.L.R. (4<sup>th</sup>) 385.

<sup>4</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 796–802 (1989); Buchanan, *supra* note 3. It need not, however, choose the least restrictive means available. See *Ward*, 491 U.S. at 796–802; Buchanan, *supra* note 3.

<sup>5</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

<sup>6</sup> The Court in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 830 (1992), suggests in dicta that the government may fail to construct public fora and may convert public fora into other facilities; the only restrictions Track Two analysis imposes upon the government in this regard concern public fora that already exist and will continue to exist.

limited basis. The Court has found no First Amendment violation where the government creates fora for speech of all kinds but for only certain speakers.<sup>7</sup> It has similarly found no violation where the government creates fora for speech on some subject but not others.<sup>8</sup> Lastly, it has upheld the government's creation of fora for only those viewpoints the government favors, as when it runs public schools.<sup>9</sup> This offends the asserted doctrine that even in nonpublic fora, government may not engage in viewpoint discrimination.

The other subcategory of Track Two cases consists of the symbolic speech cases.<sup>10</sup> Here, the government forbids certain conduct irrespective of whether those who would otherwise engage in that conduct intend their engaging in it to symbolize and communicate some idea to others. The free speech issue arises when someone in fact wishes to engage in that conduct to symbolize and communicate an idea. The accepted doctrine is that government may regulate the symbol on the same grounds and with the same restrictions as it may regulate the time, place, and manner of speech in a public forum. That is, it may do so if it is advancing a significant interest unrelated to the communicative impact of the conduct (the speaker's message), if its regulation is narrowly tailored, and if adequate alternative means exist for the speaker to convey his message.<sup>11</sup>

I wish to establish two propositions. The first, and easier to establish, is that the public forum cases and the symbolic speech cases have been, and should be, treated under the same standards. The second is that Track Two analysis applies to any law. In other words, the entire body of laws is subject to Track Two freedom of expression analysis.

An examination of both the phrasing and application of the Supreme Court's time, place, and manner test for public forum speech and its test for regulation of symbolic speech reveals that they are essentially the same test. Both tests, as stated, require that the regulation in question be narrowly tailored but not that it be the least restrictive alternative. Moreover, in both tests the government's objectives must be "significant" (that is, important), and the government must leave the speaker adequate alternative means to convey the message.

<sup>7</sup> See *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984); *Buchanan*, *supra* note 3. *But see* *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (university cannot deny religious group funds generally available for student political organizations); *Widmar v. Vincent*, 454 U.S. 263 (1981) (university cannot bar religious speech from university facilities).

<sup>8</sup> A public hospital's bulletin board can be limited to posting notices concerning hospital business; and a public school classroom discussion can be restricted to subjects in the curriculum. See Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. Pa. L. Rev. 1293 (1976).

<sup>9</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Board of Educ. v. Pico*, 457 U.S. 853 (1982); Goldstein, *supra* note 8.

<sup>10</sup> Given that all speech employs symbols and is thus symbolic, the area should perhaps be re-described.

<sup>11</sup> See *United States v. O'Brien*, 391 U.S. 367 (1968); *Buchanan*, *supra* note 3.

Regardless of the test it employs, the Court is correct, from a theoretical standpoint, in employing the *same* test for both areas. Whenever government is regulating conduct that is being engaged in to symbolize some message, government is regulating the “time, place, and manner” of speech. It is easy enough to see that, for example, burning a draft card or dancing in the nude is employing a particular manner of expression to symbolize a message. However, the time of a speech or demonstration or the place in which it occurs may also be employed symbolically.

Susan Williams has noted the Supreme Court’s erosion of any distinction between its time, place, and manner and symbolic speech tests.<sup>12</sup> She nonetheless urges that a distinction be maintained between regulations that affect those aspects of time, place, and manner that are merely “facilitative” of speech – that affect the speaker’s ability to convey his message to a particular audience – and regulations that affect those aspects of time, place, and manner that are themselves “expressive” (communicative) – that are part of the message itself.<sup>13</sup> She argues that there is never an adequate alternative available to the speaker when the regulation affects the communicative aspect of speech and thus what gets said.<sup>14</sup> Therefore, she would require regulations of that type to meet a higher standard of validity.<sup>15</sup>

Nonetheless, it is both theoretically difficult and practically impossible to separate the uniqueness of a particular message from the uniqueness of a particular audience at a particular time and place.<sup>16</sup> The Supreme Court has recognized how the choice between words having the same denotative meaning can affect the emotive and ultimately the cognitive significance of the words to the audience,<sup>17</sup> and how the choice between verbal and nonverbal symbols can do the same.<sup>18</sup> Surely, the choice between audiences and times affects not only the impact of a message, but also how that message will be translated and understood. To illustrate this, imagine delivering a talk on a given subject first to teenagers and then to senior citizens, or first at 5 a.m. and then at 8 p.m. The facilitative and the expressive, the media and the message, are ultimately inseparable.

The second proposition I want to establish is that, just as there should be no distinction between Track Two regulations affecting the facilitative aspects of speech and those affecting the expressive aspects, so too should there be no distinction between Track Two laws directly regulating speech activities and all

<sup>12</sup> Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. Pa. L. Rev. 615, 644–5, 653–4 (1991).

<sup>13</sup> *Id.* at 659–63.

<sup>14</sup> *Id.* at 70.

<sup>15</sup> *Id.* at 707–19.

<sup>16</sup> Williams herself comes close to recognizing this proposition. *Id.* at 715–16.

<sup>17</sup> See *Cohen v. California*, 403 U.S. 15, 25–6 (1971) (“one man’s vulgarity is another’s lyric”).

<sup>18</sup> See *Texas v. Johnson*, 491 U.S. 397, 404–6 (1989) (burning a flag carries a message subtly different from verbal denunciation).

other laws. All Track Two laws regulate speech only indirectly in this sense: In a Track Two case, government's interest is not in what is being communicated but in the communication's effects on values unrelated to communication, such as noise, congestion, property, aesthetics, or privacy. Track Two regulations are of freedom of expression concern because they affect what gets said, by whom, to whom, and with what effect even though the regulations are not intended to affect such matters. However, *all laws affect what gets said, by whom, to whom, and with what effect*. In short, all laws have what I shall call "message effects." Therefore, all laws, the entire corpus juris, should be subject to Track Two analysis.

Track Two includes not only restrictions on obstructing traffic while speaking or demonstrating, using amplifying devices in residential neighborhoods, posting signs on utility poles, burning draft cards, or sleeping in parks, but also includes tort, contract, and property law, the tax code, and the multitude of criminal and regulatory laws and administrative regulations. For example, laws determining who owns what property under what restrictions or the price and availability of various resources will also determine what gets said, by whom, to whom, and with what effect – that is, such laws will have message effects. A change in the law of any region of the corpus juris will have message effects. Laws equalizing income would surely have dramatic message effects. Elimination of the law against battery would produce a new form of symbolic speech as well as information – for example, what it is like to batter and be battered – and concerns that do not exist while the law against battery is on the books.

The ubiquity of potential Track Two cases has been noted.<sup>19</sup> Susan Williams, for example, notes that "[t]here is . . . no clear dividing line between facilitative aspects of speech and other activities. Instead, there is a continuum. . . ." <sup>20</sup> Yet she believes that a line must be drawn.

The task is required . . . because the alternatives are simply unacceptable. Some activities or resources that are not themselves a part of the act of speaking are, nonetheless, so closely related to speech that it would be absurd not to recognize that regulating them raises first amendment issues. Access to paper or typewriters might be a good example. On the other hand, without some limit, the free speech guarantee would be transformed into an invitation for all speakers to violate any generally applicable law if the violation contributes in any way, no matter how indirect, to their ability to speak. The constitutional solicitude for free speech demands that speakers receive special protection from regulations (even generally applicable ones) that affect either a communicative or a directly facilitative aspect of their speech activity. Nonetheless, at some point the connection to speech becomes so attenuated that the protection must disappear.<sup>21</sup>

<sup>19</sup> See Cass R. Sunstein, *Free Speech Now*, 59 *U. Chi. L. Rev.* 255, 273–7, 296 (1992); Williams, *supra* note 12, at 658–9, 722–5.

<sup>20</sup> Williams, *supra* note 12, at 724.

<sup>21</sup> *Id.*

Although Williams's concern is well-founded, the "direct-indirect" imagery on which she relies misses the fundamental point that the most profound message effects are produced by laws she would place on the indirect side of the divide. Cass Sunstein, on the other hand, is quite anxious to exploit precisely this point:

[T]here may be no neutrality in use of the market status quo when the available opportunities are heavily dependent on wealth, on the common law framework of entitlements, and on the sorts of outlets for speech that are made available, and to whom. In other words, the very notions "content-neutral" and "content-based" seem to depend on taking the status quo as if it were preregulatory and unobjectionable.

At least two things follow. The first is that many content-neutral laws have content-differential effects. They do so because they operate against a backdrop that is not prepolitical or just. In light of an unjust status quo, rules that are content-neutral can have severe adverse effects on some forms of speech. Greater scrutiny of content-neutral restrictions is therefore appropriate. Above all, courts should attend to the possibility that seemingly neutral restrictions will have content-based effects.<sup>22</sup>

As Williams recognizes, however, and Sunstein does not, the courts cannot apply the ordinary Track Two test to all laws, even though all laws are logically subject to Track Two analysis. For example, the setting of the marginal tax rate affects my income, which, if greater, I might devote to increased speaking. Under the current Track Two test, if the government's interest in the present rate is not a significant interest, and the rate adversely affects my speech, the government would be required to abandon that rate in favor of another rate. But any other rate the government chooses will affect somebody's speech – it may result in lower transfer payments, adversely affecting the communication between poorer speakers and their audiences – and thus, *it* will have to serve a significant interest as well.<sup>23</sup> Therefore, the Track Two test cannot be applied universally unless the requirement of a significant government interest is trivialized either by finding almost any interest to be significant or by being made synonymous with "the entire corpus juris is what it should be." (The latter trivializes because it tautologizes: Track Two laws are just and constitutional if they are just and constitutional.)

This leaves the following problems. First, Track Two covers all laws because all laws have message effects – they affect what gets said, by whom, to whom, and with what effect. Second, a Track Two freedom of expression challenge to a law or group of laws is a demand that the laws be changed; but every change in the laws will have message effects, so that Track Two freedom of expression claims are always aligned against each other. Thus, testing challenged laws by the significant government interest test will entail testing all of their alternatives by that test. Finally, the universal application of Track Two analysis would result

<sup>22</sup> Sunstein, *supra* note 19, at 296 (footnotes omitted).

<sup>23</sup> Moreover, all laws curtail the symbolic expression of opposition to the laws themselves through violations, a point that by itself undermines the possibility of requiring a significant interest in order to restrict symbolic speech.



in the elimination of all sets of laws except those serving significant interests (as compared to all possible alternative sets). Because of this difficulty, the universal application of Track Two analysis would most likely result in complete abandonment of Track Two protection, with all asserted interests deemed “significant” so long as they are not a mask for message-related concerns.<sup>24</sup>

<sup>24</sup> How should we classify government’s decision to ban conduct *because* it is message-bearing, but not because of concern with the messages borne? Government concerns with paper-as-litter, book-as-merchandise, or newspaper-as-high-revenue-business are clearly Track Two concerns when government bans dispensing paper on the street, bans sales of merchandise in airports, or imposes sales taxes. What if, however, government bans, not dispensing paper, but dispensing “pamphlets,” or bans, not the sale of merchandise, but the sale of “books,” or taxes, not sales, but sales of “newspapers”? Theoretically, I believe these should also be regarded as Track Two regulations. If government can build a park exclusively for softball, basketball, and tennis, and not for political rallies, then it can disfavor the activity of communication relative to other activities. Nonetheless, because speech-specific regulations can mask concerns with the messages being conveyed – after all, why would government favor all other potentially littering paper over “pamphlets” (paper bearing a message) if not out of a desire to suppress certain messages? – they are perhaps justifiably treated as content-related regulations rather than Track Two regulations. See Frank I. Michelman, *Property and the Politics of Distrust: Liberties, Fair Values, and Constitutional Method*, 59 *U. Chi. L. Rev.* 91, 108 n.56 (1992) (discussing discrimination against speech as an activity and citing *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575 (1983)). See also Jed Rubenfeld, “The First Amendment’s Purpose,” 53 *Stan. L. Rev.* 767, 831 (2001). This also suggests that when government regulates a medium that has no use other than as a medium of expression – such as the broadcast frequencies – and in doing so it restricts speech more than is necessary to serve any conceivable legitimate governmental interest – as, for example, when it leaves some broadcast frequencies unavailable for use – a freedom of expression issue is raised. See Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 *Duke L. J.* 1 (2002). Of course, a restriction on liberty that serves no legitimate governmental purpose should be deemed invalid on that ground alone. That the medium restricted is one that is usable only for communication merely goes to the weight of the liberty arbitrarily restricted. The courts of both the United States and Canada go both ways on this issue. Sometimes they treat laws that single out message-bearing media as content-based rather than as content-neutral. See, e.g., *K Mart Canada Ltd. v. U.F.C.W.*, Local 1518, 24 C.L.R.B.R. (2d) 1 (1994), *aff’d*, [1999] 2 S.C.R. 1083 (striking down a ban on leafletting as content-based violation of freedom of expression); *Committee for Commonwealth of Canada v. Canada*, *supra* note 3 (striking down a ban on pamphleteering in an airport on the same rationale). Cf. *Schneider v. State*, 308 U.S. 147 (1939) (striking down ban on leafletting enacted to reduce litter, but not on the ground that message-bearing litter was underinclusive relative to litter generally). At other times the courts treat such laws as content-neutral and uphold them. See, e.g., *Coles Book Stores Ltd. v. Ontario*, 6 O.R.3d 673 (1991) (upholding Sunday closing law’s exception for small *book* stores); *City of Montreal v. Buczynsky*, 59 C.C.C. (3d) 302 (1990) (upholding ban on posting); *Vancouver v. Jaminer*, [2001] 198 D.L.R. (4th) 333 (upholding ban on rooftop signs); *Regina v. Richards*, 88 B.C.L.R.2d. 334 (1994) (upholding permit requirement for satellite dishes); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding ban on posting). Sometimes the courts treat laws that are message-based as if they were content-neutral, such as when they uphold restrictions on abortion protesters near abortion clinics, or restrictions on protests near embassies or private residences. See, e.g., *Regina v. Lewis*, 139 D.L.R. (4th) 480 (1996) (upholding restrictions on abortion protesters); *Ontario Attorney General v. Dieleman*, 20 O.R.3d. 229 (1994) (same); *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753 (1994) (same); *Hill v. Colorado*, 530 U.S. 703 (2000) (same); *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding restriction on picketers of private residence); *Minister for Foreign Affairs v. Magno*, (1992) 27 F.C.R. 298 (upholding restrictions on protests near foreign embassy). *But see* *Boos v. Barry*, 485 U.S. 312 (1988) (striking down an ordinance regulating the content of messages on signs near foreign embassies).

## II. Weighing the Value of Messages Against the Value of Content-Neutral Regulations

What happens if instead of treating all speech interests as having a constant and significant weight, the particular value of the intended message, given its intended audience, is weighed against the values the particular laws serve? This is the heart of my critique of Track Two analysis. I propose that the value of a message cannot be balanced against the government's Track Two interests in any way that is principled and that respects the very freedom of thought that freedom of expression is believed to protect.

To make Track Two analysis work, we must assign a value to the audience's loss of information due to incidental restrictions on speech. That value in turn must be weighed against the values furthered by the incidental regulations at issue, values such as freedom from noise, litter, congestion, and taxes. Moreover, that value must also be weighed against the information lost to that and other audiences if the incidental regulations are struck down. (Each alternative set of regulations produces a different state of the world, which in turn makes available different information and/or different audiences for the same information. A trivial example: a world without an anti-litter law lacks the information "what a world with an anti-litter law is like." A less trivial example: a world in which extra police must be assigned to monitor and control street demonstrations and reroute traffic has less money available to hire teachers in public schools than a world in which street demonstrations are prohibited.<sup>25</sup>)

In addition to the theoretical difficulties of the balancing process, the Track Two analysis also poses the theoretical problem of placing a value on the information at stake. On the one hand, if we evaluate the information at stake from the position of not knowing yet what it is, we face the theoretically impossible task of placing a specific value on unknown information. On the other hand, if we evaluate the information at stake from the position of knowing or imagining what it is, we risk imposing our evaluation on others through the striking down of the existing set of incidental regulations, thereby preempting the very freedom of evaluation by others that is supposedly central to freedom of expression. In the name of freedom of expression, we end up imposing an evaluative framework on others and arguably violating freedom

<sup>25</sup> It is bootless to attempt to tote up the information gained and lost under alternative sets of incidental restrictions. Information does not come in discrete units such that it would be meaningful to compare states of the world in terms of which state has more information. We can count up the number of television channels, the amount of time spent viewing television, the number of magazines and books purchased, or the number of words in each; but talking of the amount of information is meaningless. This point is frequently ignored. One student note speaks of "a concern for maximizing information" and "concerns for a law's effect on the net stock of information." *The Supreme Court, 1990 Term – Leading Cases*, 105 *Harv. L. Rev.* 177, 284–5 (1991). Maximizing the net stock of information in the global sense used by the note is quite meaningless. All laws have information effects, but that is all one can say.

of expression. Put differently, freedom of expression is arguably supposed to protect a realm of pure process, the substantive results of which are legitimate only because that process is pure; once substantive results begin guiding the construction of the process itself, the legitimacy of the results of that process is compromised.<sup>26</sup>

The above argument is not one directed exclusively at courts. It applies to all coercive impositions of such valuations of information and thus suggests that legislative evaluation of information gains and losses is equally problematic. It suggests that legislatures should perhaps measure only the strength of the constituents' preferences in deciding, for instance, between open space suitable for speech and alternative land uses. And it suggests that taxing one group because of another group's preference for speech activities – for example, in building a town meeting hall – is illegitimate to the extent its justification depends upon the good the public will derive from the speech. (Building a meeting hall, an auditorium, or a library is nonproblematic to the extent it reflects the majority's private-good preference for information of a certain type rather than, say, more tennis courts.) Finally, when government itself speaks with taxpayers' resources, it is evaluating specific information – the most problematic of all government activities from a freedom of expression standpoint. Public schools and universities, public grants and subsidies for research, public broadcasting, public financing of election campaigns, and a variety of other activities, rather than being extensions of the animating spirit of freedom of expression, are in tension with it.

I will discuss each of these points at greater length in this and the following chapters, particularly Chapter Five.

### *A. Balancing Speech Interests Against Non-Speech Values Served by Incidental Regulations*

The entire corpus juris, from the general common law of contracts, property, and torts to the most particular tax regulations, affects what gets said, by whom, to whom, and to what effect. Speech and listening are costly activities. They use resources such as space, newsprint, radio frequencies, presses, and police protection, and impose other costs – noise, litter, and clutter. *Schneider v. State*,<sup>27</sup>

<sup>26</sup> See Robert C. Post, *Managing Deliberation: The Quandary of Democratic Dialogue*, 103 *Ethics* 654 (1993) [hereinafter Post, *Managing Deliberation*]; Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 *Wm. & Mary L. Rev.* 267, 282–3, 290, 293 (1990) [hereinafter Post, *Racist Speech*]; Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 *Harv. L. Rev.* 601, 670 (1990) [hereinafter Post, *Public Discourse*] (“[T]he normative conception of public concern, insofar as it is used to exclude speech from public discourse, is . . . incompatible with the very democratic self-governance it seeks to facilitate.”).

<sup>27</sup> 308 U.S. 147 (1939). See also *Toronto v. Quickfall*, 68 O.A.C. 190 (1994) (striking down a total ban on posting); *Ramsden v. Peterborough*, [1993] 2 S.C.R. 1084 (same).

for example, in which the United States Supreme Court struck down a municipal ordinance banning pamphleteering on city streets and sidewalks in order to reduce litter, resulted in the imposition on the public of the costs of litter or, alternatively, the costs in excess of the state's next best alternative for eliminating litter. (If a less restrictive alternative is on the order of a Pareto superior move – the alternative does all the good at no greater cost and without affecting speech – then less restrictive alternatives are unlikely to exist; all alternatives will have greater costs in some respects.)

Thus, the Court's decision in *Schneider* constitutionally mandated what can be viewed as a subsidy of pamphleteers. But why such a subsidy of pamphleteers?<sup>28</sup>

Consider Jane, who complains about the high costs of *The New Republic*, cable television, books from Oxford Press, and a college education. Those costs result from laws – laws regarding property rights, laws conserving trees, laws affecting labor costs, laws regarding tax liability, and many other laws. Jane's receipt of speech – which is, after all, what the First Amendment is arguably about – is adversely affected by those laws. Why should her attempt to receive this speech not be subsidized? (Alternatively, if one resists the notion that listeners' rights are central to the First Amendment, why should *The New Republic* and Oxford Press, for example, not receive subsidies or relief from various laws in order to communicate with a wider audience?)

Next, consider John, who wishes to demonstrate on Main Street, which will tie up traffic and require police presence. If, against the city's wishes, a court mandates that he be allowed to demonstrate, then the decision can be viewed as a forced subsidy of John and correlatively a forced imposition of costs on others.

Next, consider Joan, who is denied several outlets for her message that, given her limited resources, would be the most effective: putting graffiti on the side of city hall, using a loudspeaker at night in a residential neighborhood, or putting up a pamphlet stand on land that, due to various zoning laws, is currently unaffordable for her. Why should *Schneider* but not Joan get a First Amendment subsidy here?

Finally, consider Jason, who wants the city to build an auditorium suitable for public lectures and rallies, but who is opposed by Jean, who would like the city to build more tennis courts because she and others prefer playing and discussing tennis to attending public lectures, and Jerry, who wants lower taxes so that he can afford to go to night school.

The *O'Brien* line of cases raises the same questions. If a medium is being regulated for noncensorial reasons, then striking down the regulation under the

<sup>28</sup> If one objects that the term "subsidy" is rhetorically loaded in favor of the existing set of entitlements, we can more neutrally ask why we should give the entitlement to the pamphleteer.

First Amendment imposes a costly freedom of expression easement on others. If Jake wishes to protest inflation by burning an inexpensive work of art in the lobby of the Treasury Building, presumably a court will not protect him, even though he has cost each taxpayer an insignificant amount. Yet, how is Jake different from any other user of a tangible medium that the government wishes to regulate to avoid costs to a variety of values? This question is especially relevant because those values can always be translated into amounts of money that the taxpayers would pay to preserve them.

Track Two also includes such obviously important-to-speech governmental decisions as what resources should be dedicated to the police and courts, and as a component of that decision, to protecting speakers from hostile audiences beyond those dedicated to protecting persons from assault and battery generally. Resources that go to protecting speakers are, of course, unavailable for other public projects, which include such things as public schools and libraries and the ideas they would otherwise communicate. Because Track Two includes *all* laws and governmental decisions, however, it includes these allocations of resources decisions.

Without a theory of proper message effects, non-content-related regulations cannot be evaluated under freedom of expression, except in an arbitrary manner. Schneider did win, of course, as did the Hare Krishnas in *International Society for Krishna Consciousness, Inc. v. Lee*.<sup>29</sup> But why they and not O'Brien,<sup>30</sup> the sleep-in protesters in *Clark v. Community for Creative Non-Violence*,<sup>31</sup> or the many other actual losers? And if Schneider and the Krishnas, why not my hypothetical Jane, John, Joan, and Jason?

As discussed previously, assigning the speech value a constant weight in the calculus – for instance, equal to a significant governmental interest – does not help. Without a theory regarding message effects – what gets said, by whom, to whom, and with what effect – assigning any weight will be arbitrary. More importantly, because speech interests are affected regardless of what set of Track Two laws is chosen, the speech “constant” appears on both sides of the equation and does not produce a winner.

A possible alternative would be straightforward balancing rather than assigning speech an arbitrary constant value. Under this approach, all of the information at stake under all alternative sets of laws would be examined, as well as all the nonspeech values, and a determination would be made as to which set of laws is superior.

<sup>29</sup> 505 U.S. 830 (1992) (striking down restriction on distributing literature in an airport).

<sup>30</sup> *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding a prosecution for burning a draft card under a statute forbidding destruction of draft cards despite the defendant's claim that he was burning his card to protest induction for the Viet Nam war).

<sup>31</sup> 468 U.S. 288 (1984) (upholding conviction for violation of regulation banning sleeping in park). *Cf. Levy v. State of Victoria*, 189 C.L.R. 579 (1997) (upholding ban on entering hunting area as applied to those protesting hunting).

There are obvious practical and institutional objections to such a balancing proposal. Given that this approach would involve nothing less than a comparison of all possible entire sets of laws, both for their message effects and for their effects on all the nonspeech values, the proposal is a practical impossibility for a legislature and surely for a court.

This practical objection should by itself be sufficient to undermine all Track Two judicial decisions and to dictate complete judicial withdrawal from Track Two. There remains, however, a theoretical objection to the enterprise as well. In principle, we cannot evaluate the message effects of Track Two laws: Either we assume the viewpoint of one who does not know what the information at issue will turn out to be, in which case we cannot evaluate it at all, or we assume the viewpoint of one who does know what the information will turn out to be, in which case we can evaluate it, but only from a partisan perspective inconsistent with freedom of expression itself. I shall now discuss these two points at same length.

**1. ASSUME IGNORANCE OF WHAT INFORMATION WILL TURN OUT TO BE.** Information is in some respects a commodity just like toothbrushes, automobiles, and bananas. We buy it and sell it. When we buy it, we place a value on it in the sense that we decide to pay a particular price for it. Nevertheless, information is unique as a commodity in this crucial respect: The value of information, and therefore the price we should pay for it, is generally unascertainable until it has been purchased and received.<sup>32</sup>

For example, the fifty-dollar medical book at the bookstore may contain information that will save my life or my loved ones' lives. Then again, it may not. Should I pay the fifty dollars and find out? Similarly, in deciding whether to buy a seventy-five-dollar electric razor, should I purchase the issue of *Consumer Reports* that evaluates it? The magazine may save me some money, perhaps an amount greater than the magazine's cost. But I will not know that until I pay the price to get the magazine.

Interestingly, economic theory is mute here. It cannot tell me whether information is worth its price, except when I have good actuarial information about the information itself, such as that there is a one-in-three chance that *Consumer Reports* will save me ten dollars on a seventy-five-dollar purchase, which makes it worth its \$2.00 asking price. Economic theory itself normally assumes full

<sup>32</sup> See Kenneth J. Arrow, *The Economics of Information* 137, 160, 171 (1984); Kenneth J. Arrow, *Essays in the Theory of Risk-Bearing* 151–2 (1971); F. Knight, *Risk, Uncertainty, and Profit* 348 (1921); J. Hirshleifer & John G. Riley, *The Analytics of Uncertainty and Information – An Expository Survey*, 17 *J. Econ. Literature* 1375, 1395 (1979); see also James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 *Cal. L. Rev.* 1413, 1438, 1443–4, 1448–50 (1992) (pointing out the paradox resulting from regarding information both as a conceptual precondition for analyzing markets and as a commodity to be traded in markets).

or adequate information, or at least actuarial information about information, which makes economic theory largely irrelevant to purchases of information itself.<sup>33</sup>

Economic theory does tell us, however, that the enterprise of producing information for sale – for example, what newspapers do – suffers from a public goods problem. Because information, once purchased, can be disseminated by the original purchaser for free<sup>34</sup> or at nominal charge, the producer cannot capture the full public benefit of the information in the price charged. As a result, if the cost of production is greater than the price purchasers will pay, though less than the total public benefit of the information, the information will not be produced even though it would have been socially beneficial to produce it.<sup>35</sup>

In view of this inability of producers to recapture the full public value of the information in the price charged and the resulting underproduction of the information, one might argue that we should subsidize the production of information for distribution.<sup>36</sup> There are, however, several difficulties with this conclusion.

First, there are an indefinite number of activities that might produce – or might produce if subsidized – information of public benefit. Without knowing what information would be produced that is not produced now, how can we determine which information's production costs should be subsidized?<sup>37</sup>

There are several layers to this problem. Because we cannot know what information will be produced by any information producer if we subsidize its production, we cannot know whether the information's total social value – the public's willingness to pay for the information if free-riding were precluded – will

<sup>33</sup> See Frederich A. von Hayek, *The Use of Knowledge in Society*, in *Austrian Economics* (Richard M. Ebeling, ed., 1991), Ch. 14; Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *The Rate and Direction of Inventive Activity: Economic and Social Factors* (National Bureau of Economic Research, 1962), 609, 615; Frank H. Knight, *Risk Uncertainty, and Profit* (1957) lxii–ii, Ch. VII; Lynn A. Stout, *Irrational Expectations*, 3 *Legal Theory* 227 (1997); C. Edwin Baker, *Giving the Audience What It Wants* (2000), 320–1.

<sup>34</sup> Information is never consumed at no cost to the consumer; there are always at least the costs of time and attention. See Anthony Downs, *An Economic Theory of Democracy* 209–73 (1957). These costs, however, do not involve payment to the producer.

<sup>35</sup> See Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 *Harv. L. Rev.* 554, 558–68 (1991). See also Lillian R. Bevier, “The Invisible Hand of the Market Place of Ideas,” in Lee C. Bollinger and Geoffrey R. Stone, *Eternally Vigilant: Free Speech in the Modern Era* (2001), 233, 239–45.

<sup>36</sup> *Id.* at 570–9.

<sup>37</sup> Interestingly, in *Minneapolis Star & Tribune Co. v. Minnesota Commission of Revenue*, 460 U.S. 575 (1983), the Supreme Court held a special tax subsidy for the press to be unconstitutional because of the dangers of covert viewpoint discrimination inherent in the government's singling out the press for special treatment. The Court, however, has been quite schizophrenic in this regard, hardly blinking at the subsidies of particular viewpoints inherent in such things as public education, publicly funded research, publicly funded arts, and public libraries. See, e.g., Chapter Five *infra*. For example, in *Leathers v. Medlock*, 499 U.S. 439 (1991), the Court upheld a subsidy for the press broader than the one in *Minneapolis Star*.

equal its social cost. In turn, this means we cannot determine which of the many producers to subsidize or at what level.<sup>38</sup> Moreover, there are other public goods apart from information that require protection or subsidization, some of them in direct opposition to information production. In addition, both the content of information and its production also produce *negative* externalities not reflected in the costs because of collective action problems. For example, those who do not like the noise and congestion of demonstrations, the scandal-mongering of the tabloids, or the eyesores of campaign posters might, but for collective action problems, pay off the information producers in question to eliminate the negative externalities.

The second general problem with this public goods argument for subsidizing information production is that its own logic renders it impotent as a Track Two tool. It highlights a problem information producers face – they cannot recapture in their price the public value of the information they produce. But defining who is a “producer of information” and what is a “subsidy” requires analytically privileging a certain set of entitlements and background laws, for it is only against that background that we identify who is producing information and what is a subsidy. A Track Two challenge, however, is a challenge to precisely that set of background entitlements and laws on freedom of expression grounds. With a different set of background entitlements and laws, there would be different information producers producing – or potentially producing – different information and facing the recapture (of costs of production) problem.<sup>39</sup> Paradoxically, the public goods argument works as a potential Track Two freedom of expression argument only if we first decide on freedom of expression grounds which set of entitlements and background laws to privilege; but once that is decided, everything is decided, leaving nothing for the public goods argument to do. In short, the public goods argument has no force as a Track Two freedom of expression argument because it provides no grounds for criticizing the background entitlements and laws that determine who the information producers will be.

**2. ASSUME KNOWLEDGE OF WHAT INFORMATION WILL TURN OUT TO BE.** The [previous section](#) raised the difficulties that arise for any Track Two freedom of expression enterprise if we do not know what information will be gained and what information will be lost under alternative sets of laws. The difficulties stem from two fundamental points. First, we cannot evaluate information and whether it is worth the costs required to obtain it until we

<sup>38</sup> Indeed, because information is a byproduct of the production of other items, any producer may claim that he cannot recapture full social value of his product and therefore should be subsidized.

<sup>39</sup> Consider whether we should subsidize those who already produce information for public distribution or those who would do so if they received a subsidy. Consider further those who would produce information for public distribution if they did not have to incur the costs of such subsidies to others?



actually have it; therefore, because different information will be gained and lost under every alternative set of Track Two laws, we have no way of assessing which of those sets of law is preferable. Second, the fact that we will tend to underproduce information as a commodity because of the opportunity to free-ride is no grounds for making a Track Two attack, because each alternative set of Track Two laws produces its own distinct set of information that is underproduced.

If now we make the heroic assumption that we know what specific information will be gained and lost under each alternative set of entitlements and background laws, are we in a better position to evaluate the information effects of alternative sets of laws?

Yes and no. Yes in the obvious sense that we can and do evaluate information's importance once we have it. No, however, in the most crucial sense for freedom of expression analysis. That is because on at least its orthodox understanding, freedom of expression has as its core value that government not preempt individuals' evaluations of information.<sup>40</sup> Put differently, freedom of expression – again, on its orthodox understanding – protects a process of citizens' evaluating information and forbids preemption of that process by government's privileging certain evaluations.

Al believes that knowing intimate facts about Madonna's life is more important than knowing how Bush's tax policy will affect the economy. Barbara believes the opposite. And Charles believes that knowing how many blades of grass there are in his lawn is more important than either Madonna's private life or Bush's tax policy. There may be a point of view from which it is possible to say whether Al or the others are correct or incorrect in their evaluations, but whose point of view is it?<sup>41</sup> Each person – you, Al, Barbara, Charles, and I – will believe his or her point of view to be the correct one; that is why he or she holds that point of view.

The Hare Krishnas in *Lee* no doubt believed the information about religion that they wished to distribute to airport patrons was more important than the information conveyed by an airport uncongested and uncluttered by solicitors and proselytizers and their litter or the information that would be produced by the resources used to police and clean up after the Krishnas. Is it? What if the religious teachings are false or sinister? What if an uncluttered environment heightens valuable aesthetic sensibility?

Jed Rubinfeld puts the point succinctly:

The intelligibility of balancing in First Amendment law is hardly perspicuous. Nothing can be balanced against anything else without a common unit of measure. What is

<sup>40</sup> I am using "information" throughout this book in a broad sense, including not just items of data, but, for example, arguments, and ways of seeing and categorizing.

<sup>41</sup> Of course, for much information, its value will be purely agent-relative. See Frederick Schauer, *Reflections on the Value of Truth*, 41 *Case W. Res. L. Rev.* 669, 706–13 (1991).

the unit of measure when First Amendment rights are “weighed” against governmental interests? No court has ever said.<sup>42</sup>

Rubinfeld goes on to illustrate the point by imagining that a movie about race relations induces a few people to commit acts of violence. Under current First Amendment doctrine, the movie could not be banned. But, asks Rubinfeld, if that result is because the “balance” comes out in favor of the movie, what is the metric that supports such a balance?<sup>43</sup> Indeed, Rubinfeld notes, “no one can pretend to know whether *the freedom of speech itself is worth its costs*, which might conceivably be, someday, a complete breakdown in social order.<sup>44</sup> Moreover, balancing runs afoul of the core freedom of expression principle of evaluative neutrality.<sup>45</sup>

The point is not that an individual cannot have a point of view about the values of the competing types of information, or that one point of view cannot be correct. The point is, rather, as I stated in Chapter One, that freedom of expression on any of its orthodox understandings requires government to treat any point of view on these matters as just one point of view among many.<sup>46</sup> The only point of view it privileges is its own – namely, that no particular point of view shall be privileged.<sup>47</sup>

Of course, this view of freedom of expression’s central value is contestable and contested at its margins (though, as I have argued, not at its core). For example, some argue that freedom of expression requires only that no “political” position be privileged, and that only “political” speech and information are

<sup>42</sup> Rubinfeld, *supra* note 24, at 788.

<sup>43</sup> *Id.* at 789.

<sup>44</sup> *Id.* at 793 (emphasis in original).

<sup>45</sup> *Id.* at 818

<sup>46</sup> See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion. . . .”); Susan M. Gilles, *All Truths Are Equal, But Are Some Truths More Equal Than Others?*, 41 *Case W. Res. L. Rev.* 725, 726, 740–1 (1991); Rubinfeld, *supra* note 24, at 818; cf. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 *Colum. L. Rev.* 334, 370 (1991).

Indeed, the liberal ideal observer construct I have described may not even be coherent. Real individuals have more than a bare desire to decide correctly what candidates they should vote for, or what views to hold about others in society, or what occupation they should pursue, or what products they should buy. They have concrete desires and views about products and candidates and occupations. It is possible that unless one knows what those concrete desires are, one cannot make sense of the question: what information would this person want in circulation? The bare desire to reach a correct decision may leave that question unanswerable in principle.

*Id.*

<sup>47</sup> This is paradoxical. Indeed, the First Amendment has been held to protect anti-First Amendment views, which is also paradoxical. See Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 *U. Chi. L. Rev.* 173 (1956); see also Post, *Racist Speech*, *supra* note 25, at 303–4 (discussing the paradox of public discourse exemplified by tolerating the intolerant). And see Chapter Nine *infra*.

protected.<sup>48</sup> This position, however, is, for related reasons, both unhelpful for Track Two analysis and also wrong. Regardless of what alternative sets of laws we compare in assessing Track Two challenges, political information will be lost and gained under each.<sup>49</sup> Furthermore, the evaluation of the political information at stake surely will be political in the sense that requires governmental nonpartisanship. More fundamentally, the question of what information has political relevance is itself political.<sup>50</sup> If that is true, the position that freedom of expression protects only political speech devours itself.

Would Track Two analysis avoid the “point of view” problem if it sought “balance” or “representation” or “adequate airing” of points of view? This tack is equally unavailing. First, how many issues are there, and how many points of view are there on each? Second, whose position “represents” a point of view? Third, when has that position been “adequately aired”? The first question, if it is a meaningful one, is not a metaphysical one but one itself referable to points of view. Moreover, the number of points of view per issue is not determinable, since any answer depends on how the “issue” is described and what information and state of the argument is posited.<sup>51</sup> As for representation and adequacy of airing, no one can represent my point of view except me; and that point of view has not been adequately aired until it is universally accepted. To illustrate, if people disagree with me, they obviously have not listened or understood, or they are intellectually deficient. How else can I explain their disagreement if I still hold my point of view to be correct?

This discussion reveals a deep paradox in freedom of expression theory. There are those, such as Owen Fiss and Jürgen Habermas, who want the realm of expression to be a realm of pure process, the substantive results of which are correct because of the purity of the process from which they emerge. Yet, to make the process “fair,” they would build in substantive constraints. Fiss wants more diversity, more balance; Habermas wants to build in the various conditions that define his “ideal speech situation.”<sup>52</sup> Any conception of diversity

<sup>48</sup> See, e.g., Lillian R. BeVier, *The First Amendment and Political Speech – An Inquiry into the Substance and Limits of Principle*, 30 *Stan. L. Rev.* 299, 300 (1978) (proposing that in principle the First Amendment protects only “political” speech); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* (1971) (proposing that the categories of protected speech should consist of speech concerned with governmental behavior, policy, or personnel).

<sup>49</sup> Consider the effect of *Schneider v. State*, 308 U.S. 147 (1939), and *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 830 (1992), on the political proposition that “streets and airports should be free of pamphleteers,” a proposition communicated symbolically by the presence of the laws struck down in those cases.

<sup>50</sup> Ninety-nine percent of us would agree that the *MacNeil/Lehrer News Hour* has more relevance to political choices than do reruns of *Gilligan’s Island*. Yet, how do we convince the remaining one percent while remaining politically “neutral”?

<sup>51</sup> See Strauss, *supra* note 46, at 349.

<sup>52</sup> See Jürgen Habermas, *Communication and the Evolution of Society* (1979); Jürgen Habermas, *Legitimation Crisis* (Thomas McCarthy trans., 1973); Owen M. Fiss, *Why the State?*, 100 *Harv. L. Rev.* 781 (1987); Owen M. Fiss, *Free Speech and Social Structure*, 71 *Iowa L. Rev.* 1405

and balance, however, will be the product of, and will privilege, particular points of view. Balance and diversity can only be ascertained relative to an opinion of what points of view are plausible or sound.<sup>53</sup> Fiss's version of a fair process will be partisan, and the partisanship deprives any outcome of pure procedural legitimacy.<sup>54</sup> Similarly, Habermas's conditions for the ideal speech situation build partisan positions on all the major substantive issues into his procedural conditions. What comes out of the process will be predetermined by what went into setting it up.<sup>55</sup>

In short, a pure freedom of expression process is a vacuous concept. There are just different background conditions for expression, each of which will lead to different substantive outcomes.

(1986). It turns out that when one builds in the substantive conditions required to make the "speech situation" "ideal," there is little if anything left to debate. See Tom Campbell, *Justice* 221 (2001); Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 *San Diego L. Rev.* 763, 782 n.43.

<sup>53</sup> See Post, *Managing Deliberation*, *supra* note 26; Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 *U. Chi. L. Rev.* 20, 40 (1975); cf. Frank I. Michelman, *Property and the Politics of Distrust: Liberties, Fair Values, and Constitutional Method*, 59 *U. Chi. L. Rev.* 91, 103–4 n.47 (1992):

There are other arguable cases of unfair impairment by some people's speech of the value of other people's speech that a committedly liberal constitutional-legal order may have little choice but to disregard. It may happen that less meritorious arguments backed by an individual speaker's superior personal endowment of wit, chutzpah, eloquence, or charisma gain undue advantage in the speech market over more meritorious insights that a slower-witted, duller-spoken person has trouble articulating. However, personal handicapping in such circumstances seems not a liberally entertainable possibility. Again, it may happen that what an audience experiences as comparative cogency and soundness of argument is just a reflex of the comparative familiarity or conventionality of the ideas being urged. If this is at all a frequent occurrence, then public-forum doctrines of content-neutral order-maintenance and equal access may be a recipe for ensuring that currently prevalent views and perspectives will continue to prevail regardless of their responsiveness to the interests and values of the audience. But by what standard can liberals deal out 'deviance' or 'dissidence' subsidies?

*Id.* (citation omitted).

<sup>54</sup> See Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 *U. Chi. L. Rev.* 225, 251 (1992).

To be sure, if government controlled all the resources, then very little would be left of the value of free speech. There are two responses, however, to this concern. First, as classic liberals have always known but socialists have forgotten, a limited government and a vigorous private sector firmly beyond government's reach are crucial to freedom of the spirit as well as to economic liberty. This is the basis of the old saying that liberty is indivisible. Since community control over resources is the light that beckons on the left, the left – to the extent it cares about freedom of the spirit – must seek out devices that will discipline the government's monopoly in the realm of ideas. But any such device must consist of an official arbiter (that is, a government arbiter) to attempt to distribute access to the public forum. And that device cannot be content-neutral. It must decide which views have been heard too much, which not enough, and which should not be heard at all. The only content-neutral device turns out to be a society in which a significant portion of the resources are in private hands and beyond the reach of government altogether.

<sup>55</sup> See Strauss, *supra* note 46; Michael Walzer, *Moral Minimalism*, in *From the Twilight of Probability* 3, 3–14 (William R. Shea & Antonio Spadafora, eds., 1992).

Post understands the legitimacy difficulty faced by those who, like Fiss and Habermas, seek to manage freedom of expression. On the other hand, Post fully appreciates the other side of this paradoxical predicament.<sup>56</sup> For Fiss, Habermas, and others with similar views are correct that the set of background entitlements and laws will affect the outcomes of the freedom of expression process.<sup>57</sup> Yet, one such set must always be in place. If we cannot evaluate that set and compare it with other possible sets in terms of message effects, we cannot evaluate the most important determinants of outcomes of freedom of expression, at least not on freedom of expression grounds.

This is the paradox. Track Two laws are extremely important in determining the quality of public debate. Indeed, Track Two laws almost assuredly have a much greater effect on expression than laws covered by principle (5), where government's purpose is to affect messages, if relative effects can be meaningfully measured. Nevertheless, the core freedom of expression value that no partisan point of view be privileged precludes government from evaluating information gains and losses, which, in turn, means that Track Two analysis is precluded by freedom of expression itself.

Again, the point is not just an institutional one about the limits of courts. It applies to any institution subject to the obligations imposed by the putative right of freedom of expression. Legislative evaluations of information, though democratic (unlike judicial evaluations), are themselves antithetical to the core freedom of expression value.<sup>58</sup>

Finally, one might argue that adopting a comprehensive normative theory – such as Rawlsianism, utilitarianism, or libertarianism – as the vantage point for freedom of expression analysis provides a basis for evaluating information gains and losses and thus for evaluating Track Two laws. The rejoinder to this position is that although comprehensive normative theories are in one sense the proper bases for evaluating Track Two laws, they are the proper bases only insofar as they are not distinctly related to freedom of expression. Rawlsianism, utilitarianism, and libertarianism are frameworks for assessing the entire corpus juris – to see if it maximizes liberties and wealth, maximizes aggregate or average welfare, or reflects libertarian rights – and as such frameworks, they are important to Track Two analysis. As comprehensive frameworks, however, they have nothing to do with expression or relative information value as distinct issues apart from liberties, welfare, and libertarian rights. Usually a comprehensive

<sup>56</sup> See Post, *Managing Deliberation*, *supra* note 26, at 37–8; Post, *Racist Speech*, *supra* note 26, at 287–8; Post, *Public Discourse*, *supra* note 26, at 683–5.

<sup>57</sup> See Sunstein, *supra* note 19, at 262, 271–7, 294–7; see also Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 *Sup. Ct. Rev.* 105, 111–16.

<sup>58</sup> Thus, a decision that there shall be public libraries, not public tennis courts, if it is a decision about the relative values of the information provided by libraries and tennis (and not just a weighing up of constituents' preferences *qua* preferences), represents government's endorsement of a partisan political view that is arguably inconsistent with freedom of expression. See *supra* text accompanying notes 25–6.

normative theory assumes full information of whatever type the theory makes relevant and then directs that that information be deployed to produce the results the theory dictates. And even if we assume the lack of full information, information effects can only be relevant to the choice of Track Two laws in a very restricted way. We would have to assume that the choice among Track Two laws were entirely neutral with regard to all values made relevant by the theory in question, and that relative information effects were the only ground for choice. The theory would then dictate that we choose that set of laws most likely to lead to the information upon which the theory itself places the higher value.

Yet, even in this extremely restricted way in which comprehensive normative theories would be relevant to Track Two analysis, choosing laws because their message effects are endorsed by a specific normative theory poses a freedom of expression problem. Presumably freedom of expression, even if its ultimate justification rests on a comprehensive normative theory, forbids imposing such a comprehensive normative theory on citizens' evaluative decisions. Further, since imposition of a single comprehensive normative theory is the strongest of all governmental intrusions on the citizens' evaluative processes, it is arguably the most antithetical to freedom of expression.

The upshot of this is that comprehensive normative theories are of no help when it comes to Track Two analysis, at least with respect to how freedom of expression bears on Track Two laws. If utilitarianism or Rawlsian theory favors a particular set of laws regulating property, contracts, torts, crimes, taxation, the environment, and so on, then, assuming the comprehensive normative theory is correct, those are the laws we should have *irrespective of their message effects*. Indeed, the message effects of those laws are not only irrelevant, but they may be perverse. In a world of Rawlsian laws, anti-Rawlsian views may be generated more pervasively and with more vigor than in a world of non-Rawlsian laws. Rawlsian theory cannot favor Rawlsian Track Two laws because of their message effects, but must do so because those laws maximize equal basic liberties and the primary goods of the least advantaged.<sup>59</sup> Similarly, utilitarianism cannot favor welfare-maximizing Track Two laws because of their message effects – which may be anti-utilitarian – but must do so because they are welfare-maximizing. Comprehensive normative theories are not irrelevant to the choice of Track Two laws – they may be *all* that is relevant ultimately – *but they are irrelevant to that choice on freedom of expression grounds*.

**3. SUMMARY.** If we assume the position of ignorance regarding message effects – what would be said, to whom, by whom, and to what effect – under alternative sets of Track Two laws, then we can make no evaluation of those sets in terms of information gains and losses. At most we can assume that under each such set, the deliberate production of information will face a recapture

<sup>59</sup> See John Rawls, *A Theory of Justice* 302–3 (1971).

problem, a point that is normatively impotent because it applies to all alternative sets of laws.

On the other hand, if we assume the position of knowing the information effects under each alternative set of Track Two laws, we then face the problem that all evaluations of such information are positional and partisan and should not be officially endorsed by government. Even a comprehensive normative theory underlying freedom of expression will be too strong to be a Track Two tool because it will usually endorse a set of Track Two laws on grounds independent of information gain and loss. Moreover, comprehensive theories are nothing more than partisan positions that the government should not endorse in attempting to structure public debate, even if, paradoxically, they themselves provide the justification for freedom of expression and its proscription of their own endorsement.

### *B. The Implication of the Failure of Balancing*

Track Two freedom of expression analysis requires that we balance information gains and losses and all other values furthered by the entire set of laws in question against the information gains and losses and all other values furthered by all the alternative entire sets of laws. We cannot do this as a practical matter. Perhaps more importantly, we cannot do this as a theoretical matter. Even if we knew what information each alternative set of laws would generate, freedom of expression itself forbids government to act on an evaluation of that information. *Track Two analysis is not an extension of freedom of expression but a violation of it.* Track Two laws can be evaluated on many grounds – but not on freedom of expression ones.

There are two major implications for the freedom of expression to be drawn from this conclusion. Most obviously, the courts should no longer hear Track Two challenges to laws.

The second implication, however, is directed at legislation, not adjudication, and is quite farreaching. If my analysis is correct, the legislature violates freedom of expression if it adopts and imposes through law any partisan evaluation of information, which is to say, any evaluation. Essentially, although the government may enact laws based on a variety of values, it may not rely on the value of information gained or lost in choosing which laws to enact or repeal. Or at least it may not do so without violating the evaluative neutrality at the core of freedom of expression.

This, in turn, suggests that the government's decisions whether to build an auditorium to provide a forum for public debates, to fund election campaigns, to expand public education, to fund research, and a multitude of other decisions resting wholly or in part on government's evaluation of information rather than its aggregation of private preferences, are problematic.

This implication, however, appears to offend common sense. Do we not need more fora for public debate, more public funding of elections, more broadcasting

options, more education, and more research? Should government not support such endeavors?<sup>60</sup> Yet, how can one answer those who disagree without presupposing what information such endeavors would produce and without evaluating that information and its opportunity costs through the prism of a controverted, partisan point of view?

Ultimately, Track Two analysis reveals not only its own freedom of expression illicitness, but also the illicitness of all information-conscious legislative decisions regarding the quality and quantity of public discourse. Consider a legislative debate, such as might have occurred within the New York City Port Authority prior to *Lee*, over whether to allow the sale and distribution of literature inside the airport terminals and thereby incur the costs of congestion, annoyance, extra policing, clean-up, and so forth. The legislative body will be aware that if sale and distribution are not allowed, some passengers will not receive some messages, usually religious or political, and usually not mainstream. On the other hand, a clean, uncongested airport, aside from being valuable in itself, also communicates various messages to its patrons. Furthermore, the money saved on clean-up can be used to provide other services – including perhaps schools and libraries – or can be put in the pockets of taxpayers who might spend it on information. How is the choice to be made? The legislative body might disregard remote, uncertain, or amorphous message effects and focus only on the most direct, certain, and specific effects, such as the effects on the Hare Krishnas or the LaRouchites. Even so, what should it do? Should it count these effects as outweighing the nonspeech costs? Why? Because it sympathizes with the Hare Krishnas and LaRouchites and believes others should hear their messages at the cost of other values and messages? Alternatively, should it consider these effects as outweighed by the costs? Again, why? Legislative evaluation of the Hare Krishnas' and LaRouchites' messages seems inevitable if message effects are to be taken into account, but such evaluation on closer examination appears quite illicit.

Alternatively, consider a debate within a legislature or administrative agency over whether the broadcast media are sufficiently “diverse” or “balanced” in the array of information they provide the listeners and viewers in their markets. This debate can be meaningful only if there are criteria for identifying degrees of importance of information,<sup>61</sup> criteria for diversity,<sup>62</sup> and criteria for balance.<sup>63</sup> The choice of such criteria is deeply evaluative and partisan.

<sup>60</sup> See Benjamin Barber, *Strong Democracy* 267–8, 305–7 (1984); Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 *N.Y.U. L. Rev.* 633, 646–7 (1991).

<sup>61</sup> For example, diversity of political information is more important than diversity of music formats.

<sup>62</sup> For example, how many positions are there on labor policy, is a novel free-market position on world trade more or less diverse than a tired Marxist view, and is the latter more “diverse” relative to mainstream political programming than is religious programming or farm reports?

<sup>63</sup> For example, does a strong speech by, say, Ronald Dworkin balance three speeches by, say, Bono or the Dixie Chicks?



Current United States Supreme Court Track Two jurisprudence seems most consistent with the following position: The legislative bodies may enact or modify Track Two laws explicitly in order to facilitate speech activities or to promote balance and diversity as long as the legislature is presumed to have had no clear impression of what information would be favored and disfavored, or no particular sympathy for the messages likely to be favored. Governmental decisions to allow demonstrations, to open facilities for pamphleteering, to build public auditoria and other communicative fora, to break-up media monopolies, and to subsidize broad categories of information media will uniformly be upheld, even if those decisions were premised on some estimate of the relative value of information lost and gained.<sup>64</sup> Because the content of the information gained in these cases cannot be known with any certainty when the decisions are made, the decisions are no more arbitrary than had they been made without regard to information gains and losses. As long as the legislative body is operating in the dark, the Court will not care that concern for message effects was what determined the outcome of the legislative balance.

This analysis explains as well why the Court often strikes down obviously content-based regulations of time, place, and manner. If, for example, the legislative body has taken a partisan position in favor of speech related to labor disputes and against all other speech,<sup>65</sup> or in favor of non-religious speech and against religious speech,<sup>66</sup> the Court will strike down the time, place, and manner regulation.

Thus, when the government makes a Track Two decision based on message effects, the Court will sustain the decision if it believes that the legislature could not have evaluated information effects in a partisan manner. Where the legislative decision appears to be partisan, however, the Court will invalidate it.

When government's Track Two decision is not based on message effects – when it is purely content-neutral – Track Two First Amendment jurisprudence is destined to fail. That is so because no Track Two theory is available that is consistent with the core value of freedom of expression – citizen autonomy regarding the evaluation of information. The courts can strike down and, as in *Schneider* and *Lee*, have struck down laws in such Track Two cases. Nonetheless, Track Two judicial decisions can only be either arbitrary or illicit.

We must therefore reject principle (4) as definitive of the scope of freedom of expression. Principle (4) would deem to implicate freedom of expression all

<sup>64</sup> It is difficult to come up with unambiguous support for this statement because governmental decisions are almost always challenged on First Amendment grounds when they obviously restrict speech or obviously favor some subjects or viewpoints, and not when they subsidize speech in an apparently nonpartisan manner. Nonetheless, the Supreme Court has occasionally faced First Amendment challenges to governmental speech subsidies. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 92–108 (1976) (holding federal subsidy of election campaigns constitutional); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (holding fairness doctrine in broadcasting constitutional).

<sup>65</sup> *See Carey v. Brown*, 447 U.S. 455 (1980); *Police Dept. v. Mosley*, 408 U.S. 92 (1972).

<sup>66</sup> *See Widmar v. Vincent*, 454 U.S. 263 (1981).

governmental acts that affect quantitatively or qualitatively the receipt of messages that someone intended to communicate. But all governmental acts, and all alternatives to those acts, do so, and there is no neutral evaluative perspective from which to review the message effects of every possible corpus juris.

Jed Rubinfeld also rejects principle (4) and endorses principle (5), which is concerned solely with whether government's purpose is to affect the content of messages. Rubinfeld, responding to the proposal by Judge Richard Posner<sup>67</sup> that all laws – even laws that are content-neutral and not enacted for the purpose of affecting messages – be assessed by balancing their benefits against their costs, including their effects pro and con on expression, points out the absurdity of the proposal by considering someone arrested for violating the 55-mile-per-hour speed limit who claims that he was speeding to express some idea.

A cost-benefit judge . . . would be obliged to hold a full-dress trial to consider this kind of claim, because if the judge were persuaded (1) that driving over 55 miles per hour has some “expressive value” (which Posner does not dispute), and (2) that the 55-mile-per-hour limit is actually a bad thing for highway safety, fuel efficiency, and so on, then the judge would indeed have to strike the speed limit down. . . .

For all I know, the no-speed-limit rule prevailing on certain European highways is a better policy than a 55-mile-per-hour speed limit. Although I assume that the latter saves lives, I suspect that the question is debatable. I imagine that it is the subject of numerous studies. I'm confident, however, that this is not a constitutional question, and I'm certain it is not a First Amendment question. But under cost-benefit analysis, it is a First Amendment question. The cost-benefit approach allows a routine traffic violation to be converted into a First Amendment case, with full-dress judicial review of utterly legislative policy questions.

The root problem here is that a cost-benefit judge cannot reach the proper response to the speeder's argument: dismissal for failure to state a claim. A purpose-based First Amendment explains this result without difficulty. Empirical data tending to show that a 55-mile-per-hour speed limit is bad policy in no way suggests a state purpose to punish anyone for speaking. A person arrested in the ordinary course for speeding is arrested for what he was *doing*, not for anything he was *communicating*. As a result, the defendant has no First Amendment claim – period. Looking at the case this way makes the policy merits of the speed limit exactly what they should be: constitutionally irrelevant.<sup>68</sup>

Rubinfeld points out that under principle (4) and the balancing test that would attend it, everyone engaged in expressive conduct could claim a freedom-of-expression exemption from whatever content-neutral law otherwise restricted them. Newspapers, for example, might claim an exemption from sales taxes, which decrease sales and ultimately access to information.<sup>69</sup> Posner denies that such an exemption, or a similar exemption of authors and television anchors

<sup>67</sup> Richard A. Posner, “Pragmatism Versus Purposivism in First Amendment Analysis,” 54 *Stan. L. Rev.* 737 (2002).

<sup>68</sup> Jed Rubinfeld, “A Reply to Posner,” 54 *Stan. L. Rev.* 753, 761 (2002).

<sup>69</sup> *Id.* at 761–2.

from the income tax, would be a plausible result of balancing because it would amount to subsidizing such activities.<sup>70</sup> Rubenfeld replies:

“Subsidy” is a nasty word in the economist’s lexicon, but even assuming that a tax exemption is a subsidy in the relevant sense, what exactly is wrong with the “subsidy” here? Is the “bad consequence” of this “subsidy” that it will, precisely, increase the subsidized activity? If so, then Posner’s argument runs as follows: “It would be absurd to exempt authors and TV anchors from federal income tax on the ground that the exemption would lead to an increase in expressive activity, because the exemption would lead to an increase in expressive activity.” There is an absurdity here, but not the one Posner intends.

The “bad consequence” of subsidization seems to be that subsidizing “authors and TV anchors” would lead to *excessive* authorship and television news programming. But what does “excessive” mean here – inefficient? How does the cost-benefit judge know how much authorship and news programming is enough? No explanation is offered.

The truth is that our law almost never grants free speech exemptions from laws of general applicability. This is not because courts do a cost-benefit analysis and find the scales always tipping against exemption. It is because the freedom of speech, in American law, recognizes no right to an exemption, even when the generally applicable law is burdensome. Cost-benefit analysis simply cannot handle this doctrinal fact. Newspapers just do not have a free speech claim to an exemption from taxes, from minimum wage laws, from labor relations laws, or from any of the other generally applicable laws that impinge on them.<sup>71</sup>

As Rubenfeld points out, this result – the absence of freedom-of-expression exemptions from Track Two laws – is incomprehensible to a balancer.<sup>72</sup> Track Two laws probably have a much larger impact on what gets said, to whom, and with what effect than the Track One, content-based laws that fall under principle (5). For Rubenfeld, and for me, “[t]he message is clear: *The cost-benefit First Amendment* – that is, principle (4)-defined freedom of expression – *is not our First Amendment.*”<sup>73</sup>

<sup>70</sup> Posner, *supra* note 67, at 744.

<sup>71</sup> Rubenfeld, *supra* note 68, at 762–3.

<sup>72</sup> *Id.* at 763.

<sup>73</sup> *Id.*

## The Puzzles of Governmental Purpose

In the [previous chapter](#) I established that freedom of expression is not implicated by governmental regulations and acts that *affect* what messages are received, for all regulations and acts have message effects. What remains as a candidate principle for defining the scope of freedom of expression is principle (5), which holds that freedom of expression is implicated whenever government acts for the *purpose* of affecting what messages are received. In the next two chapters I shall examine principle (5) in terms of what laws come within it and whether invalidation of such laws in the name of freedom of expression is morally warranted. In this chapter, however, I want to raise some problems that attend any principle that makes the validity of laws turn on the purposes of the government in enacting them.

### I. The Various Venues of Governmental Purpose

There is no difficulty in locating the governmental purpose to affect messages in laws that by their terms predicate civil or criminal liability on communicating messages with specified content. Thus, a law forbidding “public displays of contempt for the American flag” (such as burning an American flag in public with the intent to express hostility toward America or American policy) comes squarely within principle (5). Its governmental purpose to affect messages is found on its face. It is the type of law that the [next chapter](#) addresses.

Perhaps less obviously, principle (5) also unproblematically covers solitary governmental acts where the governmental body or official takes action based on the content of a communication. Thus, suppose that there is a law forbidding “burning objects on the city streets and sidewalks,” but police officers routinely allow people to burn various items as long as the fire is controlled and no people or buildings are endangered. Suppose further someone burns an American flag on a street to express contempt for American policy. Finally, suppose that a police officer arrests him under the “burning objects” statute, not because the fire was dangerous or uncontrolled, but solely because the police officer was

hostile to the message being expressed. In such a case, the content-neutral Track Two law has in effect been amended in this one case to become a Track One content-based law identical to the law banning “displays of contempt.” And it is the purpose of the police officer in exercising his discretion whether to enforce the “burning objects” law that brings the arrest within the scope of freedom of expression under principle (5). American free speech jurisprudence, moreover, clearly recognizes that a message-suppressing purpose by a governmental body or official exercising discretion under a law that does not itself single out certain messages raises a free speech issue.<sup>1</sup>

There is a third type of governmental act that falls within principle (5) that is less obvious, however, and perhaps more controversial. That type consists of those instances when government enacts a content-neutral Track Two law for a message-suppressing or message-altering purpose. Thus, suppose that there is a period of time in which the only objects being burned in public are American flags, which are burned to express contempt for American policy. The government, enraged by the contempt displayed, unconcerned about fires on city streets, but also aware that a law that by its terms forbade burning American flags would violate freedom of expression, passes the law against “burning objects.” Later, when the wave of burnings of American flags passes, the government repeals the “burning objects” law. The effect of passing and repealing the content-neutral “burning objects” law for a content-based purpose such as expressing contempt for American policy is no different in effect from enacting a content-based law against expressing contempt for American policy. “Burning objects” turns out to be a convenient content-neutral proxy for the content-based prohibition of “displaying contempt.”

Indeed, there is no real difference between the content-based discretionary enforcement of a content-neutral law and the content-based enactment and repeal of a content-neutral law. As long as the government has discretion – in the one case, over how broadly to enforce the law, and in the other, over whether to enact or repeal the law – then its purpose in acting (enforcing, enacting, repealing) will be relevant and will determine whether its action falls within principle (5).<sup>2</sup> Put differently, governmental purposes will be relevant

<sup>1</sup> See, e.g., *Wayte v. United States*, 470 U.S. 598 (1985); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977).

<sup>2</sup> As Jed Rubenfeld puts it:

A person made liable under a prohibitory law is punished *for* speaking if and only if: (1) the law makes the fact that he was communicating an element of the prohibited offense; (2) the legislative purpose was to target speech even though the prohibition is speech-neutral on its face; or (3) the law was selectively enforced to target speech. If none of these three conditions holds, then the person will have no free speech claim at all, no matter how expressive his words or actions were.

Jed Rubenfeld, “The First Amendment’s Purpose,” 53 *Stan. L. Rev.* 767, 784 (2001). See generally Larry Alexander, “Constitutional Theory and Constitutionally Optional Benefits and Burdens,”

to the moral permissibility of governmental actions in any case in which the government has morally permissible options – that is, the option whether to enact (or repeal) a particular law, or the option whether to enforce it. Only in cases when the government has no morally permissible option regarding enactment and enforcement is its purpose in enacting and enforcing immaterial to the moral permissibility of what it does. I shall return to this connection between the relevance of governmental purposes in enacting and repealing laws and the existence of permissible options below.<sup>3</sup>

## II. But Still, Why Do We Care About Purpose?

Having now shown that a message-affecting governmental purpose implicates freedom of expression no matter whether the law in question is on its face content-based or content-neutral – unless, that is, the government is morally compelled to enact and fully enforce a specific law – I wish to raise a puzzlement about the conclusion. I am not referring to the problem of attributing purposes to multimember governmental bodies such as legislatures, agencies, and some courts, although that *is* a problem. Others have dealt with the issue of whether groups can “intend” things, or whether only individuals can. Some think there is such a thing as group intentionality apart from the convergence of individual intentions.<sup>4</sup> Others deny this.<sup>5</sup> But this, although a real problem, is one that has been widely discussed, and so I shall omit discussing it here.

The puzzle I wish to raise is this. Ultimately, our concern with government’s purposes in enacting and enforcing rules – including our concern with whether enactments, repeals, enforcements, and nonenforcements violate rights such as the putative human right of freedom of expression – must rest on a concern with the *effects* of actions taken with such purposes. After all, if government’s purposes were never reflected in the effects of its acts – for example, what messages get heard, by whom, and with what impact – we would not care *why* government did what it did. (Similarly, if the people who caused harm in the world – death, injury, loss of property, and so forth – never did so with culpable mental states [purpose, knowledge, recklessness]; and if the people who acted with culpable mental states never caused the harms they culpably tried to cause or thought they were causing or risking; then there would be no point to criminal prohibitions.) Our aim in declaring certain governmental acts violative of human rights is not ultimately to ferret out culpable governmental actors but

11 *Const. Comment.* 287 (1994); Larry Alexander, “Rules, Rights, Options, and Time,” 6 *Legal Theory* 391, 399–401 (2000).

<sup>3</sup> See Sect. IV *infra*.

<sup>4</sup> See, e.g., John Searle, *The Construction of Social Reality* 23–6, 37–9 (1995).

<sup>5</sup> It is a standard weapon in the attack on intentionalism in statutory and constitutional interpretation. See, e.g., Larry Alexander, “All or Nothing at All? The Intentions of Authorities and the Authority of Intentions,” in A. Marmor, ed., *Law and Interpretation* (1995): 357, 387–8, 392–3.

is to prevent certain harms from occurring to those subject to the government. Effects, not governmental purposes, must be what ultimately matter.

### **III. Moral Permissibility as a Product of Effects Over Time, Not Momentary Effects**

I have said that although government's purposes are what implicate the putative right of freedom of expression, governmental actions must ultimately be assessed by their effects.<sup>6</sup> But consider the following scenario. Assume two cities, A and B. A has a law forbidding "the public burning of the American flag to express contempt for the United States or its policies." B has a law forbidding "burning objects on city streets and sidewalks." Johnson, angered by U.S. foreign policy, burns an American flag on a street in A. Jackson, similarly angered, burns an American flag on a street in B. Each is prosecuted under the aforementioned laws and defends on freedom of expression grounds. Johnson may well have a good case.<sup>7</sup> Jackson, however, whose conduct and motivation were identical to Johnson's, should almost certainly lose, or so I have argued in Chapter Two. Given their identical conduct and motivation, what explains the difference in freedom of expression outcomes? In other words, how can it be the case that if the effects of the laws of cities A and B on Johnson and Jackson are identical, the freedom of expression outcomes can differ?

The most plausible answer goes something like this. It is true that in the cases of Johnson and Jackson, the effects of A's rule and B's rule are the same. But if we assume that both rules will endure over time, then the cumulative effects of each will differ. A's rule will result in the suppression of those, and only those, who burn American flags contemptuously, and who are expressing a narrow range of messages thereby. It will allow those who wish to communicate other messages, or the same message by other means, to do so. At the same time, A's rule will contribute very little to eliminating the danger of public conflagrations. B's rule, on the other hand, will suppress all and only those who burn objects in public, regardless of their communicative intent, if any. Over time, therefore, A's rule will more likely skew public debate than will B's rule and will be less effective than B's rule in promoting public safety.

The same point applies to other kinds of rules. For example, a rule that whites, but not blacks, may swim at a public pool is unjustifiable, but not because of

<sup>6</sup> I am ruling out any independent role for "expressivist harms," that is, harms caused solely by perceptions of the values government intends to express by its actions. For a full account of my position, see Alexander, "Rules, Rights, Options and Time," *supra* note 2, at 394–5. See also Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 *Md. L. Rev.* 506 (2001); Matthew D. Adler, *Expression and Appearance: A Comment on Hellman*, 60 *Md. L. Rev.* 688 (2001).

<sup>7</sup> See *Texas v. Johnson*, 491 U.S. 397 (1989), for the outcome under for American constitutional law. (Johnson wins.) We shall consider the soundness of this result in the *next chapter*.

its effects at any given instant in time. At 3:30 p.m. on Tuesday, only whites may be interested in swimming. At 4:30 p.m., after the whites have left, the blacks who wish to swim but who are not allowed are no worse off than if the jurisdiction in question had no public pool, which we may assume is a morally permissible state of affairs. But over time, if the rule persists, the effects of the rule will be that whites will be able to swim and blacks will not. These effects are what make the rule improper.<sup>8</sup>

#### IV. Rules and Optionality

If the human right of freedom of expression is primarily a right against rules enacted with certain purposes rather than a right to engage in specific acts, then the rules that are permissible in terms of this right must also be optional in terms of the right. That is, permissible rules for purposes of freedom of expression are rules that are neither forbidden nor required by freedom of expression.

The connection between purpose-focus and optionality appears to be one of mutual entailment. Purpose-focus entails optionality: If the impermissibility of A's rule means that Johnson escapes punishment, it must be because B's rule is not required. For if B's rule were morally required, then leaving aside questions of notice, the court in A could just order A's officials to punish everyone who burns an object in public, including Johnson. By hypothesis, it would be morally impermissible for A to refuse to punish Johnson. If Johnson is entitled to escape punishment, it must be the case that B's law is not morally required but is, instead, optional.

Optionality also entails law-focus rather than act-token focus. Johnson burns his flag. It is constitutionally optional whether he gets punished. If A has B's law, then A will permissibly punish Johnson. If A has no law against burning objects in public, then A will permissibly (or so we have stipulated) decline to punish Johnson. And, of course, if A has a law against burning American flags, it will attempt, but will not be permitted (because of freedom of expression), to punish Johnson. Given that there are morally forbidden but no morally mandated rules prohibiting Johnson's act, we cannot determine whether Johnson's punishment for the act is constitutional without knowing the law under which he is punished.

The moral optionality of laws has two versions. One version is substantive, captured by Justice Oliver Wendell Holmes's statement in his *Lochner* dissent that "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."<sup>9</sup> Or, in John Ely's updated version of that position, the Constitution does

<sup>8</sup> See Alexander, *supra* note 2, at 300–7.

<sup>9</sup> *Lochner v. New York*, 198 U.S. 45, 75 (1905). Justice Holmes went on to say, "[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views. . . ." *Id.* at 75–6.



not enact either John Rawls or Robert Nozick.<sup>10</sup> It may forbid certain political moralities, but it permits legislators to choose among more than one political morality.

For example, suppose the legislature is morally permitted to enact either the Rawlsian liberal welfare-state corpus juris or the Nozickian libertarian corpus juris.<sup>11</sup> Suppose the former includes welfare grants of \$3,000 per month to the poor, financed through redistributive taxation, and the latter includes a prohibition on all redistribution of wealth of this sort. This would explain why both generous welfare grants and no welfare grants are considered permissible.<sup>12</sup>

We might assume additionally that genuine compromise between the permitted options – for example, welfare grants higher than Nozick would allow but lower than Rawls would require – would also be allowed. On the other hand, “compromises” introducing elements, such as race, that are immaterial under any permitted political morality would be forbidden. Thus, Rawlsian welfare for whites but Nozickian (non)welfare for blacks would be impermissible.

The second version of optionality sees it not as substantive but as institutional. That is, the legislature may very well be required to enact one political morality – be it Spencer’s, Rawls’s, Mill’s, or Nozick’s – but only part of that political morality will implicate judicially-enforceable human rights. Most of the mandated political morality will have the status of “underenforced norms.”<sup>13</sup>

Whichever account of optionality we prefer, the result is the same. Legislators are permitted by the courts to act as if many rules are neither forbidden nor required. And optionality, whatever its justification, should not be a controversial assumption. Not only does it square with most nations’ constitutional doctrine, but it also accounts for the relative importance given to legislative bodies, their selection and their powers. If human rights entailed a complete blueprint of nonoptional rules that were completely judicially enforceable, legislatures would be relegated to minor details, and the judiciary would assume an importance entirely out of proportion to the role implied in actual constitutions.<sup>14</sup>

<sup>10</sup> John Hart Ely, *Democracy and Distrust* 56–8 (1980).

<sup>11</sup> A similar example is used in Alexander, “Constitutional Theory. . .,” *supra* note 2, at 296–99, and in Larry A. Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 *Ohio St. L.J.* 3, 24–39 (1981).

<sup>12</sup> See *Dandridge v. Williams*, 397 U.S. 471 (1970) (rejecting the notion that welfare, though constitutionally permissible, is a “fundamental interest” under the Constitution).

<sup>13</sup> See Lawrence Sager, *Fair Measure. The Legal Status of Underenforced Constitutional Norms*, 91 *Harv. L. Rev.* 1212 (1978).

<sup>14</sup> There are two further but quite tangential points that I wish to make about the picture of constitutional adjudication that emerges from the preceding sections. First, technically, it is not individual rules that are constitutional or unconstitutional, but the entire set of rules – the entire corpus juris – of which they are a part. Thus, if A were to have on its books not only a rule prohibiting burning American flags in public, but also a second rule, carrying the same penalty, prohibiting public burning of any object that is *not* an American flag, the *set* of A’s rules would be constitutionally permissible, and Johnson would have no better constitutional objection to

## V. Optionality and Switching

Assume two opposing rules are both optional. For example, assume that punishing those who burn objects in public is permissible but not required. The rulemaker may choose to ban public burnings, or it may choose not to ban them.

Assume that the rulemaker has chosen to ban public burnings and has enacted a rule to that effect. It now has a change of mind (or a change of personnel) and wishes to repeal the rule. May it do so? To deny this choice would be to say that options exist only at the time of the first legislative choice (in the entire history of the regime!). After that, the rulemaker would be frozen into one of the optional political moralities. This would effectively mean that optionality would not exist.

Therefore, because we assume optionality does exist, we must conclude that the rulemaker is always free to change its mind and switch from one optional rule (really, set of rules) to another. There may be some very limited freezing principles that retard such switching – for example, under the United States Constitution, the Takings Clause,<sup>15</sup> the Obligations of Contracts Clause,<sup>16</sup> and

his punishment than Jackson. The contrary position would throw constitutional analysis into the morass of determining how to individuate rules.

Second, in a world of options, questions of standing loom large. See Alexander, *supra* note 2, at 307–9. Consider Allan Bakke, who objected constitutionally to the admissions rule at the University of California medical school that favored minorities over whites. Regents of the Univ. of Calif. at Davis v. Bakke, 438 U.S. 265 (1978). Even if that rule was unconstitutional, there were an indefinite number of constitutionally permissible (if not wise) admissions rules available, under many of which Bakke would not have been admitted. The University of California could have taken the top scores on the MCATs, in which case Bakke would have been admitted, but it also could have constitutionally chosen open admissions, or preferences for tuba players, and so on. Does anyone who would have gotten into the medical school under some constitutionally permissible rule have standing to object to a constitutionally impermissible rule? If so, many minorities as well as whites would have had standing to challenge the admissions rule. If not, why did Bakke have standing? (Or, to update this example, if a state university adopts an admissions rule that automatically admits the top, say, four percent of each high school class, and does so because of the rule's racial impact, it has arguably acted unconstitutionally under current precedents – see Larry Alexander & Kevin Cole, *Discrimination by Proxy*, 14 *Const. Comment.* 453 (1997) – but who of those not admitted will have standing to complain?)

Indeed, given that it is entire sets of rules that are unconstitutional, it might appear that anyone who can point to a constitutionally optional alternative set under which he would be better off will have standing to complain that the set is unconstitutional. If the rule against burning objects in public is kept on the books *because* of its impact on burners of American flags, and is deemed unconstitutional for that reason – see Section VII *infra* – someone charged with burning trash on the street could conceivably have standing to challenge the rule's application to him on the ground that there is a constitutionally optional set of rules that does not include a rule prohibiting burning objects in public. Indeed, conceivably anyone would have standing who was suffering from the impact of any rule within the unconstitutional corpus juris! But what remedy could he get?

<sup>15</sup> *U.S. Const.* amend. V.

<sup>16</sup> *Id.* art. I, § 10.

the nonretroactivity aspect of the Due Process clauses<sup>17</sup> operate to qualify the ability to change from one optional rule to another – but in most instances, a rulemaker is free to change at any time from one optional rule to another.

## VI. Optionality and Legislative Motivation

The permissibility of legislative switching among optional rules having been established, consider the following variant on our original hypothetical: City A, constitutionally forbidden to enact a rule targeting those who burn American flags, decides (1) to enact a rule forbidding all public burning of objects immediately upon being informed that someone is about to stage a protest and burn an American flag and (2) then to repeal that rule immediately after the protest. In other words, City A has adopted – albeit informally – a “metarule” to switch back and forth between enacted rules “No burning allowed” and “Burning allowed” in such a way as to prevent those who wish to burn American flags from doing so but otherwise to allow public burnings.

Suppose now that Johnson burns his American flag and is arrested for violating the “no burning” rule, which was enacted immediately before his act – assume he had proper notice of it – and which was repealed immediately thereafter. Does Johnson have a valid freedom of expression objection?

The answer has to be yes. The real rule here – one that persists unchanged over time – is the metarule defined by the rulemaker’s purpose, not the momentary published rules that are, in effect, merely the metarule’s applications. Given optionality and the permissibility of switching, we must treat legislative purpose as material. Otherwise, we would be unable to distinguish the legitimate phenomenon of legislative switching among permissible rules from the illegitimate phenomenon of applying a single impermissible rule constantly over time.

Other examples illustrate this point. Suppose a city wants to bar blacks from the city’s swimming pool. A rule “no public swimming for blacks” would violate the Equal Protection Clause of the United States Constitution. On the other hand, a public swimming pool open to all would be a constitutionally permissible redistribution of wealth, and the closing of the public swimming pool would be a constitutionally permissible libertarian measure. So the city instructs the lifeguard on duty to hang the “pool open” sign whenever whites show up to swim, and to hang the “pool closed” sign whenever blacks show up. Because the rule “public swimming for whites but not blacks” is unconstitutional, so too is the instruction to the lifeguard. It is the operative rule for constitutional assessment, not the published rules “pool open” and “pool

<sup>17</sup> *Id.* amends. V and XIV, § 1.

closed,” which are merely its applications.<sup>18</sup> So the rulemaker’s purpose matters whenever we are dealing with rules that are constitutionally optional on their face. The purpose essentially defines the real rule that must be constitutionally evaluated. Is *that* (purpose-defined) rule constitutionally optional, or is it constitutionally forbidden? This best explains why the United States Supreme Court has deemed legislative purpose to be material in equal protection cases such as *Washington v. Davis*<sup>19</sup> and *Personnel Administrator of Massachusetts v. Feeney*<sup>20</sup> and in First Amendment cases such as *Wayte v. United States*.<sup>21</sup> The laws in these cases were constitutionally optional on their face. Therefore, it is material whether they were enacted for reasons that were also constitutionally optional as opposed to constitutionally forbidden.<sup>22</sup>

Earlier I argued that the permissibility of rules turned on their effects over time. Here I have argued that permissibility turns on the rulemakers’ purposes. Am I not contradicting myself?

The answer is that permissibility turns on *both* purposes and effects. The legislative purpose behind the rule *defines* the rule for purposes of evaluation. For instance, City A’s purpose to suppress only the burning of American flags converts its published rule, “No burning of objects in public,” into its real rule, “No burning of American flags in public.” *And it is the latter rule that is evaluated by its effects.* In other words, ultimately the permissibility of all rules turns on their presumed effects over time. (Remember: their permissibility cannot turn on their effects relative to any given act token; for the same act token that is impermissibly punished under one rule might have been permissibly punished under a different rule.) Purpose is important, however, in determining what the rules actually are.<sup>23</sup>

<sup>18</sup> And consider the many possible constitutionally legitimate reasons for which each Chinese applicant to run a laundry could have been denied a license in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). How do we know that the members of the San Francisco Board of Supervisors were not switching among the various possible legitimate rules for awarding licenses? Because whatever legitimate reasons might have been applicable had they merely been changing their minds about what reasons to choose, the circumstantial evidence was overwhelming that they were not changing their minds but were consistently following a single illegitimate purpose or metarule, to exclude Chinese. See Alexander, “Constitutional Theory . . .” *supra* note 2, at 302–4.

<sup>19</sup> 426 U.S. 229 (1976).

<sup>20</sup> 442 U.S. 256 (1979).

<sup>21</sup> 470 U.S. 598 (1985).

<sup>22</sup> This analysis also shows the futility of recent attempts to get around such antidiscrimination laws as California’s Proposition 209, which prohibits, *inter alia*, racial discrimination in admissions to public universities. *Cal. Const.* art. 1, § 31. Administrators who select facially nonracial admissions criteria “in order to promote racial diversity” are not avoiding the law but are violating it. They are choosing close proxies for race for racial reasons, and we must assume that if the reasons remain constant over time, the proxies will change if necessary. See Alexander and Cole, *supra* note 14. The real rule is “admit so as to promote racial diversity,” which is forbidden.

<sup>23</sup> Because legislative purposes can render otherwise constitutionally optional rules unconstitutional, improperly motivated legislative *inaction* and *repeals* of rules are as unconstitutional as improperly motivated enactments. The status quo is no more constitutionally privileged than

## VII. Rules and Time

I have argued that rules must be evaluated based on their effects, which of necessity means their effects over time. I have also argued that if that evaluation is concerned with rules rather than with the particular act-tokens that fall under them, then that entails the view that the rules are optional; and I have argued that the converse relation holds as well, namely, that optionality entails a concern with rules rather than act-tokens. I have further argued that if rules are optional, rulemakers may switch back and forth among them. Finally, I have argued that rulemakers may not (apparently) switch back and forth among optional rules if they are really consistently following an improper metarule.

If all of these arguments are correct, however – and I believe that they are – then we are left with a theoretical mystery: Why do we project a rule into the future and use its anticipated future effects to hold it unconstitutional, whereas the same effects in the past do not impugn rules?

To illustrate this mystery, I shall expand the original hypothetical:

City A has had a rule banning the public burning of American flags on the books for one year. It has now been repealed. Johnson burned an American flag while the law was in effect and is currently being prosecuted.

City B has had a rule banning all public burning for one year, and the rule remains on the books. It just so happens that the only people who have wanted to burn objects in public during the past year have been those who wanted to burn American flags. Jackson did burn an American flag and is now being prosecuted.

City C has alternated between a “no public burning” rule and having no rule regulating public burning. It has done so because it has changed its mind for constitutionally legitimate reasons. It just so happens, however, that all those prosecuted during the times the “no public burning” rule was in effect were those burning American flags in political protests. Jensen was such a person and is now being prosecuted.

City D has, like City C, switched back and forth between the same alternatives. Unlike City C, however, City D has been consistently motivated by its desire to punish those, and only those, who burn American flags. Jencks<sub>1</sub>, a flag burner, is being prosecuted under the “no public burning”

change, given that the status quo may itself be the product of improperly motivated failure to act. And that means that the courts must impose a remedy whenever they find a constitutionally improper rule that renders the entire set of optional rules unconstitutional. However, given that there are perhaps many constitutionally optional alternative sets of rules, which such set should they impose? They cannot evade this problem, because the legislature may not act. And if the legislature does not act, the corpus juris must be judicially altered. But which of the alternative sets of rules should be chosen? (Notice how this problem of remedy is merely the flip side of the problem of standing mentioned in note 14 *supra*.) See also Alexander, “Constitutional Theory . . .,” *supra* note 2, at 307–9.

rule in effect when he acted. A new city council, composed of radicals sympathetic to flag burning, has taken office since Jencks<sub>1</sub>'s arrest.

City E is like City D, except that the new city council took office *before* Jencks<sub>2</sub>'s flag burning and left the "no public burning" rule on the books for legitimate reasons.

City F has just repealed a "no public burning" law and enacted a "no burning an American flag" rule that will sunset in one month, when a new city council, composed of radicals sympathetic to flag burning, will take office. Jinks burned an American flag after the "no burning an American flag" rule was enacted and is being prosecuted.

Now according to the arguments I have given, Johnson (City A), Jencks<sub>1</sub> (City D), and Jinks (City F) are being prosecuted improperly. On the other hand, Jackson (City B), Jensen (City C), and Jencks<sub>2</sub> (City E) are being permissibly prosecuted. Yet all burned American flags in protest. The past effects of the rules in each city were the same. Moreover, the future effects of some of the improper rules – for example, City D's and City F's – appear to be more benign than the past effects of the permissible rules in effect in B, C, and E. Indeed, the past *and* future effects in D and E appear indistinguishable; yet Jencks<sub>1</sub> is prosecuted improperly in D, but Jencks<sub>2</sub> is not prosecuted improperly in E.

I regard this pattern of results and the asymmetry between future effects and past effects as sorely in need of justification. Unfortunately, I have none to offer. Perhaps these hypotheticals merely illustrate the more general point made in Chapter **Two**, namely that Track Two laws – the entire corpus juris excluding laws aimed at the content of messages received – have much greater message effects than laws within the scope of principle (5), those the purpose of which is to have message effects. Governmental purposes must be definitive of the scope of freedom of expression issues because, as Chapter **Two** showed, message effects cannot be. Governmental purposes, however, would be of no concern to us independently of their effects in the world; and given optionality and its corollary, switching, the effects of content-based purposes on particular messages might track or exceed in severity the effects of content-neutral ones.

### VIII. Conclusion

Somewhere, something has gone wrong. Perhaps the putative human right of freedom of expression entails a complete blueprint of legislative, executive, and judicial action with respect to every possible act-token. If so, then optionality would not exist, and governmental purposes would be immaterial.

Alternatively, perhaps human rights law is an *expressivist* battleground, concerned with evaluating rulemakers and the "meanings" they express (intentionally?) by their rules, rather than with evaluating the rules based on the rules' more straightforward effects. Perhaps judicial invalidation on human

rights grounds is itself meant primarily to express contrary meanings rather than to see that public debate is unskewed, or that public pools are open to everyone, or that other similarly tangible results are brought about. Perhaps, but I seriously doubt it. It is true that we, like dogs, can tell the difference between being tripped over and being kicked, but it matters to us only when we care about the attitude of our injurer. Human rights law seems, to me at least, to be properly concerned with rules and their tangible – and remediable – effects, not with governmental attitudes.

Another possibility is that laws resulting from certain legislative purposes are invalidated, not because we know their effects will be bad, but because we cannot predict and assess their effects with any reliability. Instead, we use certain legislative purposes as proxies for defective legislative deliberations, which we conclusively presume to lead to bad effects. In other words, desired effects are to be achieved, not by direct judicial implementation through invalidation of legislation that fails to produce those effects, but through a judicially enforced *rule* invalidating all legislation that is enacted for specific illegitimate purposes, regardless of whether the legislation ultimately differs in its effects from legislation enacted for proper purposes.<sup>24</sup>

The principal problem with this argument is that it results in different treatment of identical laws in separate but otherwise similar jurisdictions. For example, if jurisdictions A and B are otherwise similar, and even have the same number of prospective flag-burners and prospective burners of other objects, but A enacts its no burning law in order to get flag burners, while B enacts an identical law in order to protect the public, the “skewed deliberations” theory would deem A’s law, but not B’s, to be unconstitutional. Yet however reliable or unreliable are judicial predictions of effects, the effects of these two laws are identical (that is, except for the effects we might predict when either the circumstances or the legislatures change – the effects that I regard as important). Conclusively presuming them to be different might seem nonsensical. If A committed a human rights error in its deliberations, then it would appear to be a harmless error.

Of course, one could still argue that, although different results in cases of identical laws enacted for different purposes look nonsensical, over the long run the purpose-focused rule will perform better than an effects-focused rule. In other words, if the concern is, say, a skewing of public debate, then a rule invalidating all legislation enacted to favor or disfavor certain viewpoints might, in the long run, produce less skewing than an effects-focused rule, even if in specific cases the former rule produced as much or more skewing than the latter.<sup>25</sup>

<sup>24</sup> See, e.g., Mitchell N. Berman, “Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions,” 90 *Georgetown L. J.* 1, 25–6 n. 100 (2001).

<sup>25</sup> This is Mitch Berman’s point, and he may be correct. See *id.* If so, then my puzzles evaporate. Or at least my theoretical puzzles do. The question then becomes an empirical one: Is a jurisprudence that employs a concern with government’s purpose as a proxy for a concern with the effects

Finally, one might argue by analogy to criminal recklessness that it is wrong to risk harm to another without a sufficient reason for doing so. If the government, as the community, risks stifling speech for no sufficient reason (because it objects to the message), then it has acted recklessly without regard to whether harm results.

Now it is true that one can make a case for governmental recklessness here in terms of culpability. But it is doubtful that actual wrongdoing, as opposed to culpability, can be shown. For example, suppose a driver takes what he believes is a substantial and unjustifiable risk of hitting a pedestrian, but we can see that the driver will not in fact hit the pedestrian. If such were possible, would we enjoin the driver? No. The driver will in fact cause no harm, despite his culpability. On the other hand, even if the driver is driving quite safely, if we can see that he will hit a pedestrian, we will enjoin him despite his lack of culpability.

In the case of laws such as the “no public burning” law that are enacted for improper reasons (because they will stifle flag burning), there are good reasons for the law – public safety – that coexist with the bad. If the good reasons outweigh the bad – which they may since the same law enacted for good reasons is permissible – then the law produces no net social harm. We have government culpability, perhaps, but not an enactment that will cause harm. The proper analogy in the criminal law context would be a reckless act that we know will fail to cause the harm it risks and will actually produce a benefit. We must punish the defendant for his culpability, but we would not enjoin his conduct.

However, unless I am wrong about either of these two points, then I believe we end up with the odd pattern of constitutional judgments I presented in the [previous section](#). That pattern surely needs to be justified or denied, neither of which I can do. As the King of Siam was wont to say, “It’s a puzzlement.”<sup>26</sup>

I do have an intuition, however, that the source of this problem – and the remedial and standing problems that go with it – is optionality. If human rights do entail a single, coherent political philosophy, then rules will be either mandated or forbidden but will not be optional. Legislative purpose will not matter. A mandated rule will be proper regardless of why the legislature enacted it, and a forbidden rule would not be redeemable by good intentions. Switching between permissible rules will be impossible because only one set of rules will be permissible. And the remedy for improper enactments will be to reestablish the mandated corpus juris.<sup>27</sup>

government produces warranted by the facts; or, are other proxies or a direct look at effects superior ways to deal with the effects that are the ultimate concern?

<sup>26</sup> Richard Rodgers and Oscar Hammerstein, *The King and I*.

<sup>27</sup> In Chapter Two I examined briefly whether a comprehensive normative theory, such as a Rawlsian, utilitarian, or libertarian one, which would in principle render all rules either mandatory or forbidden, can justify a freedom of expression analysis of Track Two laws. See Chapter Two, text at note 58. I concluded not only that comprehensive normative theories cannot



Optionality may carry with it the virus of incoherence. Rights against rules may best describe large portions of human rights and constitutional doctrine, but ultimately rights against rules and its corollary of the optionality of rules suggest a picture of human rights and constitutional law in which we care only *why* people are treated as they are by government and not about *how* they are treated. Such a picture ultimately seems a radical distortion of why we care about human and constitutional rights.

justify Track Two analysis, but also that such theories might not be able to account for a right of freedom of expression of any sort. In Chapter [Seven](#), I take up this issue more generally.



PART TWO

THE CORE OF FREEDOM OF  
EXPRESSION

GOVERNMENT REGULATIONS AND ACTS  
TAKEN TO AFFECT MESSAGES



# The Core of Freedom of Expression

## Regulations of Conduct for the Purpose of Affecting Messages Received

Having shown in Chapter [Two](#), primarily through an excursion into American First Amendment jurisprudence and its Track Two component, but with some glances at the analogous jurisprudence of Canada and Australia, that principles (1), (2), (3), and (4) – all of which focus on the *effects* of regulations on messages intended and received – are untenable for delimiting the scope of freedom of expression, I concluded that principle (5), which has as its focus the regulator’s *purpose* in regulating conduct, defines that scope. Principle (5) includes within freedom of expression all conduct that is restricted for the purpose of affecting the messages that audiences receive. It is immaterial under principle (5) whether the conduct is the conventional method of expressing ideas – written or oral language – whether it is intended to express ideas by those engaging in it, or whether most people would receive the message in question from observing or hearing the conduct. All that matters is *why* the conduct is regulated. If it is regulated because of a message that the regulator wishes to suppress, alter, or otherwise affect, freedom of expression is implicated. Thus, if government forbids people from climbing Half Dome in Yosemite National Park – not because of the danger that they might be injured, not because of the harm they might cause the environment, but because government fears that some of them are receiving spiritual messages from the experience that the government wishes them not to receive – freedom of expression is in issue despite the absence of a speaker, an intent to speak, conventional symbols, and perhaps even the meaning most would attach to the experience. The same would be the case if government banned toy guns for children out of fear that a few children would get militaristic ideas.

Principle (5) defines the scope of freedom of expression by the purpose of the regulator. (I shall assume for the time being that “regulator” and “government” are synonymous, though I shall take up this issue later.) And the purpose that

defines a freedom of expression issue is that of affecting the content of messages received.<sup>1</sup>

Content regulations can usefully be subdivided into three types. First, there are regulations designed to affect content where government fears that the message, if unaffected, will cause harm without any further choice by the audience receiving it. Second, there are regulations designed to affect content that it is feared will otherwise cause harm through a further choice by the audience, but a choice that the government cannot control because the audience cannot be penalized for making the harmful choice. And third, there are regulations that are like the second type, except that the audience *can* be penalized for making the harmful choice. I take up these three types of content regulations in turn.

### I. Content Regulations Where the Message Directly Causes Harm

The content of messages received can directly cause many types of harm that government may legitimately try to prevent. The content of a message may be a confidence between an attorney and his client, a physician and her patient, or a priest and his penitent. The content may be a sensitive diplomatic or military secret that the government does not want other governments to learn. The content may be an embarrassing fact about a nonpublic figure. The content may be “owned” by someone who has not authorized its communication; or the conveyor of the message may be under a contractual duty not to convey its content. The content may offend the audience’s sensibilities, or cause the audience emotional trauma. The content may bias the jury in a civil or criminal trial. It may create the appearance of bias by a judge or other supposedly impartial decision maker. Or the content may be received by the audience as a coercive threat.

Now if content regulation of this sort – the sort involved in invoking confidentiality and secrecy restrictions, the privacy tort, intellectual property law, contractual obligations, laws banning offensive speech, the tort of infliction of emotional distress, gag orders on lawyers and closed judicial proceedings, the crime of uttering threats, and even the rules governing the admissibility of evidence<sup>2</sup> – is to be deemed to implicate freedom of expression, there are three possible courses open. First, we might hold that all such laws violate the right of freedom of expression. People should be free to send and receive messages the content of which is confidential, private, created by another, emotionally distressing, and so forth. This would, of course, have very profound implications and would represent a major change in the jurisprudence of all those countries that recognize a legal right of freedom of expression.

<sup>1</sup> For support for the position that principle (5) is the defining principle of freedom of expression, see Larry Alexander, *Free Speech and Speaker’s Intent*, 12 *Const. Comm.* 21 (1995); Jed Rubenfeld, *The First Amendment’s Purpose*, 53 *Stan. L. Rev.* 767, 769, 777–8, 784 (2001).

<sup>2</sup> See Christopher J. Peters, *Free Speech and Evidentiary Rules* (forthcoming).

The second alternative would be to say that although such regulations implicate freedom of expression, they do not necessarily *violate* freedom of expression. Whether a content-regulation of the sort we are considering violates freedom of expression will depend upon the results of *weighing* the interest in freedom of expression against the government's interest in preventing harm to confidentiality, privacy, ownership and creativity, emotional peace, and so forth.

If we take this second, less radical course, however, then we are back in the same briar patch we entered with Track Two regulations. For how can we construct a metric for weighing the interests in receiving certain messages against the harms those messages cause unless we assign a value to the ideas or information those messages contain? If we assume ignorance of what ideas and information will be affected, we have an obvious problem in assigning weight to the ideas and information. On the other hand, if we assess the ideas and information *ex post*, with knowledge of what they are, we still must assign them value to be weighed against the harms they threaten; and how can we do that except by reference to a framework that will differ from person to person and that will be partisan and controversial through and through?<sup>3</sup>

Let me illustrate this dilemma through some examples. First, assume that a client reveals to his attorney, in confidence, that he committed a serious crime – perhaps perjury, fraud, or even murder – in his past. Later, the client is a candidate for high office – the Senate or the presidency – and because of public-spiritedness, the attorney desperately wants to reveal what he knows about the candidate. Finally, assume there are no exceptions in the laws requiring attorneys to keep clients' confidences that would permit the attorney to reveal those confidences in cases like the one we are imagining. Thus, if the attorney discloses what he knows about the candidate, the attorney may be disbarred and/or fined. Is the attorney-client privilege more important than keeping serious criminals from being elected to high office?<sup>4</sup>

Second, assume a newspaper prints a "human interest" story that discloses that a child math prodigy now works at a menial job,<sup>5</sup> or that a current member of respectable society used to be a prostitute.<sup>6</sup> The subject of such a story sues the newspaper based on the state tort of disclosure of embarrassing private facts, and the newspaper invokes freedom of expression as its defense. Is freedom of expression more or less important than the state's interest in protecting privacy?<sup>7</sup>

<sup>3</sup> For a similar argument against balancing, see Rubenfeld, *supra* note 1, at 789, 793, 824. *See also* Jed Rubenfeld, "A Reply to Posner," 54 *Stan. L. Rev.* 753, 757 (2002) (rejecting balancing as inimical to freedom of expression).

<sup>4</sup> *See* Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 *Iowa L. Rev.* 601 (1989).

<sup>5</sup> *See* *Sidis v. F-R Publishing Corp.*, 113 F. 2d 806 (2d Cir. 1940).

<sup>6</sup> *See* *Melvin v. Reid*, 112 Cal. App. 285 (1931).

<sup>7</sup> The Supreme Court has indicated in several of its opinions that restrictions on speech because its content revealed some private fact are consistent with freedom of speech, though it has never

Third, assume that a photographer copyrights his exclusive photographs of the assassination of a president, that certain facts about the assassination are a matter of widespread interest and concern, and that the photographs might shed light on those facts. And suppose that a magazine publishes the photographs without obtaining the photographer's permission and invokes freedom of expression as a defense to the subsequent copyright infringement suit.<sup>8</sup> Is freedom of expression more or less important than protecting artistic, scholarly, and literary creativity? In this case? In a sufficient number of cases to warrant a broad rule that covers this case? What if the copyrighted matter were a human cannonball act and the infringement its unauthorized broadcast on the eleven o'clock news?<sup>9</sup>

Fourth, assume that a defendant utters hateful epithets (or makes otherwise offensive comments) to the plaintiff, knowing that the plaintiff will be traumatized, and is sued for the tort of intentional infliction of emotional distress, or is

upheld any such restriction. In every case presenting the issue, the Court has found that the information was in the public domain because it had been lawfully obtained from public sources. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989). On the other hand, where the information is obtained through an unlawful invasion of privacy but is not "private" in content, the Court has distinguished between the unlawful violator of privacy, who can be sanctioned, and the press that republishes the content, which cannot. *See, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Bartnicki v. Vopper*, 121 S.Ct. 1753 (2001). This distinction between the privacy violator or leaker of confidential information, on the one hand, and the press that ends up publishing the "contraband" information to the public at large, is a difficult one to rationalize, particularly when the press is aware that the information is contraband. *See Paul Gewirtz, "Privacy and Speech," 2001 Sup. Ct. Rev. 139* (criticizing the Court for drawing this distinction).

The courts in other countries that recognize freedom of expression have generally allowed interests in privacy and confidentiality to trump it. *See, e.g., Re C*, 10 B.H.R.C. 131 (1991) (protecting privacy over freedom to publish celebrity photos in Germany); *Douglas v. Hello! Ltd.* (No.1) [2001] Q.B. 967 (protecting interests in privacy and confidentiality in England).

For an attempt to justify excluding some speech about private matters from freedom of expression protection, and an attempt to define such speech, see Daniel J. Solove, "The Virtues of Knowing Less: Justifying Privacy Protection Against Disclosure," 53 *Duke L. J.* 967 (2003).

<sup>8</sup> *See Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968).

<sup>9</sup> *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (upholding claim against unauthorized broadcast of a performance).

Edwin Baker takes the position that copyright laws do violate the right of freedom of expression in cases where the infringer is neither acting for commercial gain at the expense of the copyright holder nor attempting merely to destroy the value of the copyright. C. Edwin Baker, "First Amendment Limits on Copyright," 55 *Vand. L. Rev.* 891, 900, 905–13 (2002). He also opposes on freedom of expression grounds restrictions on publishing private information. *Id.* at 944. The same logic might lead him to endorse, on freedom of expression grounds, the right to publish material whose content is confidential, emotionally traumatizing, threatening, covered by a restrictive contract, prejudicial to a fair trial, and so on, at least if the publication is not made for the purpose of destroying confidences, traumatizing, threatening, etc. Indeed, it is not clear why Baker limits the right to infringe copyright so as to exclude those who infringe for commercial reasons. Normally, in First Amendment jurisprudence, a profit motive does not derogate from the constitutional protection of expression. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).



prosecuted for the crime of uttering hate speech or the crime of making offensive comments.<sup>10</sup> Should freedom of expression bar prosecution or recovery?

And as my final example, assume that a defendant, for valuable consideration, agrees not to disclose publicly certain information that the plaintiff does not wish disclosed, and that defendant later breaches that agreement and invokes freedom of expression as a defense to the breach of contract suit.<sup>11</sup> Does freedom of expression trump the state's interest in enforcing otherwise valid contracts? In all cases? If only in some, which ones?

My point with these examples is not that we, individually, cannot do the weighing. We can, or at least we do, just as the legislature has done whenever it decides that the tort, contract action, or crime covers the act of communicating a particular message. My point is, rather, that the results we come up with will be a function of what we believe is true and valuable, and that each of us will differ along these lines. And this in turn means that when content regulations of the sort under consideration are evaluated, first by the legislatures (or courts or administrators) that enact them, and then by the courts that hear the challenges to them on free expression grounds, we shall have governmental officials deciding on whether a message is protected by freedom of expression either in complete ignorance of what the message is or on the basis of *their* views of what is true and valuable. And having governmental officials restricting the receipt of messages because they do not regard the messages as true or sufficiently valuable seems to be inconsistent with the very idea of freedom of expression. For if freedom of expression does not, at a minimum, prevent government from

<sup>10</sup> See *Cohen v. California*, 403 U.S. 15 (1971); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978); *Sable Communications of California v. F.C.C.*, 492 U.S. 115 (1989).

There are some who are skeptical about the harmfulness of offensive expression, especially if that harmfulness is supposed to justify censorial regulation. The famous jacket for which Cohen was prosecuted, emblazoned with "Fuck the draft," seems positively tame in today's world of HBO, R-rated movies, and rap music. Suppose, however, that Cohen, unable to generate sufficient shock with his verbal slogan, decides to replace the words on his jacket with a pictorial representation of his idea. Perhaps he has a photograph of a couple copulating that he can enlarge and silk-screen on his jacket, along with the words "Do it to the draft." Or if that is not shocking enough, suppose he greatly enlarges the photograph and puts it on a billboard. Or suppose, instead of a photograph, he has a woman wearing a sash with the words "the draft" on it copulate in public with a man wearing a sash bearing the words "the people." (From the standpoint of freedom of expression, words seem no more privileged than photographs; and photographs should be no more privileged than the live acts they portray, unless the live acts produce some harm in addition to offense.) Does one really want to maintain that offense can never provide a legitimate basis for prohibiting messages, even accepting *Cohen's* quite valid point – one I emphasized in Chapter Two – that any regulation of the medium through which a message is conveyed will affect the content of that message?

For the most sustained and philosophically acute argument for why certain offensive conduct can legitimately be banned, see Joel Feinberg, *The Moral Limits of the Criminal Law Vol. Two: Offense to Others* (1985).

<sup>11</sup> See *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (upholding enforcement of contractual obligation not to reveal source of newspaper story). See also *Douglas v. Hello! Ltd.*, *supra* note 7.

censoring messages because *it* deems them to be of too little value, what *does* it prevent government from doing?

The Supreme Court generally has upheld regulations of speech when the content of the speech could be deemed to be “owned by another,”<sup>12</sup> or “subject to another’s contractual right,”<sup>13</sup> and so forth. What is not appreciated is how radically these decisions undermine principle (5). In all these cases the government wishes to prevent receipt of a message because of its content. Of course, the laws under which the government acts are framed in a content-neutral way in terms of the harms the government is trying to prevent – use of another’s property; breach of contract; disclosure of confidences, secrets, or private facts; infliction of emotional distress; and so on. *But in every case implicating freedom of expression, government acts to prevent harms that can be described in content-neutral ways.* The fact that the ultimate purposes of governmental regulations of the content of expression are the prevention of harms that themselves can be described without reference to the content of messages cannot exempt those regulations from freedom of expression concerns without reducing the latter to a nul set.<sup>14</sup> So if government’s purpose is to prevent harm by

<sup>12</sup> See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (upholding claim against unauthorized use of copyrighted materials); *Zacchini v. Scripps-Howard Broadcasting Co.*, *supra* note 9.

<sup>13</sup> See *Cohen v. Cowles Media Co.*, *supra* note 11.

<sup>14</sup> Perhaps were a government to ban speech solely on the ground that the speech is false, and not because its being false would lead to further harms (*i.e.*, to some type of detrimental reliance), we would have an example of a regulation of messages that could not be recharacterized as the prevention of a harm describable in a content-neutral way. But if freedom of expression applied only in that circumstance, it would have virtually no practical implications. Governments almost always ban messages because of fear of harms that those messages might cause. If freedom of expression only requires that government be able to cite to some harms that it may legitimately prevent and to offer sufficient evidence to support its fear that the messages it seeks to suppress will bring about those harms, freedom of expression would be an almost completely inconsequential right. Moreover, because any restriction of liberty by government should be supported by a showing that the exercise of the liberty will cause harm to a legitimately protectable interest, freedom of expression would be merely an instance of a general right to liberty.

For an example of the view of content neutrality against which I am arguing, see Jeremy J. Ofseyer, “Speech or Opinion? Two Objects of First Amendment Immunity,” 2002 *Utah L. Rev.* 843, 903–6.

The United States Supreme Court occasionally ignores this point and treats message regulation as content-neutral because government’s concern is with the harms the receipt of the message brings about, and not with the message per se. The most notorious examples of this are the Court’s “secondary effects” cases, in which it upheld restrictive zoning of adult movie theaters and bookstores because of the neighborhood blight their presence produces. See *Young v. American Mini-Theatres*, 427 U.S. 50 (1976); *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986). In such cases, however, it is the “adult” message that draws undesirables into the neighborhood and causes desirable uses to exit.

Likewise, in some cases that the Court has treated as involving only the regulation of media and not of messages – in particular, the public nudity cases such as *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and *Erie v. Pap’s A. M.*, 529 U.S. 277 (2000) – the harm that the government is trying to avert arguably is a product of the ideas formed in the minds of the audience for the proscribed conduct (sexual ideas and fantasies, which might lead to unwanted conduct),

suppressing or altering messages, its regulation falls within principle (5) and thus within the scope of freedom of expression.

Finally, one might argue that content regulations designed to prevent one-step harms violate freedom of expression unless prevention of those harms is a “compelling interest.” According to this argument, we need not balance expression interests against harm-prevention interests. Instead, we need only assign all expression that is potentially suppressed a constant value equivalent to whatever governmental interests in harm-prevention we deem “compelling.”

The problem with this argument is that it is essentially ad hoc. Presumably, it represents the conclusion of a wholesale balancing of the interest in expression against other interests. How that balancing is achieved, however, is not revealed. Moreover, neither is it revealed how one decides which kinds of harms are sufficiently serious to render preventing them through suppressing expression “compelling.” Is erosion of lawyer-client confidentiality such a harm? The loss of privacy? Infringement of copyright? Breach of contract?

The third alternative would be to hold that content regulations of the sort that we are considering *never* violate the right of freedom of expression, the same conclusion reached with respect to Track Two regulations. The reason would be the same reason for excluding Track Two regulations from the scope of freedom of expression: We cannot have a nonpartisan assignment of weight to the value of the messages suppressed that can be compared to the legitimate harms the government wishes to prevent.

Jed Rubinfeld, like me, identifies the scope of freedom of expression with principle (5).<sup>15</sup> And, again like me, he regards evaluative neutrality as at the core of freedom of expression and therefore, vehemently rejects balancing.<sup>16</sup> However, when it comes to the laws of interest here – the laws protecting against harms caused by messages directly – Rubinfeld is selectively silent. One might expect that because Rubinfeld rejects balancing and accepts principle (5), he would find laws protecting confidences, secrets, privacy, contracts, emotional wellbeing, fair trials, and so on to be per se violations of freedom of expression. That would be a quite radical conclusion, but one that would follow from Rubinfeld’s premises. If, however, one’s views of freedom of expression entailed the illegitimacy of all sorts of commonplace laws, one would expect some mention and indeed a vigorous defense of this result. But Rubinfeld says nothing about most laws of this type, much less that they are all illegitimate. He seems to be too preoccupied with defending principle (5) and evaluative neutrality from balancers to see the radical implications of his views.

or perhaps formed in the minds of others merely thinking about the conduct and its audience (offense). Indeed, it is difficult to understand how the harms that nude dancing supposedly causes could occur other than through the production of antisocial or offensive ideas.

<sup>15</sup> See Rubinfeld, *supra* note 1; Rubinfeld, *supra* note 3.

<sup>16</sup> See note 3 *supra* and accompanying text.

I said that Rubinfeld is selectively silent. The one area where Rubinfeld does analyze laws that fall under principle (5) and are designed to prevent a one-step harm is that of copyright laws.<sup>17</sup> And Rubinfeld concludes, unsurprisingly, that because copyright laws are aimed at affecting messages – specifically, they are meant to suppress messages that are “owned” by another – they violate freedom of expression. As Rubinfeld puts it

In some parts of the world, you can go to jail for reciting a poem in public without permission from state-licensed authorities. Where is this true? One place is the United States of America.

Copyright law is a kind of giant First Amendment duty-free zone. It flouts basic free speech obligations and standards of review. It routinely produces results that, outside copyright’s domain, would be viewed as gross First Amendment violations.<sup>18</sup>

Rubinfeld argues that the fact that copyright law allows others to express the copyright holder’s ideas as long as they do not employ the holder’s particular form of expressing those ideas, or that copyright law provides various exceptions under the rubric of “fair use,” does not eliminate the basic freedom of expression violation that copyright protection constitutes. The idea/expression distinction is unavailing because form and substance, medium and message, are inextricable one from another.<sup>19</sup> Each form of expression affects the idea expressed thereby in subtle and not-so-subtle ways. And as for the fair use exceptions, which favor, for example, parodic and critical treatments of copyrighted works over other treatments, Rubinfeld points out that these amount to favoritism toward certain viewpoints (those critical of the work), a violation of the evaluative neutrality that lies at the core of freedom of expression.<sup>20</sup> Fair use, in other words, rather than salvaging the legitimacy of copyright protection, “renders copyright law viewpoint-discriminatory, which . . . amounts almost everywhere else in free speech law to virtually a per se constitutional violation.”<sup>21</sup>

Rubinfeld also rejects as a sufficient justification for copyright protection that it incentivizes the production of copyrightable works – that is, that it will lead to the production of more expression than will occur in its absence.<sup>22</sup> Even if this is true, he argues, this would not be sufficient. Bans on other types of speech – the uncivil or the offensive, for example – might lead more people to engage in public dialogue rather than to shy away from it. Yet those bans

<sup>17</sup> Jed Rubinfeld, “The Freedom of Imagination: Copyright’s Constitutionality,” 112 *Yale L.J.* 1 (2002). For an attack on Rubinfeld’s argument somewhat different from mine, see Lillian R. BeVier, “Copyright, Trespass, and the First Amendment: An Institutional Perspective,” 21 *Social Phil. & Pol’y* 104 (2004).

<sup>18</sup> Id. at 3 (footnotes omitted).

<sup>19</sup> Id. at 14–16.

<sup>20</sup> Id. at 17.

<sup>21</sup> Id. (footnotes omitted).

<sup>22</sup> Id. at 22–3.

are violations of freedom of expression notwithstanding their possibly speech-productive effects.

Finally, and perhaps most importantly, Rubinfeld rejects the notion that by dint of effort and creativity, one can acquire property in forms of expression:

The property intuition says that copyright claims are immune from First Amendment scrutiny because there is no First Amendment right to trespass on someone else's "legally recognized intellectual property." The proposition proves far too much. If Congress could act with First Amendment impunity whenever it turned speech into property, the freedom of speech would turn out to mean a freedom to speak only at the sufferance of federally designated individuals or corporations. If there is no First Amendment right to "trammel on legally recognized intellectual property rights," then there would be no First Amendment problem with, say, a statute granting Microsoft the exclusive right to use English on the Internet.<sup>23</sup>

Having taken a strong position against the constitutionality of copyright protection, however, Rubinfeld then proceeds to weaken it considerably. First, he would not protect the simple piracy of another's work, for piracy involves no new creative act – no "reimagining" – but is purely mechanical.<sup>24</sup> Indeed, Rubinfeld argues that because piracy is mechanical, laws against it are not content-based. One need not understand the messages to ascertain whether straight copying has occurred.<sup>25</sup> And Rubinfeld would not protect work that makes only trivial or obvious modifications of the copyrighted work.<sup>26</sup> All other work that derives from the copyrighted work would be protected, even if it were substantially similar to the copyrighted work, although Rubinfeld would require commercial derivations to share profits with the copyright holder.<sup>27</sup>

<sup>23</sup> Id. at 29–30.

Interestingly, Rubinfeld does not take seriously the Lockean/libertarian view that property in one's intellectual creations flows from the right of self-ownership. One has used one's mind to create a resource in a way that does not diminish the stock of resources available to others; therefore, one is entitled to one's creation in the same way one is entitled to one's mind or body and to defend them against others' attempts to appropriate them. This Lockean foundation of intellectual property rights might justify exceptions for reactive, nonexploitative works, such as fair comment and satire. (That is because the intellectual property right *would* worsen the situation of others were they not entitled to react to it in these ways.)

To further digress, one might reply to the Lockean that government has no obligation to protect every natural right, especially if social welfare is not increased thereby. After all, natural rights protection by government involves others' making sacrifices for the sake of the rightholder, which sacrifices *they* might have a natural right to *refuse* making.

Even if that reply to the Lockean argument is correct, however, it leaves the Lockean right itself intact. And it would be a valid reply only if the owners of intellectual property were permitted to use self-help and enforce their intellectual property rights by any means to which they would be entitled to resort in a condition of anarchy. Government may not refuse to enforce moral rights but then refuse rightholders permission to enforce those rights themselves.

<sup>24</sup> Id. at 48.

<sup>25</sup> Id. at 49. (Query: What would Rubinfeld say about a translation of a copyrighted work into another language?)

<sup>26</sup> Id. at 55.

<sup>27</sup> Id.

In the end, therefore, Rubinfeld's critique of copyright laws is less radical than it first appears. Copyright holders do get a property right over the expression of an idea, a property right that enjoins verbatim copying and trivial changes, and that provides the basis for a claim to share in the profits of derivative works.

Why does Rubinfeld not go all the way and repudiate any property in messages? It is true that in one sense, pirates of copyrighted works do not exercise their imagination when they copy. But so what? If creators cannot own their messages, then pirates take nothing that belongs to the creators.

In another sense, moreover, pirates *do* exercise their imaginations. Suppose that after I write this book, Cambridge University Press markets it for fifty dollars. Someone who likes this book and thinks its message important might "imagine" that its message gets disseminated widely, including to those who would not buy or could not afford to buy it from Cambridge. And in pursuance of that "imagining," this admirer might place his purchased copy of the book on a copying machine and sell the reproductions for a few dollars each, the cost of the copying. Rubinfeld would not protect the pirate, but why is his "imagining" – "Alexander's work on freedom of expression widely disseminated" – less privileged than the imagining of one who borrows liberally from this work to produce a competing product?

Of course, Rubinfeld protects the latter only to the extent of (1) preventing me from enjoining him and (2) allowing him to keep whatever profits are traceable not to my efforts but to his alone. That is why Rubinfeld's proposal is much less radical than he implies. But given his initial position, why does Rubinfeld allow me to enjoin the pirate and monopolize my particular message? Why is my imagination in *creation* privileged over his imagination in *distribution*?

Or consider the example of the photographer who copyrights his exclusive photographs of a presidential assassination. Suppose another person "imagines" those photographs widely and freely distributed in order to inform the public about the assassination, and she proceeds to so distribute them without authorization from the photographer. She has merely copied the photographs. On the other hand, she has "imagined" them in a way different from how the photographer "imagines" them – restrictively available for a high fee. And she has made no profit from their use, though she has destroyed any profit the photographer hoped to make. Would Rubinfeld allow a court to enjoin her from distributing the photographs? Would he allow her to be subject to damages liability? If so, then again why is the photographer's imagination in creating privileged over her imagination in distributing?

Suppose for a moment that copyright protection were a freedom of expression violation even as to pirating. We might assume that the following would occur: Whenever one purchased a book or magazine, watched a movie or game on television, attended a live performance, and so forth, one had to sign an agreement not to "copy" it and distribute the copy in various ways. And if one violated the agreement, one would be liable in damages and be enjoined

from future violations. The question would then be, is enforcing agreements not to convey certain messages a violation of freedom of expression? If not, then copyright protection, banished through the front door of property, would enter through the back door of contract. (No one denies that the item obtained that is subject to the contract – for example, the tangible book that is then copied – is property in the ordinary sense.)

Indeed, if enforcement of contracts regarding messages is consistent with freedom of expression – and the United States Supreme Court has indicated that it is<sup>28</sup> – some of the one-step harms caused by messages other than harms to ownership could be regulated by contract. Protection of confidential communications and many secrets could be effected by contract even if they could not be protected in the absence of contract.

I cannot see, however, why resorting to contract should be necessary. It makes more sense to say that if government can ban messages that disclose confidences, secrets, or copyrighted materials as long as there is an agreement not to disclose, it can also ban such messages if its reasons for doing so are as important as those for enforcing contracts. In other words, although enforcement of contracts may be an interest sufficiently weighty to justify suppressing messages, so too might be protecting confidences and secrecy.<sup>29</sup>

In the end, Rubenfeld does not deem illegitimate all government actions that implicate principle (5) by suppressing messages that cause one-step harms. His indictment of copyright is marginal. And he is silent about the legitimacy of protecting confidentiality, secrecy, privacy, emotional well-being, contractual obligations, fair trade, and other one-step harms through suppression of messages.<sup>30</sup>

<sup>28</sup> See *Cohen v. Cowles Media Co.*, *supra* note 11.

<sup>29</sup> In cases where the government contracts for secrecy or confidentiality, I would think that primacy should be given to the interest in secrecy or confidentiality rather than to the fact of a contract. In other words, unless the C.I.A. has a legitimate reason for keeping certain matters confidential, it cannot attempt to keep them confidential by requiring its employees to agree to do so. The Supreme Court did justify enforcement of confidentiality by reference to such a contract, but I believe that the interest in confidentiality was both necessary and sufficient to support the Court's result. See *Snepp v. United States*, 444 U.S. 507 (1980).

<sup>30</sup> Although this matter is somewhat tangential, I do wish to point out an interesting aspect of one of the one-step harms that everyone accepts provides a legitimate grounds for punishing speech because of its content, namely, the harm caused by threats. Presumably, that harm consists of fear of a future violation of one's rights – or, in the case of blackmail and related types of extortion, fear of harms that are not rights-violations – coupled with whatever harms are occasioned by attempts to avoid the threatened harm. What is seldom noted is that although criminal liability for threats requires that the threatener intend to cause fear in the victim – that is, intend to have his utterance or other conduct taken to be a threat – the harm of threats may occur in the absence of that intent *so long as the victim perceives the utterance or the conduct as a threat*. In other words, although criminal liability depends on the culpability of the threatener, the harm that the government wishes to avert by criminalizing threats results from the victim's interpretation, and these two things may come apart.

Consider a website by an anti-abortion group that publishes the names of doctors who perform abortions. See *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d

Many will find it implausible that government can never forbid breaches of confidentiality, revelations of private or secret matters, unauthorized publication of owned content, and so forth. At the very least they would maintain, the value of speech that imposes such harms must be balanced against, and may be outweighed by, the value of preventing those harms. But we must keep in mind that at the core of freedom of expression lies the principle of evaluative neutrality. And that principle deprives us of a scale according to which we can conclude that the harm, say, to client confidentiality is or is not outweighed by the attorney's revelation of the client's confidences. Unless government can take a position on what is true, right, and good, it cannot perform such a balancing of interests, either on a retail (case by case) or wholesale basis. Evaluative neutrality, however, precludes its taking such a position.

My conclusion, then, is that content regulations premised on the direct harms that specific messages cause present us with a stark trilemma: Either we must deem the laws protecting confidential communications, privacy, copyright, and so forth *always* or *never* to be violative of freedom of expression, or we must permit government officials to declare what is true and valuable in the realm of ideas and information. None of the choices seems acceptable, but no fourth way is apparent.

## II. Content Regulations Where the Message Causes Harm in Two Steps

### A. *The Nonregulable Second Step*

Sometimes government wishes to prevent receipt of a message, not because receipt will cause harm directly, but because receipt will likely cause the audience to act in ways that cause harm either to others or to the audience itself. In some

1058 (9<sup>th</sup> Cir. 2002). The publishers may be intending to threaten the doctors with injury or death. On the other hand, they may be legitimately suggesting that those who oppose abortion boycott those doctors. Suppose the latter is their actual intent, but the doctors on the list infer the former intent. Is the website list a protectable exercise of freedom of expression? It *is* causing a one-step harm. And although its publishers are not intending to threaten, why should its status as protected or unprotected by freedom of expression – as opposed to the criminal liability of its publishers – turn on culpability rather than harm?

For a similar question on the context of incitement, see text following note 59 *infra*.

It should be noted that, just as it has required intent to incite in order to punish an inciter – see *Brandenburg v. Ohio*, 395 U.S. 444 (1969) – the United States Supreme Court has required an intent to threaten in order to punish threats. See *Virginia v. Black*, 123 S. Ct. 1536, 1548 (2003). Interestingly, the Court has not clarified when the less speech-protective doctrine regarding threats trumps the more speech-protective *Brandenburg* rule regarding advocacy and incitement. If a speaker intends both to incite one segment of his audience and at the same time to intimidate another segment, who might fear the incited conduct, does the speaker's message fall under the *Brandenburg* rule or under *Virginia v. Black*?



cases, the government can attempt to prevent the harm only by preventing the message from being received. In others, the government has two chances to prevent the harm: It can attempt to prevent the audience from receiving the message, and, if it fails, it can attempt to prevent the audience from taking harmful action. I take up the first of these possibilities here, and the second in the next subsection.

Here are some examples of the first type of message-induced harm. Bob spreads false and vicious rumors about Brenda that if believed will cause the audience to shun her. Bertha tells Bill, falsely, that her potion will cure his cancer and obviate the need for chemotherapy. Brian prays aloud in the presence of Brad, who is a deranged atheist and prone to go on murderous rampages whenever he hears someone proclaiming the existence of God.

In each of these cases the government may want to prevent the audience from receiving the message because it fears that the audience, in response to the message, will act in ways harmful to others or to the audience itself. Moreover, the only tenable way for the government to prevent the harm is to prevent the audience from getting the message. Once the audience has heard the message, whether it then acts in a harmful way is beyond government's ability to control. Those who hear credible lies about Brenda cannot be punished for shunning her. Nor can Bill be reliably prevented from going off his chemotherapy. And Brad, who is deranged, is totally beyond the law's ability to control.

Thus, to prevent harm, government must prevent Bob, Bertha, and Brian from getting their messages out. Such attempts fall squarely within principle (5), but do they violate freedom of expression? Should government be precluded from penalizing defamatory speech, dangerously deceptive speech, or speech that causes irresponsible actors to commit harms? What would justify a right that so restricts government?

### *B. The Regulable Second Step*

Before answering the questions just raised, let us look at the final set of laws regulating messages, those premised on preventing harms that government may also attempt to prevent by punishing the acts that directly cause them. For example, when government punishes the incitement or solicitation of crime, it seeks to prevent the harmful act – the crime – by preventing the criminal from receiving the message encouraging the crime. Of course, it also punishes the criminal acts themselves. Therefore, it has two bites at the crime-prevention apple.

Because government can punish the audience for any crimes it commits, should government be able to prevent the audience from hearing the messages encouraging those crimes? Or does so preventing the audience contravene the right of freedom of expression? On the one hand, because the acts that the messages encourage are legitimately forbidden, it may appear that any messages that encourage them must be valueless as messages and equally condemnable.

On the other hand, if freedom of expression does not protect the audience's right to assess for itself the truth and value of a message that the government deems false and valueless, then it is hard to see what freedom of expression could mean.

Thomas Scanlon, in 1972,<sup>31</sup> and David Strauss, in 1991,<sup>32</sup> put forward, as the core principle of freedom of expression, one that forbids government from interdicting messages for the reason that those messages might persuade the audience to act in ways the government deems harmful. Scanlon calls his principle the "Millian Principle."<sup>33</sup> Strauss calls his the "Persuasion Principle."<sup>34</sup> They elaborate and ground their principles slightly differently, but for my purposes it is what these principles have in common that is significant.<sup>35</sup>

The first thing to note about the Scanlon/Strauss position is that it can be given both a very broad and a very narrow reading. On the broadest of readings, the position forbids government from penalizing solicitations and other encouragements to crime, and it forbids government as well from penalizing defamations and harmful misrepresentations. For if we take the idea that an

<sup>31</sup> Thomas Scanlon, *A Theory of Freedom of Expression*, 1 *Phil. & Pub. Aff.* 204 (1972).

<sup>32</sup> David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 *Colum. L. Rev.* 334 (1991).

<sup>33</sup> There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.

Scanlon, *supra* note 31, at 213. *See also* Charles Fried, *Saying What the Law Is* (2004) 89–93 (proposing as a free speech principle one very similar to Scanlon's and Strauss's); Thomas Nagel, *Concealment and Exposure* (2002), 43–5 (arguing for a general moral principle very similar to Scanlon's "Millian Principle" for legitimate governmental action); James Weinstein, *Hate Speech, Viewpoint Neutrality, and the American Concept of Democracy*, in *The Boundaries of Freedom of Expression & Order in American Democracy* (T. Hensley, ed., 2001), 146, 164–6 (arguing that the fundamental precepts of American democracy require allowing attempts to persuade citizens to violate fundamental rights and even to repudiate democracy).

<sup>34</sup> The persuasion principle . . . holds that the government may not suppress speech on the ground that the speech is likely to persuade people to do something that the government considers harmful. Put another way, harmful consequences resulting from persuasive effects of speech may not be any part of the justification for restricting speech.

Strauss, *supra* note 32, at 335.

<sup>35</sup> Scanlon justifies his principle on the ground that equal and autonomous citizens would not cede authority to government to violate it. In other words, Scanlon's principle is one of the legitimacy of governmental acts. Scanlon, *supra* note 31, at 214.

Strauss, on the other hand, views his principle as resting on the right not to have one's autonomy, in the sense of control over one's reasoning processes, violated; it is thus a principle that extends beyond governmental action. Strauss, *supra* note 32, at 354–6.

Scanlon later repudiated his principle – T. M. Scanlon, *Freedom of Expression and Categories of Expression*, 40 *U. Pitt. L. Rev.* 519, 532–4 (1979) – a repudiation Strauss attributes to its narrow focus on governmental acts. *See* Strauss, *supra* note 32, at 356 n.62.

audience has a right to make its own assessments of messages – the right that grounds the Scanlon/Strauss restriction on the government – then laws against solicitation of crime, defamation, and misrepresentation all appear to violate the right by attempting to preempt the audience’s assessment of messages.<sup>36</sup>

<sup>36</sup> In the United States, the common law of defamation has been modified by the Supreme Court in order to conform to the Court’s view of freedom of expression. *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that speech libeling public officials is protected unless defendant knows of or is reckless regarding its falsity); *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967) (extending the *New York Times* rule to cover public figures); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (requiring negligence as a condition of liability when private figures are defamed in discussions of matters of public concern). The United States Supreme Court protects some false and defamatory speech in order not to “chill,” through fear of liability, negative speech that is true. The Court has never explained how it knows that the true speech it has thawed is more valuable than the harms caused by the false speech it has thawed. In other countries that recognize a right of freedom of expression, the courts have found that ordinary defamation law is not violative of that right. *See, e.g.*, *Barfod v. Denmark*, 149 Eur. Ct. H. R. (ser. A), 1 (1989) (European Court of Human Rights); *Reynolds v. Times Newspapers Ltd.*, [1999] 3 W.L.R. 1010 (British House of Lords); *Lange v. Atkinson*, B.H.R.C. 500 (2000) (New Zealand Court of Appeal); *Lange v. Australian Broadcasting Corp.*, 2 B.H.R.C. 513 (1997) (Austl.); *Butler v. Southam, Inc.*, 197 N.S.R. (2d) 97 (2001) (Nova Scotia Court of Appeal); *R. v. Lucas*, [1998] 1 S.C.R. 439 (Canadian Supreme Court).

In all of these countries, though to a varying extent, misleading speech that is likely to induce an audience to act to its detriment is subject to sanctions. Thus, commercial claims that are false are subject to civil and sometimes criminal punishment. *See, e.g.*, Lillian Bevier, “The Invisible Hand of the Marketplace of Ideas,” in *Externally Vigilant* (L. Bollinger & G. Stone, eds., 2001), 233 et seq. So, too, are all sorts of misrepresentations, commercial, professional, and miscellaneous, right down to “that bridge is safe to drive over.” *See, e.g.*, *The Restatement of Torts* 2d, 310, 311. *See generally* Susan M. Gilles, “‘Poisonous’ Publications and Other False Speech Harm Cases,” 37 *Wake Forest L. Rev.* 1073 (2002). Indeed, even accurate medical and legal advice can be sanctioned if the speaker has not been licensed by the government, presumably because of the danger that unlicensed persons may purvey dangerously misleading advice. *See, e.g.*, *National Ass’n for the Advancement of Psychoanalysts v. Cal. Bd. of Psychology*, 228 F. 3d 1043 (9th Cir. 2000) (involving claim that regulation of medical advice through licensing violated freedom of speech). And in some countries, false and misleading political speech can be sanctioned. *Compare* *Brown v. Hartlage*, 456 U.S. 45 (1982) (holding that a political promise incapable of being performed did not constitute grounds for overturning an election), *with* *Frieson v. Hammell*, 57 B.C.L.R. (3d) 276 (1999) (stating that political speech that contains misrepresentations can be basis for setting aside election results); *Bonneville v. Frazier*, 2000 B.C.D. Civ. J. 3690 (2000) (same). Arguably, misleading political speech is the most dangerous of all misleading speech. *But see* *Fried*, *supra* note 33, at 117.

Of course, rendering liable for damages those who make false or misleading statements could “chill” speakers and result in the reduction of true statements. However, given that we do not know what truths will be suppressed through chilling, and given that we lack an evaluatively neutral framework for assessing the importance of those truths, we cannot conclude that the harm of imposing liability exceeds the harms caused by false and misleading speech.

Finally, every country that purports to honor the right of freedom of expression outlaws criminal solicitation. *See, e.g.*, *Brandenburg v. Ohio*, *supra* note 30 (striking down mere advocacy of crime but stating that the state may legitimately punish incitements of imminent lawless acts); *Faurisson v. France*, 2 B.H.R.C. 1 (1996) (U.N. Human Rights Commission) (upholding conviction under French “holocaust denial” law enacted to prevent incitements to anti-Semitism); *Express Newspapers v. Keys*, [1980] I.R.L.R. 247 (deeming incitements to breach contracts as unprotected by freedom of expression); *Islamic Unity Convention v. Independent Broadcasting Authority and Others*, (2002) 5 B.C.L.R. 433 (CC) (stating that incitements to hatred likely to cause harm may be punished consistently with freedom of expression). And speech that

One might attempt to pare down the reach of the Scanlon/Strauss principle by exempting intentional (knowing or reckless) defamations and misrepresentations from its scope. For after all, if both the government and the speaker believe that X is false, it is difficult to see how we, as audience, have any interest in being told, with apparent sincerity, that X is true, especially when treating X as true will turn out to be harmful to others or to ourselves.<sup>37</sup>

Eliminating intentional misrepresentations does go some distance in reducing the reach of the Scanlon/Strauss principle. However, the principle still invalidates lots of laws. If Barney really believes that his quack potion cures cancer, then the Scanlon/Strauss principle protects his right to convince Betty to take it, even if government is correctly convinced that the remedy is useless and dangerous. Moreover, ordinary criminal solicitations remain protected expression under the Scanlon/Strauss principle.

One might attempt further to pare down the Scanlon/Strauss principle by eliminating from its purview assertions of “facts.”<sup>38</sup> Facts in the free expression context are frequently contrasted with opinions, on the one hand, and with values, on the other hand. But neither the fact-opinion nor the fact-value distinction seems capable of producing a tenable and robust domain of freedom of expression.

The fact-opinion distinction, which surfaces occasionally in the Supreme Court’s defamation jurisprudence,<sup>39</sup> is particularly problematic.<sup>40</sup> Almost any statement of opinion can be viewed as an assertion of facts of various types. If Bob says, “In my opinion, Brenda is a drunk,” rather than merely “Brenda is a drunk,” his “opinion” can be interpreted as implying the existence of specific

advocates disobedience or disloyalty, if intended to give aid and comfort to an enemy, can constitute the crime of treason, a doctrine in some tension with *Brandenburg*.

<sup>37</sup> Strauss does in fact exclude lying because lying, not its suppression, is paradigmatically a violation of autonomy. Strauss, *supra* note 32, at 335, 366–7. See also Michael Robertson, “Principle, Pragmatism, and Paralysis: Stanley Fish on Free Speech,” 16 *Canad. J. Law & Jurisp.* 287, 305 (2003).

<sup>38</sup> Both Scanlon and Strauss make such a move. Scanlon excludes statements of fact that cause harm only by enabling the audience to carry out what it otherwise has decided to do on other grounds – statements such as giving out the combination of the bank’s vault or the formula for making nerve gas out of common household ingredients. Scanlon, *supra* note 31, at 211–13.

Strauss, on the other hand, at times appears to be excluding all – but only – false factual statements from protection by his principle, although his principle might appear to exclude only *intentionally* false statements of fact. See, e.g., Strauss, *supra* note 32, at 366, for an example of Strauss’s ambiguity on this point.

It should be noted that there are a number of laws in the United States that are meant to deprive people of information solely because the government fears that they will use the information in harmful ways. For example, employers are routinely forbidden from gathering information that might enable them to discriminate against employees or prospective employees on various bases.

<sup>39</sup> See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (discussing the fact-opinion distinction and its relevance to the constitutionality of defamation liability).

<sup>40</sup> See, e.g., Frederick F. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 *Va. L. Rev.* 263, 276–81 (1978).

but unmentioned facts (what he has observed or heard, what inferences are warranted from the evidence he possesses, and so on). On the other hand, if Bob lays bare all of these facts and then gives his “opinion” in addition, his opinion adds nothing. It is surely harmless, but for that very reason, no government would care about suppressing it. Therefore, if government fears harm from expressions of “opinion,” it must be for the reason that those expressions contain implicit assertions of facts that the audience might believe to the detriment of the audience itself or others.

I realize that my debunking the fact-opinion distinction will be controversial, so I ask the reader to engage in a thought experiment. Imagine that someone reveals to you all the facts he knows about a third person. (All the facts includes such things as background assumptions about the world, reasoning methodologies, and so forth.) Assume further that all the facts are true. Finally, the person states an opinion about the third person that is defamatory. However, because the facts and reasoning methodology – or at least that much of the reasoning methodology that you agree with – do not support the defamatory conclusion, you will not draw that conclusion yourself despite its assertion by the speaker. All of the persuasive power lies in the facts and reasoning methodology, and they do not lead you to the defamatory conclusion. Bare opinions are harmless because they are inert. If they are harmful, it is because they imply unstated facts.

The same problem infects the distinction between assertions of fact and assertions of value. To the extent that government fears the latter, it does so because it fears the audience may be persuaded to adopt the values asserted – again, to the audience’s or others’ detriment. But to be persuaded by an assertion of value requires assigning that expression the status of something capable of persuading. If expressions of value had the status of, say, burps, they could not persuade an audience to adopt the values so expressed. One does not have to be a realist regarding the ontology of values to regard expressions of value to be heavily larded with implicit factual assertions. And surely it is these implicit “is” assertions in the assertions of “ought” that the government fears will persuade and thereby result in harm.

It is just not true, as some freedom of expression proponents contend, that government has no legitimate interest in suppressing statements of value that it fears will lead to harms that it has legitimate reasons to prevent. If the government has legitimate interests in suppressing statements of fact that are incorrect and that if believed may induce harmful acts, then it has the same legitimate interests in suppressing statements of value that it regards as dangerous for the same reason. *A statement asserting an incorrect value must at some level be mistaken factually or imply a fact that does not exist* (such as that the speaker has some special moral insight). *When all the relevant facts about the world and the speaker are disclosed to the audience, the speaker’s assertions of value will themselves be inert and thus of no interest to the government.*

The United States Supreme Court has at times made a distinction that seems more accurately to capture what lies behind the false distinctions of fact-opinion and fact-value. Thus, in *Milkovich v. Lorain Journal Co.*,<sup>41</sup> the Court referred to *provably* false factual assertions and implications as opposed to factual assertions and implications the falsity of which could not be proven.<sup>42</sup> The Court gave as an example of the latter the statement “In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Engels.”<sup>43</sup> Presumably, the implication the truth of which is unprovable is that the teachings of Marx and Engels are false. On the other hand, “Jones is a liar,” if false, is provably so in the Court’s view.

Again, however, I think this distinction will not do the work intended. Some of the facts that are the premises of ordinary defamation and misrepresentation suits are routinely established to a lesser degree of certainty than are the facts on which assertions about the falsity of Marxism or the benefits of free trade rest. It is true that certainty about political and philosophical claims is almost never achieved, while certainty about mundane facts such as whether an airplane crashed or water is composed of hydrogen and oxygen is much more common. But many factual assertions that might be subject to governmental proscription – take for instance medical claims – are much less certain than assertions about, say, the desirability of a centrally-planned economy. No one’s liberty should be curtailed unless the possible harms to others, discounted by the probability of their occurrence – minus the benefits that can justify such harms, discounted by the probability of their occurrence – justify the restriction. Probabilities are probabilities, however, and the probability that laetrile will cure cancer is in principle no different from the probability that Marxism has got things right.

It might be useful at this point to mention David Brink’s recent interpretation of John Stuart Mill’s arguments for freedom of expression.<sup>44</sup> Mill gives four

<sup>41</sup> 497 U.S. 1, 11–20 (1990).

<sup>42</sup> Jed Rubenfeld accepts the exclusion of factual claims from the scope of freedom of expression, though he is aware of the difficulties of distinguishing factual claims from statements of opinion or value. Rubenfeld, *supra* note 1, at 819–20. He ultimately is content to rely on provability as the basis for distinguishing what matters are and are not protected by freedom of expression, though he recognizes the irony in privileging what is less provable over what is more so. *Id.* at 820–1. But provability is much more a matter of degree than Rubenfeld acknowledges.

Richard Posner also seems to rest the case for protection of opinions and value claims on provability. See Richard A. Posner, *Frontiers of Legal Theory* (2001), 85–6. He states that “the truth of political . . . ideas cannot be determined reliably by forensic processes or government experts.” *Id.* at 86. But he does not disclose why this is more a problem when, for example, government bans claims that free trade will damage the economy, but not when government acts on the opposite claim and enacts a free trade policy. Nor does he indicate why forensic processes are more reliable in determining the truth in cases of defamation and misrepresentation than they are in determining claims about public policy.

<sup>43</sup> *Milkovich v. Lorain Journal Co.*, *supra* note 41, at 20.

<sup>44</sup> David A. Brink, *Millian Principles, Freedom of Expression, and Hate Speech*, 7 *Legal Theory* 119 (2001).

arguments against message censorship:<sup>45</sup> (1) censored opinions might be true;<sup>46</sup> (2) even if literally false, they might be partially true;<sup>47</sup> (3) even if false, they may prevent true opinions from becoming dogma;<sup>48</sup> (4) true opinions held dogmatically lose their meaning.<sup>49</sup> Brink is skeptical about the strength of the first two claims.<sup>50</sup> Whether censorship will impede the search for truth or further it depends on the ability and motivation of the censor and myriad other factors; it is not preordained that without censorship, truth will vanquish falsehood, even in the long term. And in the short term in which we dwell, false opinions may cause worse harms than the loss of some truths.

Brink, however, finds Mill's arguments against censorship based on preventing true opinions from becoming dogmatic more powerful.<sup>51</sup> Censorship, even if it targets only false ideas, preempts the exercise of our deliberative capacities. And development of deliberative capacities is important to human happiness.

Brink does not believe that Mill's argument supports a total ban on censorship. Some ideas are not worth deliberating, and some harms caused by false beliefs outweigh the setback to development of deliberative capacities.<sup>52</sup>

Mill's arguments, as elaborated by Brink, might provide a rationale for distinguishing among suppression of false messages regarding values. For example, when one states that the existing great inequality of income justifies the overthrow of capitalism by force, the statement contains many "factual" claims, some explicit, most implicit. Such claims include: (1) there exists great inequality of income; (2) capitalism causes it; (3) inequality is a greater injustice than the use of force required to eliminate it; (4) when a greater injustice can be eliminated by means of a lesser injustice, it is right to eliminate the greater injustice. The first two claims could be considered straightforwardly factual. The last two are evaluative. If they contain implicit factual claims, perhaps those are the type about which citizens must be able to deliberate. Such implicit factual claims may be that Scripture supports the claim, that Scripture is an inerrant moral guide, and so forth.

Still, I doubt that it will be possible to justify protecting some factual claims – those implicit in evaluative claims – without protecting others. Are we better able to deliberate about the inerrancy of Scripture than the causes of income inequality? I see little hope in any wholesale distinction between false factual and false value claims.<sup>53</sup>

<sup>45</sup> Id. at 122.

<sup>46</sup> *John Stuart Mill, On Liberty* (E. Rappaport ed., Indianapolis: Hackett, 1978), Ch. 2, ¶¶ 1–20, 41.

<sup>47</sup> Id. at Ch. 2, ¶¶ 34–9, 42.

<sup>48</sup> Id. at Ch. 2, ¶¶ 1–2, 6–7, 22–3, 43.

<sup>49</sup> Id. at Ch. 2, ¶¶ 26, 43.

<sup>50</sup> Brink, *supra* note 44, at 122–3.

<sup>51</sup> Id. at 123–7.

<sup>52</sup> Id. at 125, 127.

<sup>53</sup> For an analysis of the fact-opinion and fact-value distinctions that is sensitive to these problems, see Rubinfeld, *supra* note 1, at 819–22. *And see* note 42 *supra*. Epistemological doubts no more

Moreover, suppose government suppresses the doomsday speech of, say, those who oppose genetically-engineered foods on the ground that the speech consists of (unintentionally) false and misleading statements of fact that if believed by the public will impair the public's ability to deliberate rationally and thus its autonomy, and lead it to choose courses of action that cause harms (more expensive, less pest-resistant foods; violations of trade treaties; starvation in the Third World). Would we not consider such suppression a paradigmatic violation of the right of freedom of expression? If we say that our verdict depends on the truth about genetically-engineered foods, have we not given away the game?

Indeed, is not the prohibition of libeling the government – making false claims about its policies and personnel – the paradigm of a violation of freedom of expression?<sup>54</sup> And does not the libel consist of factual assertions, not assertions of value? On the other hand, if the claims *are* false or misleading and capable of causing great harm, how are they to be distinguished from other false or misleading and dangerous factual assertions?<sup>55</sup>

justify restraint regarding potentially harmful messages than they justify restraint regarding potentially harmful conduct. See Robertson, *supra* note 37, at 311.

<sup>54</sup> Is that not the reason the Alien and Sedition Act is regarded as a central violation of the First Amendment despite their almost contemporaneous enactments? The Sedition Act of 1798, which made libeling the government a crime, also provided that truth was a defense. Supporters of the Act's constitutionality expressed the belief that such a defense was sufficient to make the Act constitutional. Opponents believed that the Act would chill valuable speech because the truth of "opinions" could not be proved. See Leonard W. Levy, *Legacy of Suppression* (1960), 258–63. The latter view emerged victorious in 1964 when the Supreme Court found ordinary defamation law violative of free speech when applied to protect public officials. *New York Times Co. v. Sullivan*, *supra* note 36. See generally Harry Kalven, Jr., *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 *Sup. Ct. Rev.* 191, 204–7.

<sup>55</sup> Indeed, countless factual assertions, though literally true, can create misimpressions in the minds of particular audiences that will lead to harm to others or to themselves. A truthful statement that a celebrity constantly switches lovers or uses drugs may suggest falsely that promiscuity or drug use is good even if it does not literally make such claims. Indeed, a true assertion that the government has mismanaged some affair may lead people to believe that replacing the government would be beneficial when such a belief is unwarranted – which is why even good governments fear truthful but bad publicity. An omniscient governor, whose primary concern were that people possess true beliefs, might well censor lots of literally true factual assertions.

Consider in this regard the goal motivating various campaign finance laws – and some people's pet policies regarding broadcast regulation – of equalizing the influence of various positions on issues. Putting aside such metaphysical imponderables as how "issues" and "positions on issues" are identified and individuated, the core question is what justifies or purports to justify such regulatory proposals. And the answer to that question appears to be preventing people from being led to hold mistaken views that they might ultimately act upon to their detriment. The idea is that not hearing the correct balance of views will create the misleading impression that those views heard more often because better financed are the correct views. In other words, inequality in the number of times opposing views are presented is tantamount to making false or misleading assertions. (Notably, no one proposes equalizing rhetorical skill and other intangible facts that make assertions of views more or less persuasive; nor does anyone propose measures to make sure that each member of the audience hears both sides.)



If neither the fact-opinion nor the fact-value distinction carves out a robust, but not too robust, realm of freedom of expression in cases where government fears the expression will cause harm in two steps, are there any other distinctions that might do the trick? For example, can and should we not distinguish speech that will cause harm before it can be counteracted by opposing speech from speech that can be effectively so countered? One occasionally sees this asserted to justify the Supreme Court's distinction between "mere advocacy" of harmful acts and "incitement" to such acts.<sup>56</sup>

This distinction, however, also fails to withstand close analysis. In ordinary, everyday examples of criminal solicitation – which no one seems to regard as protected by a right of freedom of expression – the speaker is soliciting an undercover police officer who needs no counterspeech to be persuaded not to carry out the crime.<sup>57</sup> On the other hand, abstract advocacy of, say, violent overthrow of all capitalist governments may reach audiences who are beyond the reach of counterspeech, or who are impervious to it, and so forth. The advocacy may be open and notorious, or it may be transmitted to only a few people. Effectively countering such advocacy might require large resource allocations – to the detriment of other rights – which government may understandably not wish to make, especially given that it regards what is advocated as wrong and worthless. And considering every argument pro and con, of which there may be an indefinite number, will outstrip the always finite resources of time and attention.<sup>58</sup>

So if speech that can be *effectively* countered by opposing speech defines the realm of freedom of expression, that realm may be quite small, depending upon what resources we believe government must commit to making counterspeech effective. And because withdrawing resources from other goals in order to devote them to countering advocacy of harms is itself harmful (to those goals), the government is put to committing some harms in order to prevent others. Or at least this is so if the right of freedom of expression requires it to employ only counterspeech, and not prohibitions, to combat advocacy of harms. But that means that advocacy of harm, if not prohibited, will be harmful one way or another. It will either be harmful by forcing government to devote resources to counterspeech – which even then might fail to be totally effective. Or it will be harmful by persuading the audience to engage in harmful acts.

This line of thought suggests that laws criminalizing corrupting vices such as gambling and drug use might fall within the scope of freedom of expression if their rationale were that the proscribed vices lead people to hold incorrect beliefs about what is valuable – *i.e.*, that they corrupt people through the mechanism of inculcating false beliefs.

<sup>56</sup> See *Brandenburg v. Ohio*, *supra* note 30 (distinguishing constitutionally protected "advocacy" from constitutionally unprotected "incitement").

<sup>57</sup> Strauss recognizes that ordinary criminal solicitations fall within his principle. See Strauss, *supra* note 32, at 338–9.

<sup>58</sup> As Strauss recognizes. See *id.* at 346–7, 367.

*Brandenburg v. Ohio*<sup>59</sup> sets forth a test for when advocacy of harmful acts can be punished without violation of the First Amendment, namely, “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>60</sup> The test is unsatisfying for several reasons. First, it suggests the speaker’s intent is material to the protectability of the expression (“is directed to inciting”). Although the speaker’s intent may be relevant to the culpability of the speaker, it is difficult to see why *speaker* culpability should offset the status of the *expression* with respect to freedom of expression. Suppose a speaker on a television show is aware that certain words in his prepared text will be interpreted by a group within the audience as a code calling for them to blow up a building. The speaker does not intend for such an act to occur and regrets that it will, but he refuses to refrain from giving his prepared text. If the government could legitimately suppress the speech if the speaker intended the harm – say, by blacking out the program – it is difficult to understand why government could not do so in the situation described. The speaker’s state of mind might be relevant to concerns about “chilling effects” of sanctions, but it appears irrelevant to the protectability of the expression itself.<sup>61</sup> (Likewise, it is surely immaterial whether the speech uses words that literally “advocate” as opposed to words that are interpreted as advocacy.)

Second, the imminence requirement is not only vague but is also of doubtful relevance to freedom of expression. I have already argued that speech advocating harm frequently cannot be effectively met by counterspeech. To make this point more concretely, consider a shipment of pamphlets that the government has interdicted. They bear a message that is literally innocuous but that the government is sure is a code designed to activate a sleeper cell of terrorists and have them blow up buildings at some indefinite future time within a year. Is the lawless action “imminent” within the meaning of the *Brandenburg* test? If so, the imminence requirement is toothless. But if not, and the government must allow the pamphlets to be distributed, then the imminence requirement is pernicious. Although the government may have sufficient time to ferret out the sleeper cell, and may have the resources to do so, it may fail in that endeavor or, if it succeeds, it may sacrifice other values in the process. (The resources consumed in finding the terrorists might have been used to avert other crimes or to fund health care, disaster relief, and education.)

We might combine these first two points and consider the publication of information about how to build an atom bomb in your bath tub, or how to

<sup>59</sup> *Supra* note 30.

<sup>60</sup> *Id.* at 447.

<sup>61</sup> Indeed, the Supreme Court has itself deemed the intent to provoke the audience to lawless action to be immaterial in the “fighting words” and “hostile audience” cases, which, like incitement, are two-step harm cases in which government is attempting to preempt the audience’s consideration of provocative ideas. *See, e.g.,* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Feiner v. New York*, 340 U.S. 315 (1951). Indeed, these two-step harm doctrines also mysteriously differ with respect to whether specific words are required and whether the police must first attempt to control the audience.

poison a city's water supply.<sup>62</sup> The article uses no words specifically advocating harmful acts. Indeed, the author is merely trying to be informative and would detest anyone who used his article for nefarious ends. Finally, although the chances of someone so using the information are quite high, *when* that use will occur is completely uncertain. In any event, the earliest one could wreak harm based on the information would be several months after publication. The article would therefore not be *advocacy*; it would not be *directed* to inciting; and the lawless action it would almost certainly trigger would not be *imminent*. Yet surely there is as much justification for suppressing this article as there is for suppressing ordinary criminal solicitations.

Finally, consider the requirement that the advocacy be "likely to incite or produc[e] such action." Likelihood of harm *does* seem relevant to whether the speech is protected by freedom of expression. As I said, however, ordinary criminal solicitations are frequently deemed punishable even when they are quite unlikely to cause harm – as, for example, when the solicitee is an undercover police officer.<sup>63</sup>

One final way to carve up the domain of speech that causes harm in two steps is to distinguish, not false factual assertions from assertions of incorrect opinions or values, but false factual assertions that we hold the audience responsible for believing, and hence acting upon, and those that we hold only the speaker responsible for making, not the audience for believing. Thus, we might deem the audience faultless for believing the *National Enquirer's* proclamation that "Hilary is having an affair" but fully responsible for believing an Al Qaeda operative's assertion that suicide bombing is righteous. In the former case, because government cannot legitimately penalize those who believe the story about Hilary and act toward her accordingly, it may attempt to prevent the harm to Hilary by penalizing the *National Enquirer*. In the latter case, government can legitimately hold the audience responsible for acquiring false beliefs about the morality of terrorism, and thus it may attempt to prevent terrorism by

<sup>62</sup> See, e.g., *Rice v. Paladin Enterprises*, 128 F. 3d 233 (4<sup>th</sup> Cir. 1992) (dealing with magazine article on how to be a "hitman"); *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wisc. 1979) (dealing with magazine article on how to construct a hydrogen bomb). See also *Olivia N. v. National Broadcasting Co.*, 178 Cal. Rptr. 888 (Ct. App. 1981) (dealing with television portrayal of gang rape that resulted in copycat crime); *Herceg v. Hustler Magazine, Inc.*, 814 F. 2d 1017 (5<sup>th</sup> Cir. 1987) (dealing with magazine article describing how to accomplish autoerotic asphyxiation and which resulted in the death of a boy who had read the article).

<sup>63</sup> For a lengthier discussion of problems with the *Brandenburg* test, see Larry Alexander, *Incitement and Freedom of Speech*, in *Freedom of Speech and Incitement Against Democracy* (D. Kretzmer & F. Hazan, eds., 2000), 101–18.

Kent Greenawalt suggests that ideologically-based criminal incitements should be more protected than those based on private reasons, although he recognizes that the line between the two types will be difficult to draw. See Kent Greenawalt, "Clear and Present Danger" and *Criminal Speech*, in *Eternally Vigilant*, *supra* note 36, at 97–119, esp. 116–17. But he would not protect even ideologically-based incitements unless they were "in public." *Id.* at 117–19. The problem is that the line between "in public" and "in private" is as difficult to draw as that between "ideological" and "private" reasons.

punishing those who act on such false beliefs, but not those who instill the false beliefs.

Yet this distinction seems to me just as unjustified as the prior ones. Why is an audience more responsible for believing the false assertions that would justify terrorism than the false assertions about Hilary's love life? "Globalization impoverishes the Third World and should be resisted by force" combines assertions of false facts (about the actual wealth effects of globalization) with assertions of plausible facts (that movements that threaten the poor with even greater poverty are to be resisted, by force if necessary). And the false assertions may be more difficult for the average audience to unmask than false defamatory assertions like those about Hilary.<sup>64</sup> I can see no defense in terms of

<sup>64</sup> Consider in this regard a scenario in which A maliciously tells gullible B a convincing tale to the effect that C is about to detonate an atomic device in New York City and needs to be killed to save thousands of innocent lives. If B kills C, A will be deemed the murderer, acting through B as A's "innocent instrumentality." See Model Penal Code, § 2.06 (2)(a). Compare that scenario to one in which Iman A preaches to gullible followers Bs that Cs, Americans, must be killed to prevent a Christian conquest of Islam. The Scanlon-Strauss principle arguably should apply to A the same way in both scenarios. And I am sure that neither Scanlon nor Strauss would insulate A from liability in the first one. And what would their position be with respect to doctors who recommend illegal drugs such as marijuana to their patients? See, e.g., *Conant v. Walters*, 309 F. 3d 629 (9th Cir. 2002).

Jim Wernstein, in private conversation, argued that in a democracy we must, as a matter of respect, treat citizens as trustworthy when it comes to assessing false and deceptive political speech, though not when it comes to false or deceptive commercial, medical, or legal claims. But surely people are no better at assessing the former than the latter. Suppose Michael Moore comes out with a "documentary" film making scurrilous and false allegations on the eve of an election. Is it disrespectful of the audience to punish the speaker for such falsehoods? For the audience to check out the accuracy of Moore's claims would take time, resources, and attention that might be unavailable or that could be devoted to other worthwhile projects. And even with time, resources, and attention, the audience may lack the expertise to identify the central flaws in Moore's claims. It surely seems no more disrespectful of the audience to protect it from being misled by Moore than to protect it from being misled by false medical claims, false claims about products, or false claims about bridge safety.

Of course, we want government to treat us as autonomous. But autonomous decisionmaking requires both information and the ability to process it rationally; and information and rationality vary from person to person and are always matters of more or less. We are never fully informed or fully rational. For these reasons, autonomy is a paradoxical and Janus-faced value that usually appears on both sides of moral dilemmas. If government protects us from misleading messages, it threatens our autonomy by arrogating to itself decisions that we might wish to make for ourselves. But government at the same time enhances our autonomy by removing the threat to that autonomy posed by misinformation. If we can, consistent with our status as autonomous agents, delegate to government the "soft" paternalistic power to protect us from false and misleading claims about quack medicines and defective bridges, it is a short and smooth path to delegating to government the "hard?" paternalistic power to protect us from false public policy and moral claims. There is no reason to think that unaided, we are better equipped to assess the latter than the former. In all of these cases, we may lack the necessary information and critical faculties required to avoid harm to ourselves or others. And see Susan Hurley, "Imitation, Media Violence, and Freedom of Speech," 117 *Philosophical Studies* 165 (2004); Caroline West, "The Free Speech Argument Against Pornography," 33 *Canad. J. Phil.* 391 (2003) (both arguing that certain messages render the audience less capable of rationally assessing certain ideas).

audience responsibility for exempting on freedom of expression grounds those who advocate false values, but not those who defame or misrepresent facts.<sup>65</sup>

So far, then, my conclusion is that the domain of speech that causes harm in two steps cannot be divided into regulable and nonregulable speech by the fact-opinion / fact-value, counterable-by-speech / not-counterable-by-speech, or audience-responsible / not-responsible-for-false-beliefs distinctions.

I am equally dubious about other suggestions for dividing up into regulable and nonregulable speech that causes harm in two steps. Some, for example, exempt incitement and solicitation of harmful acts from the scope of the right of freedom of expression by deeming incitement and solicitation to be so intertwined with the harmful acts they incite that they should be deemed harmful acts themselves, not expression.<sup>66</sup> Others would exempt incitement and solicitation by calling them, but not abstract advocacy of harmful acts, “situation-altering,” by analogy to speech-acts like promising or taking marriage vows.<sup>67</sup> The idea is that like these other speech acts, incitements and solicitations change the normative situation of their audience and thus are more akin to acts that tangibly alter the environment than to mere speech. Still others place incitement and solicitation of harmful acts on the harmful act rather than the expression side of the ledger by claiming that they trigger action through bypassing rational deliberation and evaluation.<sup>68</sup>

With all respect, I believe that none of these attempts to sever incitement and solicitation from advocacy succeeds. Incitement and solicitation are no more or less “acts” than any other speech that may cause a harmful response.<sup>69</sup> Nor do they alter the normative situation except to the extent that the audience’s values and receptivity to the message allow them to do so, which is true for all expression. And they bypass audience deliberation and evaluation, again, only if the audience permits them to do so. One may deliberate about and evaluate a request to commit a murder to no less extent than one may do so regarding the proposition that capitalism should be overthrown by force and violence.

<sup>65</sup> I likewise see no way to distinguish speech based on the degree to which the audience can be reached effectively by counter-speech. The publicness of the speech – is it made on a national television program as opposed to in a backroom with an audience of one? – is always a matter of degree, and there are always solitary auditors within a mass audience. Moreover, mobs are “public” but surely not more responsible audiences than solitary solicitees.

<sup>66</sup> See, e.g., Rubenfeld, *supra* note 1, at 828.

<sup>67</sup> See, e.g., Kent Greenawalt, *Speech, Crime, and the Uses of Language* (1989), Ch. 3. For a critique of the notion of “situation-altering” speech and its use to distinguish constitutionally protected from unprotected expression, see Eugene Volokh, “Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, ‘Situation-altering utterances,’ and the Uncharted Zones” (forthcoming, 2005).

<sup>68</sup> Strauss views some acts of incitement as falling outside his principle because they are designed to induce action by bypassing rational deliberation. See Strauss, *supra* note 32, at 338–9. However, this is surely not true of a great deal of incitement, whereas it may be true of a great deal of other speech. See, e.g., Hurley, *supra* note 64.

<sup>69</sup> See Robertson, *supra* note 37, at 306–7. Robertson there relates Stanley Fish’s attack on the speech/action distinction.

Finally, Frederick Schauer has drawn attention to the close parallel between preventing legally and morally responsible persons from receiving harmful ideas – ideas that we believe are both wrong and, if acted upon, harmful, such as the idea that it is okay to torture animals for fun – and preventing legally and morally responsible persons from engaging in activities that are in themselves harmless but that raise the probabilities of the audience’s committing wrong and harmful acts.<sup>70</sup> For example, we might prevent legally and morally responsible persons from possessing burglar tools, hand grenades, assault weapons, or other items solely on the ground that possession increases the chance that *if such persons choose to act wrongly*, they will cause great harm. If we can preemptively disable responsible adults from choosing to commit harmful acts by depriving them of means that are harmless if not misused, why, Schauer asks, can we not preemptively disable them by depriving them of harmful ideas? After all, the probability that receiving the message that torturing animals for fun is okay will lead some members of the audience to torture animals may be as high or higher than the probability that possessing, say, an assault weapon will induce the possessor to murder someone with it. And the autonomy of the audience to assess the message regarding torturing animals – the pivotal consideration for Scanlon and Strauss – is, says Schauer, no different from the autonomy of the possessor of the assault weapon to assess whether or not it should be used to kill.

### III. Principle (5) and Message-Driven Governmental Regulation: A Tentative Conclusion

When receipt of a message is itself directly harmful, and government wishes to regulate the message for that reason, its regulations are either always or never violative of the right of freedom of expression, or so I have tentatively concluded. Any attempt to carve out an intermediate position would require the *government* – first, the legislature in deciding what to regulate, and second, in jurisdictions with a judicially enforceable constitutional right of freedom of expression, the courts in deciding which such regulations to permit or strike down – to weigh the value of the messages expressed against the disvalue of the harms they cause. But such message evaluation by the government seems deeply inconsistent with any conception of freedom of expression.

When receipt of a message causes harm in two steps, but the government cannot effectively regulate the second step, then with the exception of messages that the speakers know to be false or deceptive, which I view as unproblematically regulable, I see no difference in terms of freedom of expression from messages that cause harm directly.

<sup>70</sup> Frederick Schauer, “On the Distinction Between Speech and Action” (forthcoming).

When the second, harmful step by the audience *is* regulable – as with advocacy, incitement, and solicitation of harmful acts – then the choice seems to be between regarding all governmental interdiction as violative of freedom of expression, even if no other regulations of messages are, or treating governmental interdiction of such messages as no different from all other regulations that fall under principle (5). Moreover, if the first of these alternatives is correct, then I have argued that Strauss to the contrary notwithstanding, freedom of expression would appear to exempt from liability all unknowing defamers and other misrepresenters of facts. On the other hand, if one believes that unknowing defamations and factual misrepresentations lie outside freedom of expression, then so too do incitement and solicitation. Finally, even if freedom of expression protects expression that causes harm through regulable acts of the audience, government might still legitimately regulate messages that cause harm through persuading morally responsible audiences to act harmfully if government's *reason* for regulating were fear that the message might persuade members of the audience who are *not* morally responsible actors – the immature, the insane, and so forth.<sup>71</sup>

We are left then with either a right of freedom of expression that is counterintuitively capacious and covers the entire domain of principle (5),<sup>72</sup> or one that is counterintuitively narrow and covers, at most, those messages that cause harm by persuading responsible audiences, and *only* responsible audiences, to act harmfully. Paradoxically, finding a right of freedom of expression that feels “just right” in terms of its scope requires the very evaluations of messages that any conception of freedom of expression would view as its central evil.

<sup>71</sup> For example, even if a television program depicting a violent act could not be censored because of concern that criminals who are morally responsible for their acts might decide to ape its content, the concern that some psychotic might do so might take censorship out of the domain of the Scanlon/Strauss principle and render it just another example of message-driven regulations designed to prevent harm. And because *any* message *might* cause those who are not morally responsible for their conduct to act harmfully, the Scanlon/Strauss principle is threatened with total irrelevance.

As an aside, this point connects with a point I made in an earlier article to illustrate why freedom of expression cannot turn on the value of any particular item of expression (as opposed to government's reasons for regulating): Any particular item of expression can convey a multitude of messages to different audiences. Thus, a medical textbook might be read most frequently by voyeurs looking for “dirty pictures,” while a pornographic movie might be viewed primarily by persons engaging in serious sociological and psychological research. See Larry Alexander, *Low Value Speech*, 83 *Nw. U. L. Rev.* 547 (1989).

<sup>72</sup> In a recent article, Frederick Schauer emphasizes the myriad ways in which the content of messages can cause harm: through representations about our intentions or the quality of what we are selling; through defamation; through fixing prices or otherwise conspiring; through placing bets; through extortion and blackmail; through urging boycotts; through soliciting crimes; through deceptive advertising; through bad professional advice; and through infringing intellectual property rights. He might have added to this list message content that reveals embarrassing private facts, discloses government or trade secrets, or breaches confidences. See Frederick Schauer, “The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience,” 117 *Hair. L. Rev.* 1765 (2004).

## Track Three: Government Speech and Subsidies of Speech

Laurence Tribe labeled the judicial treatment of laws that restrict liberty in order to affect messages – the content-based regulations that were the subject of the [previous chapter](#) – Track One free speech jurisprudence.<sup>1</sup> And he labeled the judicial treatment of laws that restrict liberty for reasons other than to affect messages – the content-neutral regulations that were the subject of [Chapter Two](#) – Track Two free speech jurisprudence.<sup>2</sup> Tribe did not describe any other “Tracks.” There is, however, at least one more. Track Three consists of all the governmental acts that provide aid to a particular viewpoint but that in themselves do not appear to restrict anyone’s liberty.

In this chapter I shall examine Track Three laws and governmental acts. (Hereinafter I shall refer to all Track Three governmental acts as “laws” purely for convenience.) My conclusions are these: Track Three laws turn out to be ubiquitous and potentially quite extensive in scope. Their judicial treatment when challenged on free expression grounds has been a muddle, with courts sometimes striking down and sometimes upholding laws that seem indistinguishable on freedom of expression grounds. And, most importantly, the generally accepted distinction between Track Three laws and Track One laws, namely, that the latter but not the former represent restrictions on liberty, turns out to be wrong. Track Three laws do restrict liberty, and in some circumstances they may do so as much as Track One laws.

### I. The Variety of Track Three Laws

Consider the following ways that government might attempt to affect people’s beliefs about the desirability of, say, abortion, drugs, prostitution, and free trade.

<sup>1</sup> Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 12–2, at 791.

<sup>2</sup> *Id.* at 792.



- (1) The government passes laws forbidding abortions, drugs, and prostitution and promoting free trade. In addition to passing these laws, the government publicizes the fact that it has done so and the reasons it thought such laws were desirable.
- (2) The government conducts a television ad campaign warning people not to have abortions, not to take drugs, and not to patronize or become prostitutes, and extolling the virtues of free trade.
- (3) The government teaches in its schools that abortion, drugs, and prostitution are bad and that free trade is good. It excludes from its school libraries (and its regular libraries) books that take the contrary positions.
- (4) The government gives tax subsidies (tax exemptions or deductions) to private groups and individuals who advocate against abortion, drugs, and prostitution and in favor of free trade.
- (5) The government gives money to such groups and individuals to subsidize directly that advocacy. In addition, the government commissions works of art, plays, and so forth that portray the evils of abortion, drugs, and prostitution and the glories of free trade.
- (6) The government exempts from otherwise valid content-neutral (Track Two) regulations groups and individuals engaged in speech against abortion, drugs, and prostitution and in favor of free trade.
- (7) The government subjects only those advocating abortions, drug use, prostitution, and trade barriers to restrictions that would be valid if applied to everyone. For example, government forbids *only* such groups and individuals from using loudspeakers to convey their messages in residential neighborhoods.

Finally,

- (8) The government forbids the advocacy of abortion, drug use, prostitution, and trade barriers.

Now (8) is an example of Track One laws. And if there is a right to freedom of expression, the laws in (8) are presumably paradigmatic violations of it. In the [previous chapter](#) I raised doubts about the ability to distinguish those Track One laws that violate the putative right to freedom of expression from those Track One laws that most regard as permissible. Here I shall assume that Track One laws such as those in (8) are violations of freedom of expression. My questions in this chapter are: (1) If the laws in (8) do violate freedom of expression, can they be distinguished from the laws in (7) through (1) on any grounds relevant to freedom of expression? (2) Can the laws in (7) through (1) themselves be distinguished from each other on any grounds relevant to freedom of expression?

## II. Pairwise Comparisons

### A. Comparing (8) and (7)

We are assuming that the laws in (8) are violations of the right to freedom of expression. If so, what can be said of those in (7), where government subjects those advocating certain policies to restrictions that would be valid Track Two laws if applied to all? I suggested as an example a ban on using loudspeakers in residential neighborhoods.

Now one might conclude that a law requiring only those expressing particular views to do so quietly is an attempt to punish such expression and is thus really a Track One law. And indeed, the laws in (7) might be Track One laws if the government's purpose in enacting them were punitive.<sup>3</sup>

Suppose, however, that government's purpose were not punitive but were instead to protect people from disturbing noise while they are at home. That, of course, would explain the restriction on the law's targets, but it would not explain why the law failed to restrict the myriad other groups and persons who might broadcast loud messages in residential neighborhoods. So we need an additional governmental purpose to go along with noise abatement.

Suppose government's additional purpose were this: Government generally values the ability to communicate ideas more than it values noise abatement; but it values noise abatement more than it values the communication of certain ideas, such as that abortions, drug use, and prostitution are okay, or that free trade is not. In other words, government wishes to advance noise abatement, even at the cost of some ideas, though not at the cost of (most) others.<sup>4</sup>

Remember that we are assuming that government may permissibly value noise abatement in residential neighborhoods over the communication of *all* ideas. If that is the case, may government then place the communication of

<sup>3</sup> See, e.g., Mitchell N. Berman, *Coercion Without Baseline: Unconstitutional Conditions in Three Dimensions*, 90 *Geo. L. J.* 1 (2001). Berman argues that a condition attached to a constitutionally-optional benefit is punitive if, were government forbidden to impose the condition, government would provide the benefit without the condition. If, however, government would not offer the benefit at all if it were forbidden to impose the condition, the condition is not punitive. *Id.* at 37.

In *Speiser v. Randall*, 357 U.S. 513 (1958), the Supreme Court held that a law denying a property tax credit to persons with particular political views was punitive in purpose and thus like a fine placed on expression.

Likewise, in *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984), the Court held that withholding public subsidies from broadcasters that editorialize – and just the amount devoted to editorializing – was an unconstitutional penalty on freedom of expression.

<sup>4</sup> If government enacts a facially neutral Track Two law – say, a ban on all loudspeakers in residential neighborhoods – because it generally dislikes or finds little value in the messages typically broadcast in that manner – the law should be assessed as if it were content-based and hence a Track Three law. Theoretically, this analysis applies equally to government's decisions *not* to enact Track Two laws that are based in part on its favorable evaluation of the messages that will be permitted. In both cases the government is making Track Two decisions based on the disparate impact on messages and thus is subsidizing some messages relative to others. For this reason, such apparent Track Two laws are actually Track Three laws.

*most* ideas above noise abatement in terms of value, but at the same time place noise abatement above the communication of *some* ideas?

Now, of course, what immediately jumps to mind with respect to (7) is that the government is *favoring* some ideas over others. In other words, as in (8), in (7) it is violating the principle of evaluative neutrality that I have argued must lie at the core of freedom of expression.<sup>5</sup>

Indeed, the violation of evaluative neutrality was the ground on which the Supreme Court overturned St. Paul's law against cross burnings conveying racist messages in *R.A.V. v. City of St. Paul*.<sup>6</sup> Technically, because the law discriminated within a category of expression ("fighting words") that could have been completely banned because of its *content*, it was a discrimination within Track One, not Track Two. However, because the entire class of fighting words could have been validly suppressed, the law at issue in *R.A.V.* is analogous to selectively subjecting only certain messages to Track Two restrictions that could have been applied across the board.

If, however, it is the violation of evaluative neutrality that renders the laws in (7) violative of freedom of expression, the implications of this conclusion are farreaching indeed. *For all Track Three laws – all the laws in (1) through (7) – violate evaluative neutrality.* Therefore, before accepting that sweeping conclusion, we should ask whether any relevant distinctions among Track Three laws are identifiable, and whether Track Three laws in general are relevantly distinguishable from Track One laws.

### B. Comparing (7) and (6)

Once we eliminate any punitive purpose behind the laws in (7), it is difficult to see how those laws are distinguishable from the laws in (6), which give exemptions from Track Two laws to certain government-favored speakers. After all, the laws in (6) are just like the laws in (7) except for the sizes of the groups exempted from the Track Two laws. And it is difficult to see how the size of the exempted group matters other than as some indication of the presence or absence of a punitive purpose. If we disregard punitive purposes, the laws in (7) and (6) seem identical.

Now how should we regard the laws in (6) (and hence in (7))? The United States Supreme Court has dealt with a number of cases involving laws of types (6) and (7). Sometimes it has allowed regulatory preferences for certain classes

<sup>5</sup> This is true even though government's reasons for disfavoring certain messages is that they cause harms that the favored messages do not, even if only when communicated in the particular time, place, and manner at issue. *See, e.g.,* *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding ban on electioneering near polls); *Lee v. International Society for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (upholding ban on solicitations in airport). The requirement of evaluative neutrality would be virtually meaningless if compliance required only the citing of some legitimate government interest imperiled by the disfavored message.

<sup>6</sup> 505 U.S. 377 (1992). *See also* *Virginia v. Black*, 123 S. Ct. 1536 (2003).

of speakers or certain topics.<sup>7</sup> Sometimes it has not.<sup>8</sup> When it has, it has cited either the special value of the preferred speaker or topic<sup>9</sup> or the special disvalue of the dispreferred topic.<sup>10</sup> When it has not, it has cited the requirement of evaluative neutrality vis-a-vis the ideas communicated.<sup>11</sup> Needless to say, these rationales – the one allowing the government to attach value to ideas relative to other interests, the other enjoining the government to refrain from such evaluations – are deeply inconsistent.

One concept that both courts and commentators have employed in analyzing the laws in (6) and (7) is that of a “public forum.” It is sometimes said that where government has created a public forum, it may not regulate the messages transmitted in that forum based on either viewpoint or, in some cases, content irrespective of viewpoint.<sup>12</sup> On the other hand, just because government has opened a forum for speech does not entail that it has created a public forum; it may have created a nonpublic forum for the benefit of certain speakers, subject matters, or viewpoints.<sup>13</sup>

The problem with public forum analysis is that determining whether a forum is public or nonpublic is unguided. Apparently, government may validly intend to create very limited public fora or purely nonpublic fora.<sup>14</sup> But if governmental intent is to be the touchstone of public forum analysis, then it is difficult to see why all type (6) and (7) laws would not be valid. After all, they create the

<sup>7</sup> See, e.g., *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984) (preferences regarding who can participate in college governance institutions); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983) (preference regarding who can communicate through teachers’ mail system); *Greer v. Spock*, 424 U.S. 828 (1976) (preference for commercial over political speech on military base); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (preference for commercial speech over political advertising on municipal transit).

<sup>8</sup> See, e.g., *Carey v. Brown*, 447 U.S. 455 (1980) (preference for speech about labor dispute); *Police Dept. v. Mosley*, 408 U.S. 92 (1972) (same); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (preference for family-suitable plays); *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (preferences for nonconstitutional claims by government-provided lawyers representing welfare clients); and a large number of cases striking down rules disfavoring access by speakers on religious topics.

<sup>9</sup> See, e.g., *Minnesota State Bd. For Community Colleges v. Knight*, *supra* note 7, at 291–2 (pointing to the value in preferring certain speakers); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, *supra* note 7, at 50–2 (pointing to value of giving existing teachers union preference in access to teachers’ mail system).

<sup>10</sup> See, e.g., *Greer v. Spock*, *supra* note 7, at 839–40 (pointing to dangers of political speech on military bases); *Lehman v. City of Shaker Heights*, *supra* note 7, at 304 (pointing to relative intrusiveness and appearance of bias of political ads on city trolleys). Consider in this regard the question of whether government, to avoid embarrassment, can bar certain groups, such as the Ku Klux Klan, from the opportunity to do highway cleanup and have its doing so acknowledged on a highway sign. For a discussion of the last point, see Helen Norton, “Not For Attribution: Government’s Interest in Protecting the Integrity of Its Own Expression,” 37 *U. C. Davis L. Rev.* 1317 (2004).

<sup>11</sup> See cases cited in note 8 *supra*.

<sup>12</sup> See cases cited in note 8 *supra*.

<sup>13</sup> See cases cited in note 7 *supra*.

<sup>14</sup> See *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, *supra* note 7.

precise type of forum the government intends to create. On the other hand, if government intent is *not* the touchstone of public forum analysis, what is, and why? What, for example, explains why government may sometimes, but not always, succeed in validly creating a forum for preferred speakers, subject matters, and viewpoints?

### C. Comparing (6) and (5)

The laws in (6) give particular speakers a *regulatory* subsidy by exempting them from Track Two laws. The governmental acts in (5) give the favored speakers a *monetary* subsidy. Is there any difference between the two types of subsidies that is material to a right of freedom of expression?

It is difficult to see how there is. In both (6) and (5) the favored speakers receive something that is of value in communicating their ideas. In the case of (6), they receive a permission to intrude on the interests of others to a greater extent than other speakers are permitted. The permission could theoretically be given a monetary value – perhaps the value of what it would cost the speakers to buy permission from those whose interests (in, say, noise abatement) were at stake. In the case of (5), they receive a cash payment from the public fisc.<sup>15</sup> In both cases, resources are taken from the public – peace and quiet in one case and money in the other (which could be used to soundproof homes). In both cases, the resources are transferred to the preferred group.

The United States Supreme Court has again been quite inconsistent in dealing with governmental acts of type (5). In some cases it appears to endorse “if the government pays the piper, the government may call the tune.” In *Rust v. Sullivan*,<sup>16</sup> for example, the Court upheld a requirement that clinics receiving governmental funds to promote family planning must convey the message that government prescribes and no other. And in *N.E.A. v. Finley*,<sup>17</sup> the Court upheld a government subsidy of the arts that was restricted to non-offensive art.

On the other hand, the Court in *Southeastern Promotions, Ltd., v. Conrad*<sup>18</sup> held that a municipally-owned playhouse could not restrict its offerings to

<sup>15</sup> Or the subsidy might take the form of, say, granting favored members of the press access to information or interviews that government has no obligation to make available to everyone. Government might grant access to crime scenes to reporters who generally portray the police sympathetically, or to reporters who report “hard news,” as opposed to gossip columnists interested in reporting the scandalous aspects of a particular crime. See also Randall P. Bezanson and William G. Buss, *The Many Faces of Government Speech*, 86 *Iowa L. Rev.* 1377, 1468–75 (2001).

<sup>16</sup> 500 U.S. 173 (1991).

<sup>17</sup> 524 U.S. 569 (1998).

When the subsidy for engaging in government-favored expression is conditioned on the recipient’s not engaging in government-disfavored expression *with the recipient’s own resources*, the Court has deemed the subsidy to be coercive and violative of free speech. See *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984).

<sup>18</sup> *Supra* note 8.

family-suitable plays. Moreover, in *Rosenberger v. Rector and Visitors of University of Virginia*,<sup>19</sup> the Court held that the University of Virginia could not subsidize the publications of only those student groups that had secular perspectives on public issues and refuse to subsidize student groups that had religious perspectives on those issues. And in *Legal Services Corp. v. Velasquez*,<sup>20</sup> the Court distinguished *Rust* and struck down a law forbidding government-provided attorneys for welfare recipients from mounting constitutional attacks on the welfare rules.

Finally, there are times when government subsidizes expression, not because it endorses the message, but because it wishes to increase the message's influence vis-a-vis opposing messages. This is frequently the case with political campaign advertising, where government seeks to "equalize" candidates' ability to advertize by subsidizing those candidates with fewer resources to spend on advertising. Such policies have met with conflicting judicial responses in the United States when challenged on First Amendment grounds.<sup>21</sup>

#### D. Comparing (5) and (4)

The only difference between (5) and (4) is in the form of the subsidy to favored speakers. In (5), the subsidy is in the form of money. In (4), the subsidy is in the form of a reduction in taxation, which, of course, equates to money. It is difficult then to see how it could be the case that a subsidy of type (5) might be valid, but a comparable subsidy of type (4) might not be valid, or vice versa. Whatever holds for (5) should hold for (4).

Interestingly, in an opinion upholding a selective tax exemption for one lobbying group – no other group that engaged in lobbying received a tax exemption – the United States Supreme Court took a very hands-off posture:

Congressional selection of particular entities or persons for entitlement to this sort of largesse "is obviously a matter of policy and discretion not open to judicial review." The reasoning . . . is simple: "although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation." . . . "[C]onstitutional concerns are greatest when the State attempts to impose its will by force of law." Where governmental provision of subsidies is not "aimed at the suppression of dangerous ideas," . . . its "power to encourage actions deemed to be in the public interest is necessarily far broader."<sup>22</sup>

<sup>19</sup> 515 U.S. 819 (1995).

<sup>20</sup> 531 U.S. 533 (2001).

<sup>21</sup> Compare, e.g., *Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445 (1<sup>st</sup> Cir. 2000) (upholding such a subsidy) with *Day v. Holahan*, 34 F.3d 1356 (8<sup>th</sup> Cir. 1994) (striking down such a subsidy).

<sup>22</sup> *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549–50 (1983). See also *Ontario Public Service Employees Union v. The National Citizens' Coalition Inc.*, 38 O.A.C. 70 (1990).

It is difficult, however, to square that statement in *Regan* with the results in *Conrad*, *Rosenberger*, and *Velasquez*, all of which involved monetary largesse.<sup>23</sup> And if we take the view that monetary largesse is no different from regulatory largesse, then the statement is inconsistent with a much larger set of decisions.<sup>24</sup> Indeed, it is inconsistent with its own decision in *Arkansas Writers' Project, Inc. v. Ragland*,<sup>25</sup> in which it struck down an Arkansas tax exemption that applied to some, but not all, magazines.

#### E. Comparing (4) and (3)

Is a government subsidy to private individuals and groups for the expression of government-favored views different in any meaningful way from government's fostering such views in its role as educator or librarian? It is hard to see how it is. After all, in one case the government says to a private person, "If you will express message X, government will provide you with the resources to do so." In the other, the government says to its employees, "The government is paying you to teach X in the schools and to purchase only books whose messages are consistent with X." In both cases, the public is taking the dollars and using them to advocate for X and against not-X. It is amplifying some views with resources taken in part from those who hold opposed views.

The United States Supreme Court has been of two minds about governmental acts of type (3). On the one hand, it deemed violative of freedom of expression a public school board's decision to remove from a school library books with content that the board found troubling.<sup>26</sup> Yet in the same case the Court thought that the result might be different were the board's decision one not to acquire the books initially (for the same reasons that led to their removal from the library).<sup>27</sup> And the Court thought that content control in classroom instruction and materials could permissibly be premised on the same reasons that rendered the book removal impermissible.<sup>28</sup> But although the Court expressed a hands-off position regarding value inculcation in the classroom, one suspects that the Court itself would find, say, mandated instruction in the superiority of the Republican Party to be troubling on freedom of expression grounds.<sup>29</sup>

<sup>23</sup> See text at notes 18–20 *supra*.

<sup>24</sup> See cases cited in note 8 *supra*.

<sup>25</sup> 481 U.S. 221 (1987).

<sup>26</sup> *Board of Educ. v. Pico*, 457 U.S. 853 (1982). A Canadian decision that is similar to that in *Pico* is *Chamberlain v. Surrey School Dist. No. 36*, 221 D.L.R. (4<sup>th</sup>) 156 (2002). For an attempt to distinguish, in the *Pico* context, government endorsement of a view from government *disparagement* of the opposing view, see Edward L. Rubin, "Jon Newman's Theory of Disparagement and the First Amendment in the Administrative State," 46 *New York Law School L. Rev.* 249 (2002–3).

<sup>27</sup> *Board of Educ. v. Pico*, *supra* note 26, at 862, 871–2.

<sup>28</sup> *Id.* at 869.

<sup>29</sup> It may be unusual for a public school to teach the superiority of a particular political party or candidate, but it is commonplace for public schools to take stands on issues about which

It is hard to see why the inventory of a library and the content of a classroom are materially different. Both require that government employ principles of content selection. There is, of course, neither the time to teach all points of view (assuming it is even meaningful to count points of view), nor the resources to purchase every book in existence. (With respect to monetary subsidies, it is likewise impossible to fund all artists, academics, and so forth.) Nor are there neutral criteria for deciding what to teach. And if government may teach what it wants in the classroom, why may it not employ the libraries it funds as adjuncts to its mission of espousing certain ideas and opposing others?

#### *F. Comparing (3) and (2)*

It is difficult once more to see any material difference in terms of free expression between these neighboring types of laws. In (3), government “speaks” – takes a partisan stance – in its role of educator and librarian. In other words, it speaks through particular governmental institutions. In (2), government speaks as the government rather than as a particular component thereof. But that distinction appears to be one without a difference insofar as freedom of expression is concerned.

We are accustomed to government speaking. Advertising promoting enlistment in the armed forces is ubiquitous. (“Be all that you can be; join the Army.”) Is there anything offensive to freedom of expression in such activities that is not also present in (3) through (7)? Alternatively, is there something offensive to freedom of expression in (3) through (7) that is absent from pure government speech? Is there a difference material to freedom of expression between government’s spending tax dollars to urge young people to join the armed forces or to stay off drugs and its spending tax dollars to urge us to vote Republican? If the former seems benign to most people, the latter, I predict, does not. (I made the same point with respect to teaching in the public school: It will strike many people as objectionable for the public schools to teach the virtues of the Republican Party; it will strike fewer as objectionable to teach the virtues of capitalism, and still fewer to teach the virtues of democracy.) But wherein lies the difference between them? If it is merely that more people agree with the benefits of military service than agree with the platform of the Republican Party, that hardly seems to be relevant to freedom of expression, which is, whatever else, surely not ordinarily understood as a protector of the opinions of the *majority*.

people disagree fervently. A public school teacher who teaches Darwinism implicitly teaches that Creationism and the religious views on which it rests are mistaken. And a teacher who instructs her class that 9/11 was a moral horror will be implicitly condemning any reading of the Koran to the contrary.



### G. Comparing (2) and (1)

Can (2) be distinguished from (1)? If government may pass laws and adopt policies, it surely may inform us why it does so. That is, it can give us its reasons for passing those laws. But to give reasons for taking a stance – and the passing of laws and the adoption of policies surely are the taking of stances – is to advocate that stance. And that is, after all, what the government is doing in (2). So (1) and (2) appear indistinguishable.

## III. Some Unsuccessful Approaches to Track Three

Both judicial opinions and the academic commentary thereon offer a variety of ways of dealing with Track Three laws. Unfortunately, all of them, in attempting to make distinctions *within* Track Three, end up looking ad hoc and juryrigged. Some commentators, such as Frederick Schauer, advocate a hands-off approach to government speech, at least under the First Amendment of the United States Constitution.<sup>30</sup> Schauer argues that although government speech may sometimes be problematic in terms of the values of freedom of expression underlying the First Amendment, government speech does not conflict with the First Amendment itself.<sup>31</sup>

At the other extreme, Robert Kamenshine would bar the government from taking any partisan political position, and Stephen Arons would completely eliminate public schools.<sup>32</sup> And in between the extremes of Schauer's hands-off position and the Kamenshine/Arons position that would give full force to the *Barnette* principle of evaluative neutrality<sup>33</sup> and invalidate most of Track Three, the commentators have staked out a variety of intermediate positions. Benzanson and Buss would distinguish among Track Three laws based on whether there is a danger of government's monopolizing a speech marketplace or a danger that government subsidies will distort a message or otherwise deceive its audience.<sup>34</sup> Mark Yudof cites fears of government indoctrination and domination of the marketplace of ideas, and he advocates a structural approach to handle such dangers, including decentralization and professionalization of

<sup>30</sup> Frederick Schauer, *Is Government Speech a Problem?*, 35 *Stan. L. Rev.* 373 (1983).

<sup>31</sup> *Id.* at 383–84. Schauer does dismiss concerns that government speech might “drown out” other speech, a metaphor he finds more applicable to twelve trombones than to government advertising. *Id.* at 380. Nor does he believe that the public cannot rationally assess government speech, an idea in tension with the very idea of a right of freedom of expression. *Id.* at 381–3.

<sup>32</sup> See Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 *Cal. L. Rev.* 1104 (1979); Stephen Arons, *The Separation of School and State: Pierce Reconsidered* (1977).

<sup>33</sup> See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>34</sup> Benzanson and Buss, *supra* note 15, at 1488–94, 1511.

Track Three actions.<sup>35</sup> Howard Wasserman is concerned with government domination of the marketplace of ideas, government's drowning out of other speakers, government indoctrination, and government ventriloquism (disguisedly speaking through private speakers).<sup>36</sup> Steven Shiffrin would "balance";<sup>37</sup> Leslie Jacobs would forbid partisanship in government's aiding private speakers but not in government's own speech;<sup>38</sup> whereas Edward Ziegler would forbid only government's backing or opposing particular candidates or initiatives.<sup>39</sup> And Martin Redish and Kevin Finnerty are concerned with indoctrination in public education.<sup>40</sup>

Although I cannot discuss in detail all of the distinctions that various commentators and judges have attempted to draw within Track Three, in what follows I shall analyze what I believe are the three principal contenders for Track Three sorting devices: the concept of the public forum; the distinction between viewpoint discrimination and other forms of content and speaker discrimination; and the notion of message distortion.

#### A. Public Fora Versus Nonpublic Fora

I have already mentioned that the courts of the United States sometime distinguish between public fora and nonpublic fora.<sup>41</sup> In public fora, the constitutional rule is supposed to preclude government's making distinctions based on the content of the messages being conveyed. In nonpublic fora, the government may favor certain speakers and messages.<sup>42</sup> Whether a forum is "public" or "nonpublic," however, turns on whether government intends to create a public forum or only a nonpublic one.<sup>43</sup> Yet if governmental intent is the touchstone

<sup>35</sup> See Mark G. Yudof, *When Government Speaks* 42, 168–9 (1983). Benzanson and Buss also advocate structural approaches to Track Three; but unlike Yudof, they do not rely exclusively on structural solutions. See Benzanson and Buss, *supra* note 15, at 1499–1500, 1511.

<sup>36</sup> See Howard Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 *Tul. L. J.* 163, 187–8 (2002).

<sup>37</sup> Steven Shiffrin, *Government Speech*, 27 *U. C. L. A. L. Rev.* 565, 610 (1980).

<sup>38</sup> Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 *U. Mich. J. L. Reform* 35, 113 (2001).

<sup>39</sup> Edward H. Ziegler, Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 *B. C. L. Rev.* 578 (1980).

<sup>40</sup> Martin H. Redish and Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 *Corn. L. Rev.* 62 (2002). See also Richard Arneson and Ian Shapiro, *Democratic Autonomy and Religious Freedom: A Critique of Wisconsin v. Yoder*, in *Democracy's Place* (I. Shapiro, ed. 1996), 137. I am skeptical that a principled line can be drawn between the inculcation of partisan values and indoctrination in those values. *But see* Redish and Finnerty, *supra*, at 106–8.

<sup>41</sup> See text at notes 12–14 *supra*.

<sup>42</sup> See cases cited in notes 7 and 14 *supra*.

<sup>43</sup> See note 14 *supra*. For a criticism of the public forum doctrine, see Charles Fried, *Saying What the Law Is* 132–3 (2004).

for determining what kind of forum is in issue, it is difficult to see why governmental partisanship in allowing access to the forum would not conclusively demonstrate an intent to create a nonpublic forum – that is, a forum for the benefit of specific speakers and messages. The result would then be that governmental partisanship would establish a nonpublic forum which would in turn legitimate the very partisanship that established it. In any event, public forum analysis has proven to be completely unilluminating – a way of characterizing conclusions about the legitimacy of Track Three laws rather than a basis for demonstrating the soundness of those conclusions.

*B. Distinguishing Among Subject Matter, Viewpoint,  
and Speaker Discrimination*

One approach to Track Three laws that is sometimes put forward in the literature is to distinguish between those content distinctions that turn on the subject matter of the message and those that turn on the particular viewpoint expressed by the message. (Track Three discriminations among speakers might similarly be analyzed in terms of whether government, by favoring some speakers over others, intended to advance or suppress certain subject matter or to advance or suppress certain viewpoints.) If government is discriminating against subject matter – that is, certain topics, such as religion, politics, or art – the discrimination will ordinarily be treated as consistent with freedom of expression. However, if government is discriminating against certain viewpoints – such as that abortion is okay, that Democrats are preferable to Republicans, or that morality is connected to religion – then its discrimination is presumptively violative of freedom of expression.

There are several problems with this approach to Track Three laws. First, and of least concern, the approach is inconsistent with the case law (though the case law is itself internally inconsistent). For example, the United States Supreme Court has struck down as violative of free speech Track Three laws that discriminated on the basis of subject matter. In *Carey v. Brown*<sup>44</sup> and *Police Department v. Mosely*,<sup>45</sup> for example, the Court struck down laws that gave picketers involved in labor disputes the right to picket at places where all other picketers were excluded. The laws did not base eligibility for the exemption on any particular viewpoint that the labor picketers were expressing. And in *Southeastern Promotions, Ltd. v. Conrad*,<sup>46</sup> the Court held unconstitutional a policy of a city-run theater to put on only family-suitable plays, again without regard to any specific message the play might convey. On the other hand, the

<sup>44</sup> *Supra* note 6.

<sup>45</sup> *Supra* note 8.

<sup>46</sup> *Supra* note 8.

Court approved value-inculcation in public schools;<sup>47</sup> and indeed, the public schools teach specific viewpoints throughout the curriculum.

The second and much more serious problem with distinguishing subject matter discrimination from viewpoint discrimination is that the line between the two types of discrimination is an impossible one to draw and to defend. Is a ban on discussions of abortion in public schools a subject matter ban or a viewpoint ban? Were the exemptions for labor picketing in *Carey* and *Mosley* really viewpoint-neutral? Are “family-suitable” plays a viewpoint-neutral category? Subject matter and viewpoint bleed into one another.

Consider in this regard the question of whether the St. Paul ordinance at issue in *R.A.V. v. City of St. Paul*<sup>48</sup> discriminated on the basis of subject matter or of viewpoint. The ordinance prohibited the display of a burning cross or other symbol that would arouse anger, alarm, or resentment on the basis of race, color, creed, religion, or gender. Justice Antonin Scalia deemed the ordinance to discriminate between viewpoints. A cross burning expressing hostility to a racial group would fall within the ordinance, whereas a cross burning expressing solidarity with that group would not.<sup>49</sup>

Justice John Paul Stevens, however, saw the ordinance as making only a subject matter discrimination, not a viewpoint one.

Contrary to the suggestion of the majority, the St. Paul ordinance does not regulate expression based on viewpoint. The St. Paul ordinance is evenhanded. In a battle between advocates of tolerance and advocates of intolerance, the ordinance does not prevent either side from hurling fighting words at the other on the basis of their conflicting ideas, but it does bar both sides from hurling such words on the basis of the target’s “race, color, creed, religion or gender.” To extend the Court’s pugilistic metaphor, the St. Paul ordinance simply bans punches “below the belt” – by either party. It does not, therefore, favor one side of any debate.<sup>50</sup>

The same battle over characterizing a content discrimination as subject-matter-based or as viewpoint-based arose in *Rosenberger v. Rector and Visitors of University of Virginia*,<sup>51</sup> *Lamb’s Chapel v. Moriches Union Free School District*,<sup>52</sup> and *Good News Club v. Milford Central School*.<sup>53</sup>

In *Rosenberger*, the question was whether a University of Virginia policy authorizing payment of the printing costs of a variety of student publications but prohibiting payment for any student publication manifesting “a particular belief in or about a deity or an ultimate reality” was viewpoint discrimination, as the excluded student group claimed, or was merely a subject matter restriction

<sup>47</sup> See Board of Educ., *supra* note 26.

<sup>48</sup> *Supra* note 6.

<sup>49</sup> *Id.* at 391.

<sup>50</sup> *Id.* at 434–5.

<sup>51</sup> *Supra* note 19.

<sup>52</sup> 508 U.S. 384 (1993).

<sup>53</sup> 121 S. Ct. 2093 (2001).

(excluding religion), as the University of Virginia claimed. The Supreme Court held that the university's policy amounted to an unconstitutional discrimination against a religious viewpoint on topics rather than a discrimination against certain topics.<sup>54</sup> The dissent argued, however, that because all religious, agnostic, and atheistic perspectives were treated equally, the policy did not constitute viewpoint discrimination.<sup>55</sup>

In *Lamb's Chapel*, the Court found a school district rule prohibiting the after-school use of school property for religious purposes to constitute viewpoint discrimination when applied to exclude a group wishing to show religious-oriented films on family and childrearing matters. The Court rejected the lower court's holding that the district's rule amounted only to subject matter discrimination, reasoning that the rule permitted all views on family issues except those reflecting religious perspectives.<sup>56</sup> And in *Good News Club*, the Court again found a similar school district rule to be unconstitutional viewpoint discrimination as applied to a Christian group engaged in instructional and devotional activities. The dissent characterized the group's activities as proselytizing and worship, not merely the teaching of morals from a religious perspective, and argued that schools should be able to exclude such activities in a nondiscriminatory manner.<sup>57</sup> Justice Scalia responded by pointing out that because political, social, and cultural organizations were free to inculcate beliefs and proselytize, prohibiting religious groups from doing so constituted viewpoint discrimination.<sup>58</sup>

Despite the difficulties in distinguishing subject-matter from viewpoint discrimination within the broader category of content discrimination, some commentators remain attracted to this distinction as a way of negotiating the Track Three subsidy-of-private-speakers domain. Martin Redish and Daryl Kessler are notable examples.<sup>59</sup> Redish and Kessler label subsidies to private speakers and expenditures of government funds to purchase library books, put on plays, and so forth as "auxiliary subsidies."<sup>60</sup> They then divide the realm of auxiliary subsidies into "categorical" and "viewpoint" subsidies and subsidies of "judgmental necessity."<sup>61</sup> Categorical subsidies are "viewpoint neutral choices to fund particular categories, subjects, or classes of speech."<sup>62</sup> Redish and Kessler give as examples the funding of a study on the effects of smoking and the purchase of history books or books of American fiction by a public library.<sup>63</sup>

<sup>54</sup> *Supra* note 19, at 831.

<sup>55</sup> *Id.* at 895.

<sup>56</sup> *Supra* note 52, at 394.

<sup>57</sup> *Supra* note 53, at 2114 (Stevens, J., dissenting).

<sup>58</sup> *Id.* at 2110.

<sup>59</sup> Martin H. Redish and Daryl I. Kessler, "Government Subsidies and Free Expression," 80 *Minn. L. Rev.* 543 (1996).

<sup>60</sup> *Id.* at 567.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

Categorical subsidies, which Redish and Kessler would generally permit, are to be distinguished from subsidies of speakers based on their viewpoint, which Redish and Kessler would generally forbid. They reason that subsidies of categories of speech, though content-based, are unlike content-based *restrictions* on speech in that the former increase the total amount of speech. And they are unlike viewpoint-based subsidies in that they present little danger of skewing public debate; they do not provide one side with more resources, nor do they disguise from the audience the government's role in inducing the speech.<sup>64</sup>

On the danger of masking impermissible viewpoint discrimination through categorical subsidies, Redish and Kessler write:

One must concede that government may on occasion seek to disguise what are in reality viewpoint-based subsidies behind the mask of permissible categorical subsidies. This problem has long plagued the doctrinal distinction between viewpoint-based and content-neutral regulations of expression. Although this danger is impossible to avoid completely, at least two tactics can mitigate the likelihood of its arising. Initially, courts must prohibit the government from defining categorical subsidies in a viewpoint laden manner, such that the very contours of the category effectively exclude viewpoints with which government disagrees. For example, government cannot define the category as "the evils of abortion," thereby effectively excluding any expression that advocates freedom of choice. A reviewing court generally should be in a position to resolve this issue on the four corners of the governmentally established category, without the need to resort to a separate factual inquiry.

In certain situations, however, courts must still undertake a separate factual inquiry. Such a case would arise when, although on its face the categorical description unambiguously excludes viewpoint distinctions, an unsuccessful applicant for the subsidy asserts that in reality the government based its denial on the applicant's underlying viewpoint.<sup>65</sup>

The final type of speech subsidy that Redish and Kessler discuss is the subsidy of "judgmental necessity." Such a subsidy occurs when the government subsidizes a particular category of speech but, because of finite funds, must discriminate among speakers within the category. Thus, if the National Endowment for the Arts funds "modern art," it still must select for grants only some of the modern artists who apply. Or if the National Endowment for the Humanities funds historical research on the Revolutionary War, it still must choose among competing researchers based on some criteria. Those criteria for selection will undoubtedly include evaluative criteria that reflect one viewpoint among several. Redish and Kessler would permit use of such evaluative criteria to choose within a viewpoint-neutral category as long as the criteria are "substantially related" to the government's purposes in funding the general category. Thus, government could choose for funding the "best" modern artists or American historians, but it could not choose modern artists or American historians based

<sup>64</sup> Id. at 569–70.

<sup>65</sup> Id. at 570–1.

on their politics.<sup>66</sup> Likewise, in selecting American history texts for use in the public schools, school boards can pick the texts based on accuracy; and that means that if the board believes Christopher Columbus was a racist, it may select history books based on whether they portray Columbus as such.<sup>67</sup>

In deciding to purchase accurate textbooks in the first instance, the government makes a viewpoint-neutral choice to fund a particular study or class of speech, a constitutionally valid categorical subsidy. Within this category of speech, a school board must of course select one textbook for use in its schools. Under our approach, the board's choice falls within the "judgmental necessity" exception, as long as it makes that choice on the basis of criteria "substantially related" to the predescribed purpose of the program pursuant to which textbooks are funded. The job of the school board, presumably, is to select the textbook that will provide students with the most complete and accurate description and understanding of history. If a school board believes that Christopher Columbus was a racist, then it is likely that, all other things being equal, this school board will choose a textbook that describes Columbus as a racist over one that ignores his treatment of Native Americans. Insofar as subjective viewpoint is inextricably linked to the board's judgment of textbook quality, it is difficult to argue that a school board cannot make the decision based on the textbooks' treatment of Columbus.<sup>68</sup>

Despite their heroic efforts to justify the distinction between subject matter and viewpoint discrimination, I do not believe Redish and Kessler have succeeded, nor do I think success is possible. Subject matter and viewpoint do not define natural kinds. There is no principle relevant to freedom of expression as a human right that tracks such a distinction among Track Three laws. Not only will any postulated boundary between subject matter and viewpoint discrimination be contestable – *R.A.V.*, *Rosenberger*, *Lamb's Chapel*, and *Good News Club* surely illustrate that – but it will be unprincipled as well. All Track Three laws involve content discrimination, and all content discrimination violates the *Barnette* principle of evaluative neutrality. And that is as true of content discrimination based on subject matter as it is of content discrimination based on viewpoint.

Consider: If the National Endowment for the Arts subsidizes "modern art," is modern art a category, or is it a viewpoint? The government is surely expressing views: that modern art is "art"; that it is as or more meritorious in terms of art's functions than other categories of art; that art should be funded; and so forth. And not only is each of these an expression of a viewpoint, but each of these is controversial. The opposing viewpoints – that modern art is not "art," that it is decadent or otherwise nonmeritorious, or that art should not be publicly funded – are viewpoints that the government is discriminating against in its subsidies. And the same is true whenever the National Endowment for the

<sup>66</sup> Id. at 572–3.

<sup>67</sup> Id. at 584.

<sup>68</sup> Id. at 585 (footnote omitted).

Humanities decides, contrary to Henry Ford, that history is not bunk but is instead worthy of public subsidy.

Moreover, because funds for subsidies are always scarce, government will have to make what Redish and Kessler call subsidies of judgmental necessity within the subject matter categories, which essentially involves drawing the subject matter categories more narrowly. If the National Endowment for the Humanities cannot fund all historical research, it must limit its funding to “good” or “the best” historical research, which it might define as research demonstrating “the oppressive nature of Eurocentric thought” or “the anti-Native racism of Columbus.” Redish and Kessler admit the evaluative nature of such judgments and concede their necessity. What is true, however, is that the lines defining the categories themselves perforce exhibit the same evaluative judgments, including quite contestable ones.

The same problem arises when the government subsidizes not subject matter, but speakers. For example, in *Arkansas Education Television Commission v. Forbes*,<sup>69</sup> the Supreme Court dealt with a candidates’ debate on publicly-funded television that excluded minor candidates, defined as those having little support in the polls. The Court upheld the exclusion because it was not based on the speaker’s viewpoint.<sup>70</sup> Surely, however, restricting public funding to candidates far ahead in the polls expresses a message, and a quite contestable one, about whose views it is important for the public to hear. (Arguably, the very public exposure that third-party candidates seek through public subsidies may be both necessary and sufficient to generate the showing in the polls required to get those public subsidies. If so, an equally plausible case could be made for discriminating *against*, not in favor of, the major party candidates.) All of which is not to deny that there are good reasons to restrict candidates’ debates to those *ex ante* likely to win the elections. It is only to deny that those reasons are somehow neutral or nonevaluative and do not express a viewpoint.

### C. Guarding Against the Distortion of Views

Another approach to Track Three that is sometimes put forward is built on a concern that the audience not be deceived regarding the authorship of speech. Thus, if a doctor conveys family planning information to a patient but, because of conditions attached to the governmental funding of the clinic, fails to mention the availability or desirability of abortion, the patient may interpret the information differently depending upon whether she is aware of the government’s

<sup>69</sup> 523 U.S. 666 (1998)

<sup>70</sup> A Canadian court, however, held that an allocation of television time for political advertising that was based on popular support was violative of the Charter right of free expression of minor parties. *Reform Party of Canada v. Attorney General of Canada*, 13 C.R.R. (2d) 107 (1992). This case was reversed, however, by *Reform Party of Canada v. Canada (Attorney General)*, 123 D.L.R. (4th) 366, add’l reasons in 32 Alta. L.R. (3d) 430.



role in the doctor's speech. If she is unaware of that role, she may conclude that what the doctor conveys about family planning is all that the doctor knows or endorses, *which may not be the case*. Thus, governmental funding may distort the message that the audience receives from the speaker.

Another type of message distortion that one might worry about in connection with Track Three laws is that caused by inducing speakers to tailor their messages in order to receive governmental grants and privileges. The problem here is not so much speaker insincerity but rather that speakers will have their beliefs subtly altered by the allure of receiving funding. In other words, speakers will be speaking sincerely but at the same time will be exhibiting bad faith or false consciousness.

Commentators and justices who worry about these effects of Track Three laws usually distinguish between those cases where government itself is clearly the speaker and those in which the government is funding or exempting from regulation speakers with favored messages, finding much more danger of message distortion in the latter than in the former. But approaching Track Three laws from the vantage point of a worry about message distortion is, I believe, unpromising.

First, because governments "speak" only through agents, agents who are required to follow a government script to hold public employment will be induced, even if only subtly, to alter their beliefs to fit their scripts. A biology teacher who rejects Darwinism in favor of Creationism will likely encounter cognitive dissonance if he is forced to teach only Darwinism to his students and to mark Creationist answers as incorrect. So any Track Three law can represent an inducement to speakers to alter their beliefs. The problem is not confined to government subsidies of private speakers.

Second, even where there is transparency regarding government's role, and thus no danger of message distortion, disquiet with Track Three laws will likely remain. Consider a public school curriculum that teaches the superiority of the Republican Party. Because it is a public school, government's role in shaping the message is obvious to the audience. And it is the government speaking, not the government subsidizing private speakers. Nonetheless, those who worry about Track Three laws tend to put this example in the "clear violation of freedom of expression" column.

I doubt, therefore, that we will get much mileage out of concern for how Track Three laws might distort messages, either from the audience's standpoint or from the speaker's. Message distortion sounds like a bad thing, and perhaps it is. Perhaps it violates a right not to be deceived, a right that is independent of the right of freedom of expression.<sup>71</sup> But message distortion is a concern that has either too much or too little traction within Track Three.

<sup>71</sup> See generally Larry Alexander and Emily Sherwin, "Deception in Morality and Law," *22 Law & Phil.* 393 (2003).

#### IV. Conclusion: Does All, None, or Only Part of Track Three Implicate Freedom of Expression?

##### A. *Is Track Three A Sorites Problem?*

In the previous discussion I attempted to show that principled line-drawing within Track Three looks impossible. The hypothetical laws in (1) look to be of a piece with those in (2) and so on all the way to the laws in (7). Teaching evolutionary theory in the public schools is difficult to distinguish in any principled way from teaching the superiority of congressional candidate Jones. And both are difficult to distinguish in any principled way from government funding of only research within the orthodox evolutionary theory paradigm, or from government exempting only candidate Jones from the proscription of placing posters on utility poles.

Of course, it is open to someone to respond that all I have shown is that Track Three laws present a classic Sorites problem. We cannot draw any principled line of demarcation between that number of hairs that makes one hirsute and that number that makes one bald, nor can we identify precisely that number of grains of sand that make a heap. Still, we know that a head with only a couple of hairs is bald, while one with 10,000 is not, and likewise with heaps of sand. And similarly, can we not be confident that government's advertising the armed forces is not a free expression problem, whereas its supporting candidate Jones or the platform of the Democratic Party is?

Although I cannot fully defend the point here, I do not believe the cases on Track Three are like the classic Sorites cases. The latter involve linguistic or conceptual vagueness. Track Three line-drawing is a normative matter, however, and I doubt the applicability of Sorites analyses to the normative realm.<sup>72</sup> To argue that there is a line of great normative significance somewhere along a smooth continuum, but we just do not know where it lies, is to offer a promissory note without the collateral of a normative theory to secure it. So in the absence of a theoretical defense of lines within Track Three – and a defense that is connected to freedom of expression as opposed to other concerns – I believe we can safely move on to consider the relation between Track Three *as a whole* and freedom of expression.

##### B. *All Track Three Laws Violate Freedom of Expression*

One possibility is that *all* Track Three laws are impermissible. If we are certain that some Track Three laws violate freedom of expression, and if we can find no principled basis for distinguishing them from the remainder of Track Three laws, then it seems that we must conclude that all of Track Three is violative of freedom of expression.

<sup>72</sup> See Larry Alexander, "Deontology at the Threshold," 37 *San Diego L. Rev.* 893 (2000).

Track Three laws do violate the evaluative neutrality that must be at the core of freedom of expression. They do so when they endorse evolutionary theory as correct and a career in the armed forces as desirable every bit as much as when they endorse candidate Jones or the platform of the Democratic Party. They do so when they endorse modern art but not chocolate-coating performance art as worth taxpayer support.

Yet no commentator endorses overturning all Track Three laws. Although some would go as far as to urge the inconsistency of public education with freedom of expression,<sup>73</sup> no one wants the government to refrain from informing the public about why it has enacted the laws that it has, or why it believes a free trade treaty is advisable. Democracy requires some Track Three laws, or so it would appear.

### C. No Track Three Laws Violate Freedom of Expression

This is the final possibility. If we cannot accept that government speech in support of its own policies or public education is per se violative of freedom of expression, and if we cannot distinguish those Track Three cases from others, then perhaps we should drop beliefs such as that government's endorsement of partisan political positions is violative of freedom of expression. Perhaps such governmental nonneutrality is not morally problematic. Or perhaps it is, but not for freedom of expression reasons. (Perhaps it is problematic because anti-democratic.) Although the intuitions of most commentators are to the contrary – they do believe that at least some Track Three cases violate freedom of expression – perhaps they are just mistaken.

This view – that none of Track Three is of concern to freedom of expression – can be buttressed by the claim that cases on Track Three and cases on Track One, though both violate evaluative neutrality, are different from each other in a decisive way. In Track One cases, government violates evaluative neutrality *in restricting liberty*. In Track Three cases, no one's liberty is restricted.

The problem with the argument is simply that it is false. Governmental speech and subsidies do in a real sense restrict liberty. Governmental speech and subsidies employ resources that come, of course, from private citizens and leave them with fewer resources to devote to propagating their own views. Now this may seem trivial in an advanced Western nation where the percentage of anyone's tax bill traceable to governmental speech activities is tiny. Imagine, however, a very poor nation whose citizens have very little in the way of surplus monies available to publish and to broadcast, and assume that the government of that country, fearful of dissent, taxed those resources to support a massive governmental propaganda machine. Would we not in such a case believe that

<sup>73</sup> See Arons, *supra* note 31.

the citizens' liberty *was* being restricted by the taxation, and being restricted to affect what messages were being received?

All government speech, subsidies of speech, and regulatory exemptions for favored speakers leave private citizens, including those who oppose the government's positions, with fewer resources. And if a small fine for expressing a disfavored view represents a loss of liberty, so too must a much greater resource loss that increases the salience of views one opposes while at the same time deprives one of the means to express one's opposition.<sup>74</sup>

I shall not attempt to settle the relation between Track Three and freedom of expression. Government could not operate without some governmental speech, a point suggesting that not all of Track Three can be inconsistent with freedom of expression (unless the latter demands anarchy). On the other hand, because governmental speech does require the scarce resources of the citizenry, I think it implausible that *no* Track Three cases implicate freedom of expression.

<sup>74</sup> The United States Supreme Court has held that coerced payments of dues to support others' viewpoints can violate the First Amendment. *See, e.g.*, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Keller v. State Bar of California*, 496 U.S. 1 (1990). These cases were distinguished by the Court in *Board of Regents of the University of Wisconsin v. Southworth*, 529 U.S. 217 (2000), in upholding a mandatory student fee that supported a university forum at which many views could be expressed, not just those favored by the majority of students.

The European Court of Human Rights has given some support to the idea that excessive government control of resources for expression is a freedom of expression problem. In *Informationsverein Lentia v. Austria*, 17 Eur. H.R. Rep. 93 (1994), the Court held as violative of the European Convention on Human Rights Austria's monopoly over broadcasting.

## Miscellaneous Regulations of Expression

In this chapter I take up some areas of regulation that are thought to implicate freedom of expression but that are not usually placed within Tracks One, Two, or Three. In fact, however, I shall attempt to show that each one of this disparate group of regulations falls squarely within one of these tracks and raises considerations quite similar to those already discussed.

### **I. The Speech, Beliefs, and Affiliations of Government Employees**

Governments tend both to regulate the expression of their employees and to make certain beliefs and affiliations disqualifying for government employment. We have already dealt in Chapter [Five](#) with those cases in which government has a message that it wishes its employees to deliver. If, for example, there are to be public schools with prescribed curricula, then public schoolteachers – government employees – will perforce need to speak as government prescribes, at least while on the job. But what if the schoolteacher, after school, publicly disavows the curriculum, gainsays its content, and blisteringly criticizes the school board, her principal, and her more accepting colleagues? May she be fired for undermining the education of her pupils and the morale of the workplace? And what if she belongs to an organization the positions of which are antagonistic to the policies of her public employer? May that affiliation provide the grounds for deeming her unqualified for the government job she holds or seeks? In this section I address both issues.

#### *A. Public Employee Speech*

The United States Supreme Court has decided a handful of cases involving public employee speech that led to discipline or termination but that would likely have been constitutionally protected had it been made by a private citizen. Although it is always hazardous to attempt to distill a general principle from such a small sample of cases, particularly when those cases are not unanimous

and are decided over a span of years involving changes in the Court's personnel, the cases appear to stand for the following proposition: Government may fire or otherwise sanction an employee for speech that impedes the government's ability to perform its functions if the speech is not about a matter of "public concern" or is knowingly or recklessly false in its content.<sup>1</sup>

There are basically two ways that public employee speech impedes the government's ability to perform. First, the speech may damage personal relations within the governmental department or institution. Our hypothetical teacher's criticism of her principal and colleagues is an example of speech with the potential to damage relationships in a way that affects the delivery of services, at least if we assume that effective education requires decent relations among teachers and administrators.

Second, the speech may damage public confidence in the government's performance. Our hypothetical teacher's remarks about the curriculum and the school board (and perhaps, as well, her criticisms of her principal and colleagues) could cause the public to lose confidence in the public schools, perhaps leading many to withdraw their children in favor of private schools.

This second way that public employee speech can impede governmental effectiveness is, however, a dubious basis on which to treat public employee speech as special. In the first place, any speech that has the potential for undermining public confidence in the government would seem of necessity to fall within the "matter of public concern" exception. In other words, only if the public is interested in and concerned about the subject of the speech will the speech affect its confidence in the governmental office in question. In the second place, public employee speech criticizing the government in a way that undermines public confidence is no different in this respect from similar speech by private citizens. The teacher's criticism of the curriculum, for example, should damage public confidence no more and perhaps less than the same criticism made by an education expert not in the government's employ. The criticism might be valid or invalid and, if the latter, honestly or maliciously voiced. But however the principles of freedom of expression constrain the government in dealing with private critics of its policies, its regulation of its own employees when they criticize its policies should be similarly constrained.

That brings us back to speech by public employees that undermines working relationships within the government office. Note that this reason for sanctioning public employee speech cuts across the public-concern/not-of-public-concern divide. The principal of a public school might have as difficult a time dealing with a teacher who has publicly criticized her curricular policies as with a teacher who has called her a jerk. The Supreme Court's exempting speech on

<sup>1</sup> See *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968). See also *Waters v. Churchill*, 511 U.S. 661 (1994); *Rankin v. McPherson*, 483 U.S. 378 (1987).

matters of public concern from sanction rests, then, on the view that the content of some speech (matters of public concern) is more important than maintaining the efficiency of governmental services, but the latter is more important than the content of other speech (matters not of public concern). Already in Chapter [Two](#) and again in Chapter [Four](#), I have pointed out the violation of evaluative neutrality that this assignment of importance entails.<sup>2</sup> Moreover, because these lines rest ultimately on judges' evaluations of the importance of speech, which will frequently turn on their own policy views and assessments of accuracy, the line for a given item of speech will be drawn differently by different judges.

There is another point to be made about the "undermining governmental efficiency" rationale for limiting public employee speech. Presumably, there are many valuable endeavors accomplished by private individuals working cooperatively that may be impeded if relations among the citizens become strained due to the critical comments of some. Yet, leaving aside the special cases of defamation, fighting words, and infliction of emotional distress, governments do not seek to regulate remarks that might strain personal relationships, even when those remarks might jeopardize valuable cooperation. Why then does the Supreme Court permit the government to regulate the speech of its employees on such a ground?

Now one could reply that although government does not directly regulate all efficiency-impeding speech in the private sector, it generally permits private employers to fire or sanction employees whose speech undermines morale and negatively affects the private firm's output. Because much of the beneficial cooperative activity in the private sector takes place within the economic sphere, employers and the constraints of the market can more effectively police relationship-damaging speech than can the government.<sup>3</sup> When such speech takes place within a government enterprise, however, the government as employer is the only institution capable of imposing the necessary sanctions.

Moreover, whenever we seek more from the private employment relation than economic efficiency – as when we seek nondiscrimination on the basis of race and sex – the government does not rely on private employers to police relationship-straining speech. Private employers may find racially or sexually hateful speech to be less costly than its regulation and so may not discipline employees who engage in such speech. In such cases the government may step in to force the employer to impose discipline or face liability for violation of laws forbidding racial or sexual discrimination.

<sup>2</sup> See pp. 27–34, 59–61, 66 *supra*.

<sup>3</sup> Of course, one can argue persuasively that nonmarket cooperative endeavors, particularly the family, contribute directly or indirectly to the common weal as much if not more than purely economic relations. And if that is the case, then speech that ruptures or strains those cooperative endeavors – and for which by hypothesis there is no immediate corrective, such as an employer concerned with efficiency – poses a greater threat to public welfare than disruptive public employee speech.

This reply is probably adequate to explain why government is permitted to regulate speech by public employees that undermines working relationships, even though as a descriptive matter government does not regulate such speech in the private sector, at least where the speech's negative effects are on efficiency rather than policies of nondiscrimination. Still, we could conclude that freedom of expression outweighs any loss of efficiency of governmental operations, and that government's employees and managers should cultivate thick-skinned attitudes toward personal attacks by colleagues. Indeed, where government has attempted to impose speech restrictions within private firms through its antidiscrimination laws, those attempts have themselves been criticized by many as violations of freedom of expression.<sup>4</sup>

The jurisprudence of public employee speech from other jurisdictions is sparse. The Canadian and European courts have decided a moderate number of such cases. Although it is difficult to discern any hard and fast rules from the opinions to date, in general the Canadian and European courts have been less speech protective than the United States Supreme Court. They typically employ a balancing test, in which whether the speech undermines working relations is apparently the key to its protectability, although whether the speech is about a matter of public concern and whether it is true are also factors that are thrown into the weighing.<sup>5</sup> (I assume at this point I need not dwell on the absence of evaluative neutrality inherent in such a balancing test: on what scale does one weigh impairments of governmental efficiency against revelations of information that some in the public might find important?)

In concluding this subsection I want to point out that regulating public employee speech that undermines intra-office morale represents just one more instance of a Track One regulation to prevent a one-step harm. In the jurisprudence of the United States Supreme Court, the "public concern" exemption allows the Court to conclude that the harm to governmental efficiency from non-exempted speech always outweighs the value of the suppressed expression.

<sup>4</sup> See, e.g., Eugene Volokh, "What Speech Does 'Hostile Work Environment' Harassment Law Restrict?," 85 *Georgetown L. J.* 627 (1997); Eugene Volokh, "How Harassment Law Restricts Free Speech," 47 *Rutgers L. J.* 361 (1995); Eugene Volokh, "Freedom of Speech and Workplace Harassment," 39 *U.C.L.A. L. Rev.* 1791 (1992); Kingsley R. Browne, "Title VII as Censorship: Hostile Environment Harassment and the First Amendment," 52 *Ohio St. L. J.* 481 (1991).

<sup>5</sup> The leading case is *Fraser v. Canada*, [1983] 1 F.C. 372, in which the Federal Court upheld the termination of a civil servant for criticizing the Prime Minister and governmental policies. See also *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union*, 3 L.A.C. (3d) 140 (1981) (upholding dismissal of public employee for making unfounded allegations on matters of public concern); *Re Simon Fraser University and Association of University and College Employees, Local 2*, 18 L.A.C. (3d) 361 (1983) (upholding reprimand of public employee for speech of no great public moment undermining working relationships); *Re Brampton (City) and A.T.U., Local 1573 (Monette)*, 7 L.A.C. (4th) 294 (1989) (same).

The leading European cases are *Connolly v. Commission of the European Communities*, [2001] E.C.R. I-1611; *Nafria v. Spain*, 36 Eur. H.R. Rep. 36 (2003); *Bobo v. Spain*, 31 Eur. H.R. Rep. 50 (2001).



In principle, what the Court has done is no different from what it has done in drawing lines in other Track One domains. The “idea-expression” and “fair use” lines drawn by copyright law, to the extent the courts deem those lines to track freedom of expression principles<sup>6</sup>; the “public concern/private concern” and “malice/no malice” lines that the courts themselves have drawn to reflect freedom of expression principles in defamation<sup>7</sup>; and the *Brandenburg* welter of lines the United States Supreme Court drew to deal with advocacy of illegal action<sup>8</sup> are of a piece with the lines drawn regarding public employee speech. Public employee speech is thus just one more Track One problem area. And just as with other Track One laws, evaluative neutrality forces freedom of expression into either extreme antagonism or extreme permissiveness toward government regulation of speech.

### B. Public Employee Beliefs and Affiliations

Suppose a member of the Ku Klux Klan applies for a job as a policeman in a city heavily populated by racial minorities, Catholics, and Jews. Suppose a member of an organization that espouses pederasty applies to drive a school bus. Suppose a member of a political group that advocates the overthrow of the government by force applies for a job in a sensitive weapons facility. May government rely on such memberships, or the beliefs that such memberships evidence, as the determinative reason for refusing to employ such persons in those positions? Put differently, does the right to freedom of expression extend to freedom of belief, and if so, what does freedom of belief entail?

I believe this last way of putting the question is potentially misleading. It should be obvious that there is some connection between the freedom to express beliefs and the freedom to hold them. Governments, however, although they can *affect* what beliefs people hold through the variety of Track One, Two, and Three laws regulating expression, cannot directly *change* beliefs through sanctions on the threat thereof applied to the beliefs themselves apart from their

<sup>6</sup> The copyright laws do not extend protection to the author’s ideas, but only to her expression of them. And under the rubric of “fair use” they permit others to make specific uses of the author’s expression without his consent. The United States Supreme Court appears to believe that these limitations on copyright protection are all that freedom of expression requires. *See, e.g., Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985). For challenges to the Courts’ position, see Jed Rubenfeld, “The Freedom of Imagination: Copyright’s Constitutionality,” 112 *Yale L. J.* 1 (2002); C. Edwin Baker, “First Amendment Limits on Copyright,” 55 *Vand. L. Rev.* 891 (2002). For responses to their criticisms, see Chapter 4, pp. 58 n. 9, 62–5.

<sup>7</sup> *See, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964) (requiring malice for defamation of public officials); *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967) (extending the malice test to defamation of public figures); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (introducing the “public concern” test for defamation of private figures).

<sup>8</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (making criminal advocacy punishable only where directed at inciting and likely to incite imminent lawless conduct).

expression. Rarely in modern societies is mere belief in something the basis of punishment.

Modern societies do, however, take numerous actions based on how people who hold certain beliefs are predicted to behave. In more repressive societies, people who hold certain beliefs are regarded as sufficiently dangerous to be exterminated or preventively detained in prisons or camps. Even in less repressive societies, however, forms of preventive, quarantine-like restrictions are applied on the basis of belief-as-evidence-of-likely-behavior.

Moreover, such restrictions are quite rational. Although there is nothing that prevents one from acting differently from how he would be predicted to act given his beliefs, the correlation between how one believes one should act and how one in fact acts is generally positive, and often quite strongly so. A policeman who endorses the Klan's views of minorities and Jews is more likely to treat such persons disrespectfully or abusively than is someone who believes in racial and religious equality and integration. One who endorses the propriety of pederasty is more likely to commit it if left in control of children than one who believes it to be immoral. One who endorses the overthrow of the government by force is more likely to use sensitive government information for subversive purposes than one who opposes the overthrow of the government. Indeed, one who belongs to the opposition political party and endorses its, rather than the incumbent government's, policies is less likely than a member of the party in power to work wholeheartedly to implement the government's policies.

Thus, government acts quite rationally in taking into account persons' beliefs in determining whether they are qualified to hold particular positions. And it acts quite rationally in concluding that what one says and the groups one joins are *evidence* of what one believes. Thus, one's beliefs can be *material* to one's fitness for a particular position; and one's speeches and affiliations, even if not material, can be *relevant* to one's fitness.

The United States Supreme Court's decisions in this area are generally in line with this analysis. Thus, in several cases dealing with membership in the Communist Party, the Court concluded that endorsement of the Party's goal of violent overthrow could disqualify one from practicing law and from working in a defense facility.<sup>9</sup> In addition, the Court held that although bare membership in the Party was not itself a permissible ground for disqualification,

<sup>9</sup> See, e.g., *Konigsberg v. State Bar*, 353 U.S. 252 (1957) (distinguishing between mere membership in the Communist Party, which cannot justify disqualification from practicing law, and endorsement of the Party's violent goals, which can); *United States v. Robel*, 389 U.S. 258 (1967) (making the same distinction for workers in defense plants).

The Canadian courts appear to allow public employment decisions to turn on whether the employee's beliefs are compatible with the job. See, e.g., *Peel Board of Education v. O.S.S.T.F.*, 105 L.A.C. (4th) 15 (2002). And the jurisprudence under the European Convention on Human Rights appears in accord. See, e.g., *Glaserapp v. Germany*, 9 Eur. H.R. Rep. 25 (1986); *Kosiek v. Germany*, 9 Eur. H. R. Rep. 828 (1987); *A v. Germany*, 11 Eur. H.R. Rep. CD 95 (1989). *But see Vogt v. Germany*, 21 Eur. H.R. Rep. 205 (1996).

membership was relevant as evidence of endorsement and could be inquired into in determining fitness for sensitive positions.<sup>10</sup>

With respect to practices of political patronage, in which the party in power gives out government jobs and contracts only to party members, the Court reached similar results. The Court held that nonpolicymaking positions could not be awarded on the basis of party membership, but that policymaking positions could be.<sup>11</sup>

Finally, a public employee's beliefs might be deemed disqualifying, not because they suggest that the employee will be disloyal or less than wholehearted in carrying out the government's mission, but because public reaction to those beliefs makes it impossible for the employee to carry out his tasks effectively. Suppose, for example, that the public employee or independent contractor who runs the food service at a heavily Jewish university believes in the propriety of Palestinian attacks on Israel. And although he has not publicly spoken out on this issue, his views become known, causing most of the students to boycott the university's food service. May the employee or contractor be fired on the grounds that his beliefs have rendered him ineffective?<sup>12</sup>

The United States Supreme Court has not addressed this issue directly.<sup>13</sup> In the area of discrimination, however, it has shown reluctance to allow private prejudices to legitimate governmental decisions that take those prejudices into account, even though the private prejudices have tangible effects that would otherwise have been proper for government to consider. Thus, in determining the best interest of the child in custody and adoption cases, the Court has held that officials placing the children may not consider public reaction to interracial families, even if that reaction will affect the children's prospects.<sup>14</sup> And in deciding where to site a group home for the retarded, government may not

<sup>10</sup> See *Konigsberg v. State Bar*, *supra* note 9.

<sup>11</sup> See *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996) (protecting independent contractors from patronage practices). See also *Condon v. Prince Edward Island*, 95 C.R.R. (2d) 216 (P.E.I.S.C. 2002) (striking down patronage system as applied to low level public employees).

<sup>12</sup> A Canadian case that resembles this hypothetical is *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, in which public reaction to a teacher's anti-Semitic beliefs was deemed to have impaired his effectiveness and justified his removal from his teaching position.

<sup>13</sup> The Supreme Court has upheld restrictions on government employees' engaging in partisan politics on the ground that such manifestations of partisan sympathies might undermine public confidence in impartial treatment. (The Court also relied on the separate interest in shielding public employees from superiors' pressures to engage in partisan politics.) See *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973). Canada's principal decision regarding partisan political activities by public employees is *Osborne v. Canada*, [1991] 2 S.C.R. 69, which struck down a sweeping prohibition of such activities. The European Court of Human Rights appears to be in accord with *Letter Carriers*. See, e.g., *Ahmed and Others v. United Kingdom*, 29 Eur. H.R. Rep. 1 (2000).

<sup>14</sup> See *Palmore v. Sidoti*, 466 U.S. 429 (1984).

consider the irrational fears of neighbors, even though the fears will adversely affect property values.<sup>15</sup>

Should the same approach that the Supreme Court employs when government wishes to take into account private prejudices be extended to cases where the government wishes to take into account the public's reaction to the beliefs of its employees and contractors? On the one hand, those beliefs do not indicate any likelihood that the employee will fail at his task due to his own reluctance to carry it out. On the other hand, those beliefs, once publicly known, *do* predict lack of success.

One might argue for the legitimacy of taking into account public reaction to beliefs by comparing provocative beliefs to public employee speech that undermines intra-office morale. Thus, one could say that when the employee calls his supervisor a jerk, the negative effect on their working relationship stems not from the speech itself, but from the employee's underlying beliefs about the supervisor that the speech reveals. Had the supervisor discovered those beliefs other than through the employee's speech – say, by examining a memo that the employee wrote to himself – the effect on the working relationship would have been the same. Thus, it is really the underlying beliefs, not the caustic words, that provide the legitimate basis for disciplining employees who criticize their colleagues and supervisors.<sup>16</sup> And if the *belief* that one's supervisor and colleagues are jerks is a legitimate basis for termination, why should not other beliefs the knowledge of which impedes effectiveness?

Having set forth the basic considerations and the jurisprudence regarding taking account of beliefs in government employment, I now want to ask how this topic relates to freedom of expression. One might think the relation to be obvious, given that what one believes is intimately connected to what one says and the groups one joins. And the courts frequently treat freedom of expression and freedom of belief as if they were synonymous. Expression, membership, and belief are not, however, the same things, and how they differ matters.

Freedom of expression is, as I have argued, implicated only by those governmental actions designed to affect audiences' beliefs by affecting the information and arguments that audiences receive. Freedom of *belief*, however, to the extent it differs from freedom of expression as I have defined it, might extend to two other types of government action. The first would be that of punishing people merely for believing certain propositions. Governments rarely do this because people do not have direct control over their beliefs. The second type of case that might implicate freedom of belief as opposed to freedom of expression is the type this subsection has discussed, namely, those in which the government

<sup>15</sup> See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

<sup>16</sup> See Larry Alexander, "Banning Hate Speech and the Sticks and Stones Defense," 12 *Const. Comm.* 21 (1995) (discussing whether the pain caused by hate speech is a product of the speech itself or of the underlying beliefs that the speech reveals).

preventively restricts or withholds positions from people because of their beliefs. Such governmental actions may or may not be morally warranted. And there may or may not be a human right at stake in such actions. If there is a human right at stake, however, it is much more likely to be a right not to have government preemptively restrict one's freedom and opportunities based on how it predicts one will choose to act in the future. The topic of preemptive action, both governmental and individual, and the moral rights it implicates, is an important and difficult one. Any right that restricts government from acting preemptively based on beliefs is, however, a separate right from the putative right of freedom of expression, which latter right is concerned with belief formation and not preemptive action. Even where these two issues overlap, as they do in cases where government regulates messages to prevent two-step harms, the freedom of expression issue arises because the government is trying to affect messages, whereas the preemption issue arises because of the causal connection between the receipt of the message and the harm that purports to justify the restriction, a connection that goes message/predicted belief/predicted conduct. The freedom of expression issue here is logically separate from the preemption issue: one could conclude that Track One two-step harm regulations are violations of a right of freedom of expression but not of any right against preemptive action; one could conclude the opposite; or one could conclude that both or neither right is violated by such regulations.

I conclude that the topic of this subsection – laws disqualifying persons from positions based on their beliefs – is outside the domain of freedom of expression, even though the courts frequently treat it as part of that domain. Instead, it raises issues going to the legitimacy of preemptive action by government, issues that only occasionally overlap with those of freedom of expression. Moreover, the same is true of the impact on association caused by government's using persons' associations as evidence of their potentially disqualifying beliefs: Any right of association implicated by such governmental action is separate from the right of freedom of expression, a point that I shall address more fully in the *next section*.

## **II. The Protection of the Exercise of Freedom of Expression**

Suppose the right of freedom of expression requires the government to permit speakers to stand on the sidewalk and criticize the government's foreign policy. And suppose the government does in fact permit speakers to do so. Has the government fully discharged its duties correlative to the right of freedom of expression, or is there further action that the right requires it to take? Specifically, does the right of freedom of expression require government to take affirmative steps to protect speakers exercising their rights from reprisals by private citizens? More specifically, does freedom of expression require government to spend resources on police protection of, and on prosecutions and injunctive

actions against, private parties who seek to intimidate, drown out, or retaliate against those exercising their right of freedom of expression?

This issue has arisen in United States Supreme Court jurisprudence only once in any explicit way. In *Feiner v. New York*,<sup>17</sup> a “hostile audience” case, the Court dealt with whether police, faced with a crowd apparently on the verge of violence, could silence the speaker whose speech was roiling the crowd, or could only prevent violence through attempts at crowd control. In a divided opinion, the majority held that the police could silence the speaker. The dissent, however, argued that freedom of expression required the police to make all reasonable efforts to deal with the crowd before taking action against the speaker.<sup>18</sup>

Note, however, that all acts by the police (and prosecutors and courts) consume resources. Money, time, and personnel are always finite. Therefore, under the dissent’s approach, the question is what level of resources should be devoted to affirmatively protecting speakers exercising their freedom of expression, either from private acts designed to curtail that expression (such as threats against the speaker), or from consequences caused by the expression that might otherwise justify *government’s* curtailing it (such as riots or violence against third parties)?

Once we see that the question is a resource question, it should be clear that we are dealing with just another Track Two issue.<sup>19</sup> For Track Two cases all deal with the trade-off between values that content-neutral laws seek to promote – aesthetics, safety, redistribution of wealth, property, and so on – and the value of those myriad message-effects that every possible set of Track Two laws will produce. I argued in Chapter Two that the evaluative neutrality principle that lies at the core of any recognizable right of freedom of expression precludes the possibility of a Track Two freedom of expression jurisprudence because it rules out the possibility of weighing the message effects of Track Two laws against the other values those laws promote, or weighing those message effects against the message effects of alternative Track Two laws.

The same point applies here. Police sent to protect speakers cannot patrol against burglaries. Extra money for the police budget to protect speakers means less money for schools and hospitals. Prosecution of audiences crowds court dockets and prosecutors’ time. And so on.

It is impossible not only in practice but also as a matter of principle to specify the resource commitments governments should make to protect speakers exercising their freedom of expression.<sup>20</sup> As with Track Two cases in general,

<sup>17</sup> 340 U.S. 315 (1951).

<sup>18</sup> Id. at 326 (Black, J., dissenting).

<sup>19</sup> As I pointed out briefly in Chapter Two, at pp. 22–3.

<sup>20</sup> The same is true as well for those exercising other rights against the government. For example, there is no way in principle to determine the resources government should allocate to protect those exercising the right to obtain an abortion from private persons seeking to thwart that exercise. The Supreme Court rejected the contention that the right to obtain an abortion set forth

all that freedom of expression can demand is making sure that what appears to be a Track Two resource allocation decision is not really a covert Track One content-based decision, with government withholding the level of protection it would normally provide because of (unjustified) hostility to the message being expressed.<sup>21</sup>

### III. The Regulation of Broadcasting

What are the freedom of expression implications of government's regulation of broadcasting by private parties? (Government's own broadcasting is just one type of government speech, a topic discussed in Chapter Five.) To get a handle on this question, we must distinguish between the two general government purposes that broadcast regulations reflect. One purpose is that of allocating a scarce resource in economically viable units and then policing that allocation to prevent trespasses (broadcasting on another's frequency). The second purpose is to allocate those frequencies in ways that produce preferred patterns of broadcast *content* – for example, content that is politically or culturally diverse, or politically balanced, or dedicated to “public service” items.

The first purpose – the perpetization of a resource – is an unremarkable Track Two purpose. We might analogize the situation to one in which the government is allocating land in its territories, land that in this case is useful, not for farming, ranching, or mining, but for a unique voice amplification resource. The land might be allocated on a first-come, first-served basis, with rules about how large a holding one can acquire and how its metes and bounds are to be established. Or government could auction the units of land to the highest bidders, or by lot. In any event, there is nothing special about the electronic spectrum that distinguishes broadcast frequencies from land. Although the frequencies, unlike land, have only one productive use, they are similar in all other respects relevant to allocation. Each alternative set of rules governing the allocation of broadcast frequencies will, of course, have different message effects. Unit size

in *Roe v. Wade*, 410 U.S. 113 (1973), entailed an affirmative obligation to provide abortion seekers with the necessary medical resources. *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980). Police, prosecutorial, and judicial resources are indistinguishable from the medical resources insofar as governmental obligations go.

<sup>21</sup> I leave open here, as I did in Chapter Two, whether discrimination against the activity of speaking in general, as opposed to discrimination based on content, should be considered a Track Two or a Track One issue, although I believe the better argument is that it is a Track Two issue. See Chapter Two, p. 24 n. 24, *supra*.

I also express no view on whether government should be permitted to engage in content discrimination in the allocation of resources to protect the exercise of the right of freedom of expression when the discrimination is based on government hostility to the message, which message government believes to be immoral even though protected against *government* restriction by the right. For example, need government allocate the same resources to protect a Nazi march against reprisals that it allocates to protect a peace or civil rights march? This issue is of a piece with the Track Three issues raised in Chapter Five.

rules, monopoly ownership rules, and the decision regarding whether to allocate by auction, lot, or squatting will each produce different classes of broadcasters saying different things to different audiences of different sizes. But the same is true of the property, contract, taxation, and other rules that allocate printing presses, ink, newsprint, and reporters' services. The allocation of broadcast frequencies for nonmessage reasons is just one more Track Two matter and subject to the general analysis in Chapter Two.

Suppose, however, that government tailors its allocative rules and regulations with an eye to the message effects of its actions. Does government's message-related purpose place its rules within Track One or Track Three? And is broadcasting special with respect to content regulation by the government?

At the end of Chapter Five I noted the theoretical difficulty in distinguishing Track One from Track Three.<sup>22</sup> Track One at its core deals with government's *penalizing* speech based on its content, whereas Track Three at its core deals with government's nonpunitive content-based allocations of resources and liberties to which persons have no preexisting rights. To distinguish Track One from Track Three governmental acts, then, one needs a theory regarding which resources are held by persons as a matter of right against the government and which are subject to seizure by the government to promote its policies, including its communicative policies. (The distinction between punitive and nonpunitive governmental purposes can also be problematic in Track Three contexts, particularly those in which favored speakers are exempted from the time, place, and manner restrictions that govern nonfavored speakers.<sup>23</sup>)

If we treat the electronic spectrum as property that the government may rightly claim to own as an initial matter, then content-conscious government allocation of broadcast frequencies would appear to be a Track Three matter. If government may spend "its" money to subsidize particular educational, political, or artistic content, it should be able to allocate "its" frequencies to produce desired messages.

Is there anything special about broadcast frequencies insofar as content-based regulations are concerned? For a long time the United States Supreme Court thought that the scarcity of those frequencies made their content-based allocation rules less problematic than they otherwise would have been.<sup>24</sup>

<sup>22</sup> See Chapter Five, pp. 101–2.

<sup>23</sup> *Id.* at 84–5.

<sup>24</sup> See, e.g., *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969) (upholding the Federal Communicative Commission's "fairness doctrine" on the basis of the scarcity of broadcast frequencies). Compare *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding unconstitutional a Florida fairness doctrine for newspapers).

The European Court of Human Rights has taken the view that broadcasting can be regulated because of its unique attributes. See, e.g., *Groppera Radio AG v. Switzerland*, 12 Eur. H.R. Rep. 321 (1990).

Both the United States Supreme Court and the British House of Lords have upheld Track One laws that apply more restrictively to speech over the airwaves than to speech conveyed through



Cable and satellite technologies have eviscerated any such scarcity rationale, though it is questionable whether scarcity could ever plausibly distinguish broadcast frequencies from other speech-related resources. Newsprint, ink, and printing presses are all scarce resources, yet no one thought that their scarcity justified government control of the content of newspapers, books, and magazines.

In any event, it is difficult today to argue that broadcast frequencies are scarce in any way that renders them uniquely subject to content control by government. Their freedom of expression analysis, then, turns entirely on whether the frequencies are *ab initio* government property, and, if so, what we conclude about Track Three in general.

#### IV. Freedom of Expressive Association

In *Boy Scouts of America v. Dale*,<sup>25</sup> the United States Supreme Court held that New Jersey's antidiscrimination law, which prohibits discrimination on the basis of sexual preference, could not constitutionally be applied to the Boy Scouts' decision not to permit an openly gay man to serve as a scoutmaster. The Court deemed the Scouts to be an "expressive association" – a group organized at least in part to promote certain viewpoints – and it concurred with the Scouts' claim that forcing the Scouts to employ gay scoutmasters would impair the Scouts' ability to convey their message that homosexuality is immoral. Therefore, the Court concluded, applying New Jersey's law to the Scouts' decision violated the Scouts' right of freedom of speech.

The *Dale* decision was quite controversial. Critics attacked each link in the chain of argument. Some argued that the Scouts' had no expressed view on homosexuality.<sup>26</sup> Some argued that retaining Dale as a scoutmaster would not impair the Scouts' ability to condemn homosexuality.<sup>27</sup>

I believe, however, that on those points, the Court was correct to decide as it did. For all sorts of reasons, the Court has no business trying to determine whether an organization really holds the views its leadership claims. (And as several commentators pointed out, it would not necessarily be a good thing to

other media. *See, e.g.*, *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding ban on offensive speech on the airwaves during prime time); *ProLife Alliance v. British Broadcasting Corp.*, (2003) UKHL 23 (same). Both cases stand in stark contrast to the United States Supreme Court's much more speech protective decisions regarding offensive speech in other contexts. *See, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

<sup>25</sup> 530 U.S. 640 (2000).

<sup>26</sup> *See, e.g.*, Madhavi Sunder, "Cultural Dissent," 54 *Stan. L. Rev.* 495, 498–501, 508, 557 (2001); David McGowan, "Making Sense of *Dale*," 18 *Const. Comm.* 121 (2001).

<sup>27</sup> *See, e.g.*, Jason Mazzone, "Freedom's Association," 77 *Wash. L. Rev.* 639, 683–4 (2002); James P. Madigan, "Questioning the Coercive Effect of Self-Identifying Speech," 87 *Iowa L. Rev.* 75 (2001).

require the Scouts to make their anti-homosexuality more explicit.<sup>28</sup>) And it should be self-evident that forcing an organization to act inconsistently with its stated positions will tend to undermine the effectiveness of its message. The very act of forming an organization dedicated to certain tenets is a way of expressing those tenets; and admitting into the organization people who do not endorse the tenets (Dale), or people who may outwardly endorse the tenets but whose conduct belies them, undermines that expression.

The real problem with the Court's decision in *Dale* is with the framework the Court employed. The Court assumed that laws governing membership in expressive organizations raise free speech issues because they affect the organizations' ability to express their views. Indeed, the Court had taken this stance in several cases leading up to *Dale*.<sup>29</sup> Laws governing membership in organizations are, however, Track Two laws. Their purpose is to integrate social life along various axes and to make certain resources and opportunities more widely available. Their purpose is *not* to affect messages.<sup>30</sup> Of course, as is true of all Track Two laws, these laws *do* have message effects. Indeed, they have the kinds of message effects the Court identified. But as Chapter Two made clear, message effects are ubiquitous and cannot themselves render a law one that implicates freedom of expression.

This is not to say that the Court was wrong to decide that New Jersey's law could not constitutionally apply to the Scouts' qualifications for membership and organizational roles. Perhaps the United States Constitution can be properly read to include a right to freedom of association that would cover the Scouts. Indeed, I believe that as a general matter, freedom of association is a worthy candidate for constitutionalization.<sup>31</sup> Consider the array of associations that we form. They range from families and friends to professional associations, ideological and credal (political, religious, philosophical) associations, discussion groups and debating societies, associations based on accomplishments

<sup>28</sup> See Laurence H. Tribe, "Disentangling Symmetries: Speech, Association, and Parenthood," 28 *Pepperdine L. Rev.* 641, 648–50 (2001); Mark Hager, "Freedom of Solidarity: Why the Boy Scout Case Was Rightly (But Wrongly) Decided," 35 *Conn. L. Rev.* 129, 171 (2002).

<sup>29</sup> See *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987); *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1 (1988); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995).

<sup>30</sup> For another commentator who recognizes that *Dale* is a Track Two case, see Jed Rubenfeld, "The First Amendment's Purpose," 53 *Stan. L. Rev.* 767, 708–9, 813–16 (2001); Jed Rubenfeld, "The New Unwritten Constitution," 51 *Duke L. J.* 289, 297–300 (2001); Jed Rubenfeld, "The Anti-Discrimination Agenda," 111 *Yale L. J.* 1141, 1160–2 (2002). And see Stephen Clark, "Judicially Straight? *Boy Scouts v. Dale* and the Missing Scalia Dissent," 76 *S. Cal. L. Rev.* 521 (2003).

<sup>31</sup> Freedom of association is recognized as a right distinct from freedom of expression under the European Convention on Human Rights, The Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights. See European Convention on Human Rights, Articles 10 and 11; Universal Declaration of Human Rights, Articles 19 and 20 (a); Int'l Covenant on Civil and Political Rights, Articles 19 and 20.

and virtues, recreational associations (for sports, games, and hobbies), fraternal, civic, and charitable associations, ascriptive associations, common interest associations, commercial associations, and business firms. Membership can be based on affective ties, creed, conduct, interests, occupation, accomplishments, or ascriptive traits. Such associations, although they may in particular instances have malign effects, are in general essential to the development of well socialized and autonomous citizens; and they form the intermediate institutions that are the bases of civic life and the bulwarks against the totalizing state that are essential to maintaining liberal democracies.<sup>32</sup> And although there are hard cases with respect to freedom of association – most notably, those involving certain forms of discrimination by businesses, where access to jobs is at stake<sup>33</sup> – in most cases we would be well advised to have the state stay out of the internal affairs and membership criteria of private associations. Do we really want the state to have the power to outlaw a black political party or a women-only or gay-only political group?<sup>34</sup> to require the Catholic Church to admit women to

<sup>32</sup> See generally Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* (1998); George Kateb, “The Value of Association,” in *Freedom of Association* (A Gutmann, ed., 1998): 35–63; John O. McGinnis, “Reviving Toqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery,” 90 *Cal. L. Rev.* 485 (2002); Hager, *supra* n. 27.

<sup>33</sup> The Supreme Court has attempted to separate the religious from the commercial aspects of enterprises run by religious groups in determining when those groups may discriminate in favor of members of the religion. See *Corporation of Presiding Bishop of the Church of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

There is no doubt that forbidding discrimination on certain bases precludes many who engage in business from associating on grounds that they prefer and from constructing their products and services in specific ways. For discussion of the conflict between antidiscrimination laws and product/service definition, see Kimberly A. Yuracko, “Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination” (unpublished manuscript on file with author); Larry Alexander, “What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies,” 141 *U. Pa. L. Rev.* 149 (1992). For a defense of exempting commercial endeavors from the right of freedom of association, see Hager, *supra* note 28, at 159–61.

<sup>34</sup> In *Terry v. Adams*, 345 U.S. 461 (1953), the last of the so-called “white primary” cases, the Court did appear to hold the view that political parties could not define themselves racially. One might have thought that whatever restrictions the Constitution might impose on government’s actions once the government is chosen, it should not be read to control the grounds for selecting the government.

Putting aside the case for a general constitutional right of freedom of association, there is a strong case for constitutionalizing a right of political association, which right would entail, among other things, the right of political parties to control their membership and procedures for selecting candidates. The Supreme Court has indeed upheld such a right of political parties, but it has erroneously regarded it as a part of freedom of expression under the First Amendment. See, e.g., *California Democratic Party v. Jones*, 120 S. Ct. 2402 (2000) (invalidating state law permitting non-party members to vote in party’s primary); *Tashjian v. Republican Party*, 479 U.S. 208 (1987) (invalidating state law preventing independents from voting in party primary). As was true of the Court’s decision in *Dale*, however, these decisions cannot be derived from a plausible principle of freedom of expression. They seem more naturally connected to structural necessities of democratic self-government. (I discuss the linkage – or absence of linkage – between democratic self-government and the putative human right of freedom of expression in Chapter Seven.)

the priesthood, or Orthodox Jews to integrate the seating of men and women worshippers? to make illegal the formation of a group requiring abstinence from homosexual (or perhaps all) sex? to set the rules for sports and games?<sup>35</sup> (Indeed, in some cases, it is difficult to imagine what a rule requiring admission of someone into an organization that wishes to exclude him actually would require of the organization: Would its members be required to fraternize with him? Would they be forbidden to bloc vote against him?<sup>36</sup>)

Having stated the case for freedom of association and for the desirability of the result in *Dale*, I must reiterate that laws such as the New Jersey antidiscrimination law in *Dale*, which clearly do infringe on freedom of association, do not implicate freedom of expression. Such laws' aim is to affect association, not the content of messages. Insofar as freedom of expression goes, such laws are merely garden variety Track Two laws, the analysis of which was given in Chapter Two. Freedom of expressive association, the right invoked in *Dale*, is not part of freedom of expression.

### V. Anonymous Speech and the Privacy of Speakers

The United States Supreme Court has at various times held that the First Amendment protects the anonymity of certain vulnerable speakers,<sup>37</sup> and that it also entails a privacy right regarding membership in political organizations.<sup>38</sup> The government's interests in knowing the identity of certain speakers and the membership of certain organizations are avoiding audience deception – the *ad hominem* argument that knowing who is behind positions helps audiences assess the positions' credibility – and identifying harmdoers (those who are defaming others, violating others' copyrights, inciting violence or conspiring to commit violence, and so on).

Do speaker anonymity and privacy fall within the scope of freedom of expression? Again, the answer turns on the harms the government is seeking to

<sup>35</sup> In *P.G.A. Tour, Inc. v. Martin*, 532 U.S. 661 (2001), the Court and Congress teamed up to deem the regular P.G.A. tour's ban on players' using golf carts, as applied to a golfer with a congenital leg defect, to be inessential to the game of golf and thus illegal under the Americans With Disabilities Act. Justice Scalia authored a scathing dissent, and he mocked the majority's assumption that golf had an essence apart from whatever rules the sport's governing bodies promulgated. *See id.* at 698–704 (Scalia, J., dissenting). He might have asked how the Court would handle then American League Commissioner Will Harridge's exclusion of midgets and dwarfs from American League baseball in 1951 in response to Bill Veeck's use of Eddie Gaedel, a midget, to draw a walk for the St. Louis Browns in a game with the Detroit Tigers.

<sup>36</sup> *See Terry v. Adams*, *supra* note 34, for what was tantamount to a prohibition of racial bloc voting.

<sup>37</sup> *See McIntyre v. Ohio Elections Com'n*, 514 U.S. 334 (1995); *Brown v. Socialist Workers*, 459 U.S. 87 (1982); *Talley v. California*, 361 U.S. 516 (1960). *See generally* Jonathan Turley, "Registering Publius: The Supreme Court and the Right to Anonymity," 2001–02 *Cato Sup. Ct. Rev.* 57 (2002).

<sup>38</sup> *See, e.g., N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958).

prevent and whether interdicting messages because of their content is a step on preventing that harm. With respect to preventing the deception of the audience by revealing the identity of speakers and the membership of organizations that “speak,” one should view the government’s actions as message driven. After all, what government is attempting to do is alter the speaker’s message, albeit only slightly.

That having been said, such government actions are theoretically no different from other laws targeting messages that government believes are deceptive. I have already taken these laws up in Chapter [Four](#). All that anonymity adds to the analysis is that speakers’ reasons for withholding their identity from messages are frequently different from their reasons for wording their messages in potentially misleading ways. Typically, the motive for anonymity is fear of some sort of reprisal against the speaker. Although that motive makes government’s attempt to eliminate anonymous speech on the basis of its deceptiveness more likely to deter speakers from speaking than will government’s ordinary laws against deceptive speech, that difference is one of degree, not one of kind.

Government’s actions directed toward identifying lawbreakers – which goal lies behind many of its incursions on privacy, and not just speaker and organization privacy – fall into the category of government information-gathering, not message-targeting. Those actions are therefore Track Two actions with speech effects and, as such, covered by the discussion in Chapter [Two](#).

## **VI. Private Regulation of Speech**

Does principle (5) apply, not just to governmental regulations, but to private restrictions on others’ liberties as well? If Megacorp refuses to hire anyone who supports the Democratic Party – in order that its market clout may affect political messages and bring about the Republican policies it favors – is the right to freedom of expression violated? If Megafarms prevents, through use of the trespass laws, union organizers from gaining access to its farmworkers – because it fears the effects of their messages – has it violated the right of freedom of expression of the union and the farmworkers? If Mediagiant orders its reporters to slant their stories in favor of the Democrats, on pain of dismissal, is it violating the reporters’ or the audience’s right of freedom of expression? If Gated Community, in pursuance of policies agreed to by all of its homeowners, excludes publishers of tabloids from delivering their papers, even to homeowners who would like to receive tabloids, is it violating the homeowners’ and publishers’ freedom of expression?

On the one hand, such private entities, backed by the laws of property, contract, and so forth, are surely acting like governments within the domain those laws carve out for them. On their property, or within the scope of their employment, others are being restricted from conveying messages in ways that

arguably would be paradigmatic freedom of expression violations were the restrictions imposed by government.<sup>39</sup>

On the other hand, the right of freedom of expression against government would be worthless if it did not entitle private persons to affect messages as they want. A newspaper publisher cannot be prevented by government from giving her slant to the news, and this seems to entail that government must permit the publisher to invoke Track Two laws – contract, property, tort, and so forth – to get *her* views out, even if this means that her reporters, *qua* employees, are denied any right of freedom of expression to ignore her orders with impunity.

There is a dilemma here. Private restrictions on speech, enforced through content-neutral Track Two laws, can have as great or greater a magnitude of message effects – what gets said by whom, to whom, and with what impact – as governmental restrictions on messages. Indeed, this point about private restrictions is just a corollary of the point made earlier that Track Two laws may have more important message effects than the message-targeted laws that fall under principle (5). But if freedom of expression were implicated by the Track

<sup>39</sup> The United States Supreme Court did indeed hold that a privately-owned town must afford speakers the same rights as it would be compelled to afford were it a municipal corporation or other political subdivision of the state. *See Marsh v. Alabama*, 326 U.S. 501 (1946). On the other hand, after first extending *Marsh* to shopping centers in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Court quickly retreated in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and *Hudgens v. NLRB*, 424 U.S. 507 (1976), leaving *Marsh* as the only unrepudiated instance where the Court has applied the Constitution's freedom of speech provision to restrict a concededly private entity.

The state courts have split over whether state constitutional protections of freedom of expression apply to private entities such as large farms and ranches, shopping centers and malls, gated residential communities, apartment and condominium complexes, large warehouse retail stores, and the like. For a sample of the wildly varying state supreme court decisions, see *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979) (shopping center); *Sam Andrews' Sons v. Agricultural Labor Relations Board*, 47 Cal. 3d 157 (1988) (farm); *Golden Gateway Center v. Golden Gateway Tenants Ass'n*, 26 Cal. 4th 1013 (2001) (apartment complex); *Batchelder v. Allied Stores International, Inc.*, 388 Mass. 83 (1983) (shopping mall); *People v. Goduto*, 21 Ill. 2d 605 (1961) (parking lot); *People v. Sterling*, 52 Ill. 2d 287 (1972) (shopping mall); *People v. DiGuida*, 152 Ill. 2d 104 (1992) (grocery store); *State v. Wicklund*, 589 N.W. 2d 793 (Minn. 1999) (shopping mall); *State v. Schmid*, 423 A. 2d 615 (N.J. 1980) (shopping center); *New Jersey Coalition Against the War in the Middle East v. J.M.B. Realty Co.*, 138 N.J. 326 (1994) (shopping mall); *Green Party v. Hartz Mountain Industries, Inc.*, 164 N.J. 127 (2000) (shopping mall); *Bork v. Westminster Mall Co.*, 819 P. 2d 55 (Colo. 1991) (shopping mall); *Stranahan v. Fred Meyer, Inc.*, 311 Or. 28 (2000) (shopping center); *Estes v. Kapiolani Women's and Children's Medical Center*, 71 Haw. 190 (1990) (hospital entrance); *S.O.S., Inc. v. Mirage Casino-Hotel*, 23 P. 3d 243 (Nev. 2000) (hotel property subject to pedestrian easement); *State v. Lacey*, 465 N.W. 2d 537 (Iowa 1991) (restaurant).

There is a tiny number of similar cases outside the United States. For one example, see *Case of Appleby and Others v. The United Kingdom*, European Court of Human Rights, 6 May 2003 (shopping mall). And in states like California that have interpreted their constitutions to make freedom of expression in some circumstances a right against private property owners, the lower courts have rendered some significant decisions. *See, e.g., Laguna Publishing Co. v. Golden Rain Foundation*, 131 Cal. App. 3d 816 (1982) (newspaper exclusion in gated community); *Laguna Publishing Co. v. Golden West Publishing Co.*, 124 Cal. App. 3d 967 (1981) (same); *Albertson's, Inc. v. Young*, 107 Cal. App. 4th 106 (2003) (grocery store entrance); *Costco Companies, Inc. v. Gallant*, 96 Cal. App. 4th 740 (2002) (warehouse retail store).

Two laws that give private persons, organizations, and corporations the ability to regulate speech within the domains those laws carve out, then freedom of expression would always appear on both sides of every contest. Every set of Track Two laws will produce different private messages and message effects. And every incursion by government into this domain designed to alter those message effects would come under principle (5) and involve government in deciding which messages should be heard more and which less.

A digression is in order here to place this issue in the proper perspective. First, if freedom of expression is, as stated in Chapter One,<sup>40</sup> a right against governmental action, how can it even be possible for one to assert it against a private party? One answer is that one's freedom of expression attack on the speech restrictions issued by the private party are all actually attacks on the government's laws and acts enforcing those laws that together legally empower the private party to restrict speech. The private party's speech restriction can be a Track One restriction aimed at the content of messages, a Track Two restriction aimed at the time, place, and manner of expression, or a Track Three subsidy of particular messages. The government's action, in all of these cases, however, will ordinarily be a Track Two action; for example, the law of property that empowers the private landowner to exclude speakers whose messages she does not like – or the law of contract that requires reporters to write what the publisher wants – is not itself enacted or enforced because of these or other message effects. (If it were, then it would be a Track One, not a Track Two, law.)

The situation is analogous to that in *Shelley v. Kraemer*,<sup>41</sup> the famous “state action” case. There, the courts of Missouri enforced a private racially-restrictive covenant in a residential neighborhood. The Supreme Court held that the judicial enforcement of the covenant was state action and therefore subject to the command of the Equal Protection Clause of the Fourteenth Amendment, which forbids the *state* to deny equal protection of the laws.<sup>42</sup> The Court went on to hold that because governmental racial restrictions on real estate were unconstitutional, and because the judicial enforcement of the racial covenant was state action subject to the Constitution, that enforcement was unconstitutional.

*Shelley* was quite controversial because it appeared to extend constitutional restrictions to acts of private parties generally through the state's enforcement of private contract and property rights. The problem was generally thought to lie in the Court's deeming judicial enforcement to be state action subject to the Constitution. But the problem with *Shelley* was not *that*. Rather, the problem was with the Court's equating qualitatively two distinct forms of state action: discrimination by the state itself and enforcement of private discrimination by the state. Both are state action, but they are qualitatively and constitutionally distinct. State action permitting and enforcing choices of a type the state

<sup>40</sup> See Chapter One, p. 4.

<sup>41</sup> 334 U.S. 1 (1948).

<sup>42</sup> U.S. Const., amend. XIV, §1.

would be constitutionally forbidden to make is not necessarily or even usually unconstitutional: the state has legitimate and sometimes constitutionally compelled reasons for permitting private actors to choose in ways that the state itself is constitutionally forbidden to choose. Obviously, private actors have religious and political beliefs and autonomy and privacy interests that the state *qua* state does not have. And the Court never made the argument that the state's reasons for allowing private parties to make legally enforceable racially-restrictive covenants were as deficient constitutionally as whatever reasons the state might have for its mandating racial segregation. This failure to assess the reasons for Missouri's enforcement of covenants was the problem with *Shelley*, not the Court's finding that enforcement was state action.

In the context of private regulation of speech, the government is acting through those Track Two laws and their enforcement that make the private regulation of speech possible. However, as long as those Track Two laws really *are* Track Two laws and are not enacted because of their message effects, what is true of Track Two generally also applies here: freedom of expression is not implicated.

Perhaps, however, the argument here moves too quickly. Perhaps there are some Track Two laws that give so much power to private persons that the latter should be viewed as equivalent to governments for purposes of freedom of expression. Just as the government often acts no differently from how private employers act – and is for that reason permitted by the First Amendment to restrict its employees' speech<sup>43</sup> – so also may private employers (or landowners) at some point look indistinguishable from governments and become subject to similar legal constraints. Imagine, for example, a small country, the government of which is quite permissive regarding expression. All of the land, however, is owned by one family or corporation, which also controls all of the jobs; and it is quite repressive about expression. In this scenario, is the private landowner really the “government” insofar as the right of freedom of expression is concerned? Perhaps it is. But the jurisprudence of determining when an otherwise private actor becomes “governmental” will, I suspect, be quite difficult to rationalize.<sup>44</sup>

The conclusion to draw from this chapter's discussion of various special freedom of expression problems is that none of them turns out to be special after

<sup>43</sup> See section I.A. *supra*.

<sup>44</sup> For a comprehensive discussion of both “state action” and the government/private actor distinction as they bear on constitutional values, see Larry Alexander and Paul Horton, *Whom Does the Constitution Command?* (1988). For a nutshell of that discussion, see Larry Alexander, “The Public/Private Distinction and Constitutional Limits on Private Power,” 10 *Const. Comm.* 361 (1993). For a recent look at private suppression of speech, see Gregory P. Magarian, “The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate,” 73 *Geo. Wash. L. Rev.* (forthcoming).



all. Public employee speech is just one more Track One problem of a piece with those discussed in Chapter [Four](#). Government's resource allocation to the protection of speakers, its allocation of broadcast frequencies, its laws affecting membership in associations, and its property and contract laws giving private parties rights to control others' speech are all Track Two matters and subject to exactly the same analysis as was put forward in Chapter [Two](#) – unless, of course, these governmental actions are taken because of their message effects, which would convert them into Track One or Track Three actions, but not exceptionable ones. And although the question of when private actors become “the government” is an interesting and deep conceptual one, the answer to it, although it bears on the right of freedom of expression, does not bear uniquely on that right, but on all rights against government. Finally, governmental action taken because of employees' beliefs raises no freedom of expression issue at all.



PART THREE

THEORETICAL PERSPECTIVES ON  
FREEDOM OF EXPRESSION



# General Justifying Theories of Freedom of Expression

In the previous chapters we have taken a look at the variety of circumstances in which claims of freedom of expression might be invoked and at the variety of interests that government might be pursuing through the allegedly infringing law or governmental action. We have attempted to glean from those myriad cases some covering principle that might closely fit and justify our intuitions about those cases and yet remain faithful to the requirement of evaluative neutrality that must lie at the core of freedom of expression. Our attempts in this regard, however, have been unsuccessful. Again and again we have had to balance freedom of expression against harm to some other interest, and evaluative neutrality has forced us in every case to give expression either overriding weight or zero weight in the balance, resulting in a right of freedom of expression that is either too strong or ineffectual.

In this chapter we shall look at freedom of expression from the top down, so to speak, rather than from the bottom up. We shall look at various theories of freedom of expression that have been advanced and see whether any one of them is capable of nonarbitrarily supporting a human right without at the same time producing counterintuitive results.

## I. Consequentialist Theories of Freedom of Expression

One family of theories attempts to justify a right of freedom of expression by pointing to various good consequences that such a right will bring about. The most often invoked good consequences of this sort that freedom of expression is supposed to produce are truth, autonomy, and virtue.<sup>1</sup> I take up these three consequentialist goods in turn.

<sup>1</sup> I have already discussed David Brink's Millian consequentialist justification of freedom of expression. See Chapter Four at 72–4. And I shall discuss Richard Posner's cost-benefit approach to freedom of expression – and to everything else – in Chapter Eight.

### A. *The Promotion of Truth*

One common justification advanced on behalf of freedom of expression is that such freedom is instrumental to the discovery of truth. Freedom to disseminate new information and to criticize prevailing views is necessary for eliminating misconceptions of fact and value.

Although this justification is frequently criticized as resting on a philosophically naive realist view about facts and values, that criticism is off the mark. The justification for free inquiry as a means for discovering truth is not tied to any particular metaphysical view about fact or value.

The real problem with this justification is not in what it assumes about the nature of truth but in what it assumes is the best procedure for obtaining truth. In domains in which obtaining truth is the principal value – for example, in legal proceedings – expression is regulated and circumscribed. Even in the area of scientific inquiry, professional journals refuse to publish claims that the editors believe are not properly substantiated, and faculties and laboratories refuse to employ those who hold what in the opinion of the faculties and laboratories are outlandish views.<sup>2</sup>

<sup>2</sup> Robert Post points out that it is only within specialized environments, themselves quite regulated, that we can say that “truth-seeking” is the function of the freedom of expression that remains in the space left by the regulations:

There is thus a disturbingly large gap between the actual shape of our constitutional law and doctrinal rules that seem to express the theory of the marketplace of ideas. This gap suggests either that we do not believe in the theory of the marketplace of ideas, or that our doctrine has somehow misconstrued the actual implications of the theory. The latter alternative seems to me the more plausible. Although First Amendment doctrine presently understands “the truth-seeking function” of the marketplace of ideas to flow directly from the communicative properties of speech, in fact truth-seeking requires much more. It requires an important set of shared social practices: the capacity to listen and to engage in self-evaluation, as well as a commitment to the conventions of reason, which in turn entail aspirations toward objectivity, disinterest, civility, and mutual respect. Thus John Dewey once remarked that rational deliberation depends upon “the possibility of conducting disputes, controversies and conflicts as cooperative undertakings in which both parties learn by giving the other a chance to express itself,” and that this cooperation is inconsistent with one party conquering another “by forceful suppression . . . a suppression which is none the less one of violence when it takes place by psychological means of ridicule, abuse, intimidation, instead of by overt imprisonment or in concentration camps.”

The social practices necessary for a marketplace of ideas to serve a truth-seeking function are perhaps most explicitly embodied in the culture of scholarship inculcated in universities and professional academic disciplines. Certainly this culture is what Charles Sanders Peirce had in mind when he advocated “the method of science” as a preferred avenue toward truth, a method that he explicitly contrasted with the “method of authority” which employs the “organized force” of the state to suppress “liberty of speech.” In this limited sense there is deep insight in the Court’s often repeated observation that “[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’” The augmentation of knowledge within professional academic disciplines does not flow merely from the fact that ideas are formally free from official censorship, but rather from the fact that this freedom is embedded within what John Stuart Mill once called a “real morality of public discussion.” In the absence of such a morality, it is merely tautological to presume that truth is what most people come to believe after open discussion.

It is thus inaccurate to infer that the theory of the marketplace of ideas requires that the First Amendment protect all speech that communicates ideas. Instead, the theory requires the protection

Moreover, it is a mistake to assume that truth is something quantifiable, so that we can assess alternative regimes based on how much “truth” each produces. There is no *single thing* called Truth that we can obtain, either absolutely or in varying degrees. To ask whether a regulation promotes or impedes Truth is to ask a question that is essentially meaningless, like asking how many individual things there are in the universe. All regulations, and all failures to regulate, produce different environments, and each environment reveals some truths and obscures others.

Of course, the truthseekers might want to see the question posed differently. Instead of posing the question in a way that invokes Truth, one might pose a specific truth-seeking question: say, whether a specific regulation promotes or impedes a scientific truth.

One should concede that there are specific truths – “right answers” to specific truth-seeking questions. One should concede that some of those specific truths can be viewed as particularly important to obtain. These concessions having been made, it would follow that if (1) a governmental regulation interferes with the search for the answer to a particular question – a particular truth – and if (2) obtaining the answer to that particular question is viewed as very important, then (3) the regulation is unjustified unless (4) the other values served, or “truths”

only of speech that communicates ideas and that is embedded in the kinds of social practices that produce truth. The Court’s failure to offer doctrinal articulation of the social prerequisites of truth-seeking is a significant source of the gap between doctrinal rules attempting to embody the theory of the marketplace of ideas and the actual shape of our First Amendment law.

Society consists of myriad forms of social practices, and speech is constitutive of almost all of these practices. The number of these practices that can plausibly be rendered consistent with the truth-seeking function of a marketplace of ideas is relatively small. It makes no sense, for example, to locate a truth-seeking function in the speech between lawyers or doctors and their clients, or in the communication contained in product warning labels. Judges recognize this distinction; their common sense rebels against applying to such situations doctrinal rules based upon completely incompatible social presuppositions. That is why First Amendment doctrine differs from the actual shape of our law.

To implement accurately the theory of the marketplace of ideas, therefore, doctrinal rules would have to confine the scope of their application to those domains of social life where the prerequisite forms of social organization for a functioning marketplace of ideas either were present or could constitutionally be conjured into existence. Exactly where the theory could appropriately be applied, of course, would be highly debatable, but I suspect that under any fair construction the scope of its application would be quite narrow.

Robert Post, “Reconciling Theory and Doctrine in First Amendment Jurisprudence,” in L. C. Bollinger and G. R. Stone, eds., *Eternally Vigilant: Free Speech in the Modern Era* (2002) 153, 163–4 (footnotes omitted). *And see* James Boyd White, “Free Speech and Valuable Speech: Silence, Dante, and the ‘Marketplace of Ideas,’” 51 *U. C. L. A. L. Rev.* 799, 812 (2004) (pointing out that “when we really do believe that speech can advance truth . . . we normally do not free it from constraint, but instead . . . regulate it”). *See also* Steven D. Smith, “Believing Persons, Personal Beliefs: The Neglected Center of the First Amendment,” 200 *U. Ill. L. Rev.* 1233, 1246–7. As Smith points out, it is doubtful that “the communicative free-for-all that prevails in, say, political campaigning or the advertising of competing products [is] well calculated to help voters or consumers apprehend the truth in these matters.” *Id.* at 1247.

revealed, by the regulation are equally as important as obtaining the answer to that particular question.

For example, one might believe that forbidding the publication of the *Pentagon Papers*<sup>3</sup> substantially obstructed the search for the truth about U.S. involvement in Vietnam, and that the “truths” and other values served by keeping the *Pentagon Papers* secret were less important than the truth about that involvement. If one subscribes to this belief, then one would have condemned any attempt to restrain the publication of the *Pentagon Papers*, even though, because of other values that would be implicated, one might not have allowed citizens to search the Pentagon looking for those papers, or one might have punished those whose thievery was responsible for their publication.

The problem with the “quest for truth” as a theory of freedom of expression in the “specific truths” sense is that one cannot extrapolate from the quest for specific truths to any recognizable general theory of free speech. The quest for specific truths demonstrates only that *some* expression does help answer *some* questions that are relatively important, and that regulation of expression *sometimes* will be unjustified. Other expression contributes little toward answering some questions; some activities other than expression contribute a great deal toward answering some questions; and answering some questions is less important than, and occasionally is downright destructive of, other values that even avid specific-truth seekers would want to protect or maximize.

This last point is crucial. The corollary of the proposition that some freedom of expression in some environments is conducive to discovering some truths that are worth the harms that the expression causes is that in many instances freedom of expression may lead to error rather than truth, even in the long run, or that the long run may be too long given the harms the expression causes in the short run. And not all truths are equally important. Knowing what Tony Blair wears to bed is undoubtedly not worth the embarrassment the revelation might cause, even if unbridled expression about it might converge on the truth of the matter in a short time.

Freedom of expression thus promotes the search for some truths and impedes the search for others; and in the former cases the truths at issue will sometimes be worth the costs of the expression and sometimes not. The promotion of truth cannot provide the basis for a general right of freedom of expression. At most, it can support specific (and not unbridled) rights of freedom of expression in certain types of environments.

### *B. The Promotion of Autonomous Decisionmaking*

Various theorists have suggested that freedom of expression promotes individual self-rule, individual self-development, and political self-rule. To the extent that

<sup>3</sup> See *New York Times Co. v. United States*, 403 U.S. 715 (1971) (the *Pentagon Papers* case).



we can characterize these theories as based on the general value of autonomy, they seek to maximize autonomy rather than to treat it as some absolute or near-absolute side constraint.

The autonomy these theories seek to maximize, however, is not affected only by regulations aimed at communicative impact, that is, by regulations designed to prevent audiences from learning certain information or hearing certain arguments or opinions. Autonomy also is affected by any regulation that affects the information and opinions one receives – that is, by all governmental regulations. All of government's regulations affect the ideas that individuals receive – those regulations directly affecting access to information, and those affecting access to the indefinite diversity of media of communication, including private property in others' possession, that are useful for communicating generally, communicating certain ideas, or communicating ideas in a particular form. Hence, *all* government regulations influence individuals' self-rule and self-development. And, of course, the interests that government balances against speech – such as security of person, security of property, and protection of privacy – all affect autonomy values. In other words, autonomy is on both sides of the balance in a typical freedom of expression case because one's autonomy is surely compromised, not only when government deprives one of facts and good arguments, but also when it fails to prevent speakers from lying to one, lying about one, revealing one's shameful secrets, threatening one, shocking one into seclusion, taking one's intellectual property, persuading others to harm one, and so on.

Thus, these consequentialist autonomy theories all require some sort of balancing mechanism. Balancing is required so that government can, for example, decide whether allowing Able to burn Baker's dollar bill without Baker's consent (in order, say, to protest inflation in front of a particular audience and with a particular communicative effect) advances autonomy more than not allowing Able to do so (with the resulting benefits of protecting security of property while permitting whatever speech would result if property allocations were undisturbed).

Consequentialist autonomy theories require that expression be assigned a "proper value" in furthering autonomy. They likewise require that other values be assigned "proper weights" relative to autonomy. Surely "expression" has some value, and surely the value of "expression" varies with the truth and importance of its message. Therefore, these theories require some government agency – ultimately courts or legislatures – to assess expression for its truth, importance, and so forth, as well as to balance the value of "expression" against other values. In sum, consequentialist autonomy theories require violation of evaluative neutrality.

Finally, none of these consequentialist autonomy theories can justify the special treatment of expression. If autonomy is important, why is autonomy regarding expression more important than autonomy regarding conduct? It cannot be because expression is harmless and conduct potentially harmful. Expression

can cause all sorts of harms, as we have seen, many of which themselves reduce autonomy. Moreover, conduct not intended to express ideas nevertheless generates ideas – what the conduct is like, whether it is valuable, and so forth. Indeed, restrictions on nonexpressive conduct may be more intellectually stultifying and thereby reduce autonomy more than restrictions on expression. Moreover, what *in terms of promoting autonomy* justifies elevating the freedom to receive and assess ideas over the freedom to act on them? As Steve Smith puts it,

The challenge now is not to justify restraints on government: it is easy enough to appreciate that government often interferes with choice – or that some people acting through government will sometimes interfere with the choices of other people. The basic difficulty now is to explain why one category of choices that people in fact value deserves more respect from the law than most other kinds of choices receive. . . . [D]ifferent people surely regard different kinds of choices as more important or more fundamental to their self-conception or life projects. So justifications asserting the central importance of choices involving expression or religion to autonomy, by in effect telling people which choices are most important to them, seem inconsistent with the value of autonomy itself.<sup>4</sup>

### C. *The Promotion of Virtue*

Some have argued that the most cogent justification for a right of freedom of expression is that it is conducive to the cultivation of certain virtues that are essential to the success of liberal democracy. In particular, freedom of expression leads to development of tolerant attitudes towards others' beliefs as well as to becoming thick skinned about critical, insulting, and offensive statements.<sup>5</sup> Tolerance and a thick skin are in turn vital to life in a modern pluralist democracy, with its competing visions of the Good, its differing standards of civility, and its competitive economy and politics. Without a high incidence of tolerant attitudes and thick skins among their citizens, pluralist societies would be riven with civil strife and could not maintain their liberal democratic character. Freedom of expression assists in the development of these essential virtues, or so the argument goes.

I shall not assess the descriptive claims of this theory, though I am not sure that freedom of expression is the cause rather than the effect of tolerance and cognate virtues. What I do argue, however, is that these "virtue theories" fail as general theories of freedom of expression. For one thing, they are radically overinclusive. Tolerance could be cultivated by forcing people to endure, say, insulting speech, or offensive speech; permitting speech that incites crime, ruins reputations, infringes intellectual property rights, invades privacy, deceives, and

<sup>4</sup> Smith, *supra* note 2, at 1257 (footnote omitted).

<sup>5</sup> See, e.g., Vincent Blasi, "Free Speech and Good Character: From Milton to Brandeis to the Present," in Bollinger and Stone, *supra* note 2, at 61; Lee C. Bollinger, *The Tolerant Society* (1986).

so on has no obvious connection to tolerance or becoming thick skinned. With the possible exception of invasions of privacy, the harms such speech causes are not primarily psychic.

These theories are also radically underinclusive, as this last point illustrates. For tolerance and other virtues can be cultivated equally well by forcing people to endure nonexpressive conduct. Perhaps we could learn to tolerate really loud noises, slaps to the face, forced child marriages, and different aesthetic tastes – consider old cars parked in our neighbors' yards, or the cutting down of old growth forests and their replacement with plastic trees.<sup>6</sup>

In short, there are lots of ways to cultivate tolerance and thick skins. We do not need to permit harmful or even psychically harmful speech in order to do so. Religious liberty might work as well. And surely there is lots of nonexpressive conduct that we are presently intolerant of but which we could learn to endure.

#### *D. Do Consequentialist Theories Have the Right Shape for Justifying a Human Right of Freedom of Expression?*

The foregoing discussions have attempted to demonstrate the shortcomings of the usual consequentialist theories of freedom of expression – those that posit truth, autonomy, or virtue as the goal for the attainment of which freedom of expression is instrumental. Truth (in the form of particular truths) is sometimes served and sometimes disserved by freedom of expression, and it is often served as well as disserved by freedom of action. Autonomy is the same. And the cultivation of tolerant virtues cannot itself support any particular instance of freedom of expression.

Beyond these criticisms of particular consequentialist theories, and reflected in them, are two more general points. First, any consequentialist theory will be hostage to the facts. Whether a particular rule immunizing certain expression from governmental sanctions will promote good consequences, however specified, will almost assuredly vary from time to time and from place to place. It may even be the case that a freedom of expression doctrine that produces good consequences in the United States will not do so in Canada and vice versa. And if that is true of nations so close geographically, linguistically, technologically, demographically, and politically as the United States and Canada, then it is surely true of nations that are far less alike in these regards. And if it is true synchronically across similar nations, then it is probably true diachronically, even within one nation. For these reasons, consequentialist justifications for a human right of freedom of expression – one that is the same for all people wherever and whenever located – look hopeless.

<sup>6</sup> See, e.g., Laurence H. Tribe, "Ways Not to Think About Plastic Trees: New Foundations for Environmentalism," 83 *Yale L. J.* 1315 (1974).

Consequentialist justifications of a human right of freedom of expression are problematic for another, though related, reason. The protection that they afford the individual speaker and listener is not justified out of concern for them and their moral entitlements as individuals but is rather justified by how granting them the right will promote public welfare. Although it is possible that one's conception of human rights has this indirect consequentialist form, on most understandings, I suspect, the individual's human right has a primary and not derivative status.<sup>7</sup>

## II. Deontological Theories

If consequentialist theories seem incapable of justifying a human right of freedom of expression, are deontological theories better equipped to do so? After all, deontological rights, unlike consequentialist ones, are not derivative of some goal and are not variable in shape according to the circumstances. They are primary in moral reasoning and (relatively) impervious to public welfare considerations and the myriad contingencies that affect those considerations.

The difficulty with deontological theories of freedom of expression is that any such theory that is at all cogent will be both too narrow and too extreme. First, one type of deontological theory – what I shall call the libertarian liberal's nonappropriation theory – looks to be inapplicable to freedom of expression cases. The nonappropriation theory proscribes appropriating without consent another's body, labor, or talents in order to produce good consequences.<sup>8</sup> Thus, government is forbidden from forcefully taking a kidney from someone who has two good ones and redistributing it to someone who needs it to survive, even though the kidney redistribution will save the recipient's life at minor cost to the involuntary donor.

In freedom of expression cases, however, government is not appropriating others' bodies, labor, or talents. It is instead preventing harm to third parties or to the audience from the medium of expression (in Track Two cases) or from the audience's receipt of the message (in Track One cases). The deontological injunction against appropriation will only apply to cases in which government is compelling individuals to speak (or sing, or produce poetry, and so forth). Such cases, however, although they are candidates for deontological proscription, are at the fringe of freedom of expression concerns and assimilable to libertarian liberal concerns that range far beyond compelled expression.

A different type of deontological theory of freedom of expression is the kind advanced by Scanlon and Strauss that we considered in Chapter Four. That type

<sup>7</sup> See James Weinstein, "Campaign Finance Reform and the First Amendment: An Introduction," 34 *Ariz. St. L. J.* 1057, 1080 (2002).

<sup>8</sup> See Larry Alexander, "'With Me, It's All er Nuthin': Formalism in Law and Morality," 66 *U. Chi. L. Rev.* 530, 558–61 (1999).

of theory forbids government from acting to prevent audiences from receiving messages when government's reason for doing so is that it does not trust the audience's ability to assess the messages. Thus, Scanlon and Strauss would prevent government from proscribing expression on the ground that it fears the expression will persuade the audience to violate legitimate laws. On the other hand, if government is proscribing expression for any reason other than distrust of the audience's ability to assess it properly, government is not violating the Scanlon/Strauss deontological constraint.

In Chapter [Four](#) I raised doubts about the Scanlon/Strauss principle. For one thing, it would appear to render illegitimate the crimes of criminal solicitation and incitement, despite Scanlon's and Strauss's protestations to the contrary.

More importantly for our purposes here, even if the Scanlon/Strauss principle is a justifiable deontological constraint on government, it is far too narrow to provide a basis for a general theory of freedom of expression. Its maximum scope of application is to those Track One laws and actions designed to prevent two-step harms by morally responsible audiences. Although Scanlon and Strauss undoubtedly believe their principle applies whenever government is proscribing what it believes is the propagation of false opinions – as opposed to false facts – on the ground that the audience might believe those false opinions and act to its or others' detriment, I have raised doubts about the cogency of the opinion/fact distinction on which any extension of the principle beyond criminal advocacy rests. (Indeed, because I likewise attacked the fact/value distinction, I concluded that the principle might have *no* range of application whatsoever, *not even to criminal advocacy*.)<sup>9</sup>

Moreover, the Scanlon/Strauss principle is completely inapplicable to the many laws and acts designed to prevent one-step harms from expression or designed to prevent two-step harms from nonresponsible audiences. (A governmental concern with how the immature, the insane, and other nonresponsible actors might process a message does not fall within the Scanlon/Strauss principle; but it is difficult to imagine what laws Scanlon and Strauss find problematic that could not be justified by such a concern.) Nor does it have any obvious application to Track Three. And, of course, it is completely irrelevant to Track Two.

I conclude that neither type of deontological principle – the general nonappropriation principle or the Scanlon/Strauss freedom of expression principle – provides us with a defensible theoretical underpinning for a human right of freedom of expression.<sup>10</sup>

<sup>9</sup> See Chapter [Four](#) at 70–80.

<sup>10</sup> I should add that I do not see any prospect for deriving a right of freedom of expression from a putative right to speak the truth. First, there is no case for such a right. Many of the ways we inflict harm on others involve speaking the truth – consider breaching confidences, revealing secrets, disclosing embarrassing private facts, and infringing copyrights, just to name some of those ways. Do we really have a right to do *those* things?

### III. Freedom of Expression as Concomitant to Democratic Decisionmaking

Perhaps one of the most popular justifying theories for the right of freedom of expression posits the right as the necessary concomitant to democratic governance. The democratic theory of freedom of expression comes in several forms, but I shall reduce them to two: the general theory, which derives a right of freedom of expression from the democratic necessity of an informed citizenry; and the public discourse theory, which derives a right of freedom of expression from the requirement of an unregulated “public discourse” in forming the public opinion on which the legitimacy of democratic decisionmaking is based. I take up these two types of democratic theories of freedom of expression in turn.

#### A. *The General Theory*

The general theory account of freedom of expression is easy to state and to grasp. Democratic government requires that the citizens who elect it be capable of assessing its performance. That requirement in turn requires that the citizenry have access to the information that bears on the performance of the government, both past and future. And that informational requirement in turn requires that expression conveying such information not be suppressed. Thus, beginning with the premise of democratic decisionmaking, and adding premises that merely state its requirements, one reaches the conclusion that expression must be free of governmental restrictions. The argument is quite modest in its assumptions, but generates a powerful result, or so it would appear.

Of course, one reason to be suspicious of such an argument is that the same argumentative form might be used to justify an embarrassing surfeit of human rights. Someone might argue, for example, that democratic decisionmaking is impugned, not only when citizens are denied access to information and arguments that bear on governmental performance, but also when they lack food, or shelter, or decently remunerative work, or lots of education. After all, people who are ill-fed, ill-housed, ill-paid, and ill-educated cannot attend to public affairs, or will feel dominated by their employers, the wealthy, or the welfare department, or will be unable to understand the information they possess.

What about a right to speak the truth about the government? Suppose government fears that the truth will prove harmful. Speaking the truth may reveal matters better kept secret. Or the speech may be true in one sense but dangerously misleading, ultimately inducing people to act to their detriment. And these governmental fears of “the truth” need not be paternalistic. Government’s concern may be for third parties harmed by the revelations or the acts the speech induces.

For a general critique of both deontological and consequentialist versions of justifications of freedom of expression based on autonomy, see Susan J. Brison, “The Autonomy Defense of Free Speech,” 108 *Ethics* 312 (1998).

Perhaps, however, one cannot have a democracy without a right to speak the truth about the government. That is a topic I consider in the following section.

Thus, one might be able to derive all sorts of rights from the requirements of democratic decisionmaking – perhaps so many that it will leave democratic institutions with little left to decide.

I shall ignore this *reductio* of the democratic argument for freedom of expression and assume that the argument can somehow be limited to freedom of expression. For even so limited, the argument is highly problematic.

**1. THE DEMOCRATIC PARADOX OF FREEDOM OF EXPRESSION.** The democratic argument for freedom of expression leads to a paradox. As Frederick Schauer has pointed out, freedom of expression is normally thought to be a right against governmental regulations, *even when those regulations have been democratically enacted*.<sup>11</sup> In other words, freedom of expression is thought to oppose and trump democratic decisionmaking, at least when that decisionmaking produces laws that infringe on freedom of expression. Therefore, the value of democratic decisionmaking will appear on both sides of the issue whenever a democratically enacted law is claimed to infringe the right of freedom of expression. On the one hand, that value is on the side of striking down the law because freedom of expression is the corollary of democracy. On the other hand, that value is also on the side of upholding the law, which presumably represents the democratic will. In a democracy, striking down democratically enacted laws in the name of democracy – which is how the democratic argument portrays the right of freedom of expression – is surely paradoxical.<sup>12</sup> And when one notes the contested nature of the scope of the right of freedom of expression – a point I take up below – it appears doubly paradoxical to deny, in the name of democracy, democratic bodies from determining for themselves whether freedom of expression is infringed by democratically enacted regulations.<sup>13</sup>

**2. THE UNCERTAIN SCOPE OF THE DEMOCRATIC RIGHT OF FREEDOM OF EXPRESSION.** The argument we are considering is that the right of freedom of expression is derived from democratic decisionmaking through premises regarding the citizenry's need for information relevant to their role in the process of such decisionmaking. But just what are the boundaries of freedom of expression on such a view? Some proponents of the democratic right would protect only "political speech," fairly narrowly construed.<sup>14</sup> At the other extreme, some democratic theorists would protect not only scientific and academic speech, but also art and entertainment as relevant to democratic decisionmaking.<sup>15</sup> And

<sup>11</sup> See Frederick F. Schauer, *Free Speech: A Philosophical Enquiry* 40–4 (1982).

<sup>12</sup> See Smith, *supra* note 2, at 1256–7.

<sup>13</sup> Jeremy Waldron is critical of such "democratic" arguments for limiting democracy. See Jeremy Waldron, *Law and Disagreement* Chs. 10–13 (1999).

<sup>14</sup> See, e.g., Robert H. Bork, "Neutral Principles and Some First Amendment Problems," 47 *Ind. L. J.* 1 (1971).

<sup>15</sup> See Alexander Meikelfohn, *Political Freedom* (1960); Martin H. Redish, "The Value of Free Speech," 130 *U. Pa. L. Rev.* 591 (1982).

although most democratic theorists restrict the corollary right of freedom of expression to an immunity from governmental censorship, some, such as Cass Sunstein and Owen Fiss, view freedom of expression as including a claim that government affirmatively provide information and otherwise regulate the media to ensure that the correct number of views and informational programs are aired, and aired adequately.<sup>16</sup>

I find this capaciousness problem with the democratic theory of freedom of expression devastating. Who is to decide what the people need to know in order to perform the role of democratic citizen, and on what basis? Are Nike ads claiming that Nike treats foreign workers fairly, despite public allegations to the contrary, “political” – and hence democracy-relevant – or are they merely “commercial”? On the one hand, whether and how to regulate multinational corporations like Nike is or can be on the democratic agenda. On the other hand, Nike’s ads, unlike the allegations to which they respond, are the speech of a commercial corporation chartered solely to make profits for its shareholders.

Consider as well speech about the dangers or lack thereof of genetically-altered foods. Is that speech “political” and important for democratic decision-making, or is it “scientific” and outside the protection of freedom of expression? Or consider the religious clubs’ religiously interpreted views of political affairs that were at issue in *Rosenberger*.<sup>17</sup> “Political” or “religious”? Is speech by physicians warning patients about certain aspects of abortion of only medical and not political concern? Indeed, consider *The Grapes of Wrath* or *Guernica*. On which side of this divide do *they* fall, and why?

Moreover, the requirement that we decide whether expression is or is not central to democratic decisionmaking assumes as a metaphysical matter that we can separate expression into discrete units in answering this question. Consider a medical text that contains pictures of sexual organs. Suppose it is never read by medical students, but is instead read only by voyeurs who sexually fantasize over the pictures and do not read the text. Is this text “scientific” or “pornographic”? What is the unit of assessment – the text as a whole or just the pictures in which the audience is interested? And if the conclusion is that the text is pornographic, what do we do with the fact that the text’s pictures play a prominent role in a

<sup>16</sup> See Owen M. Fiss, *Liberalism Divided* (1996); Cass R. Sunstein, *Democracy and the Problem of Free Speech* (1993); Cass R. Sunstein, “The Future of Free Speech,” in Bollinger and Stone, *supra* note 2, at 284.

I believe that determining the number of “issues” there are and the number of “views” on those issues is metaphysically muddled. Likewise, determining whether those views have been “adequately aired” – I never find my views to be “adequately aired” until everyone agrees with them – is hopelessly ideological. In a society of millions, who differ both in terms of background beliefs and in terms of their attention to arguments – which attention is a function of time of day, speaker identity, subject matter interests, and a multitude of other factors – what could possibly serve as a neutral standard of “adequately aired”? For a recent critique of Fiss and Sunstein, see Christopher S. Yoo, “The Rise and Demise of the Technology-Specific Approach to the First Amendment,” 91 *Geot’n L. J.* 245 (2003).

<sup>17</sup> See *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995).



psychological or sociological study of the voyeurs who look at it, which study in turn plays a role in a public debate over pornography? Similarly, is a racial epithet in *Huckleberry Finn* the unit of expression to be assessed, or is it the novel as a whole, and why? The democratic theory, to the extent that it protects only that expression of relevance to democratic decisionmaking, needs a way to make these distinctions. I think, however, that there is no metaphysical basis for any such lines determining units of expression.<sup>18</sup>

Finally, recall the point of Chapter Two and its rejection of principle (4). All governmental regulations and their alternatives have message effects. And all regulations and their alternatives will have message effects that are relevant to democratic decisionmaking, even on the narrowest construction thereof. If the right of freedom of expression is meant to protect receipt of information and arguments relevant to democratic decisionmaking, then principle (4) should be within the scope of that right, and we should be concerned with the message effects of governmental actions, not just with government's reasons for acting (principle (5)). But principle (4) Track Two jurisprudence is wholly unworkable and ultimately requires the government itself, *qua* the courts, to decide what information and arguments the citizens need for democratic decisionmaking. And that violation of evaluative neutrality in deciding whether or not to invalidate acts taken by democratic institutions appears to be antidemocratic rather than a corollary of democracy.

### B. Public Discourse Theory

There is a form of the democratic argument for freedom of expression that merits independent treatment. I refer to the "public discourse" theory of freedom of expression associated with Robert Post and James Weinstein.<sup>19</sup> According to this theory, the democratic will is legitimate only if it reflects "public opinion." And the latter is a legitimate basis for the democratic will only if it is formed under conditions of freedom. This does not mean, however, that all expression must remain unregulated. Rather, what is necessary is that expression that is part of public discourse – the exchange of ideas that forms public opinion – be left free of Track One censorship and be regulated on Track Two only if adequate alternative channels of communication are available.<sup>20</sup>

<sup>18</sup> See Larry Alexander, "Low Value Speech," 83 *Nw. U. L. Rev.* 547, 551 (1989).

<sup>19</sup> See, e.g., Robert C. Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v. Falwell*," 103 *Harv. L. Rev.* 601 (1990); Robert C. Post, "Community and the First Amendment," 29 *Ariz. St. L.J.* 473 (1997); Post, *supra* note 2; Robert C. Post, "Recuperating the First Amendment," 47 *Stan. L. Rev.* 1249 (1995); Weinstein, *supra* note 7, at 1079; James Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine* 45–8, 72–3, 168–81 (1999).

<sup>20</sup> See, e.g., Post, "Recuperating the First Amendment," *supra* note 19.

The most fundamental problem with the public discourse theory of freedom of expression is its arbitrariness in specifying what lies within and without public discourse. Most statements by its proponents have the air of *ipse dixit*: “commercial speech is not part of public discourse”;<sup>21</sup> “physician speech to patients is not part of public discourse”;<sup>22</sup> “art and movies are part of public discourse now, but they were not prior to the Supreme Court’s reversing itself and declaring them to be so.”<sup>23</sup> No criteria are offered, much less justified, for delimiting public discourse and specifying the types of expression that comprise it. What is offered instead is either a vague sociological concept that one is supposed to know when one sees or, even worse, a concept that rests on nothing other than judicial fiat. In the latter case, “public discourse” functions as a conclusion rather than as a premise in an argument justifying the protection of expression from regulation.

Consider some of the examples raised earlier in the discussion of the democratic theory of freedom of expression. Post states that commercial speech is not part of public discourse. But how then do we treat Nike’s ads responding to claims that it mistreats foreign workers (or Exxon’s ads proclaiming that it loves the environment)? Are these “commercial,” and hence out, or “political,” and hence in? I think the correct answer has to be “yes,” which indicates that the question is ill-formed. The same applies to other attempts to categorize speech: Is speech condemning genetically modified foods (“Frankenfoods”) “scientific” or “political”? Is *Guernica* art or politics?

Likewise, Weinstein asserts that professional speech – for example, that of lawyers and physicians acting in their professional capacities – lies outside public discourse.<sup>24</sup> But again, consider the example in Chapter Four of the lawyer who reveals a client’s confidential communication that bears directly on an upcoming election. Is the lawyer’s communication “professional” or “political”? Again, the correct answer is that this poses a false dichotomy.

Weinstein asserts that harmful misinformation written on the instructions accompanying a medical prescription is different in kind from the same harmful misinformation published in a cookbook.<sup>25</sup> He concludes that the latter but not the former should receive constitutional protection because “books” but not “medicine labels” are part of public discourse. It is hard to believe, however, that a court would, much less should, treat, say, reckless medical advice given by a physician or pharmacist differently depending upon whether it is published

<sup>21</sup> See Robert C. Post, “The Constitutional Status of Commercial Speech,” 48 *U.C.L.A. L. Rev.* 1 (2000).

<sup>22</sup> See Weinstein, *supra* note 7, at 1079.

<sup>23</sup> As stated by Post in a conversation with the author, April 7, 2003.

<sup>24</sup> Weinstein, *supra* note 7, at 1079. See also Robert C. Post, “Reply to Bender,” 29 *Ariz. St. L. J.* 495, 499 (1997).

<sup>25</sup> *Id.* Would Post and Weinstein declare “scientific” speech to be outside public discourse? Consider in this regard an article in a scientific journal discussing findings on the dangers of genetically altered foods.

in a book or given to a single patient. If anything, the case for excluding the book is stronger, given its greater potential for harm.

Sometimes Post and Weinstein define media of public discourse by the type of message at issue. Sometimes, however, they define it by the tangible form by which it is communicated – by film versus by live performance, or by book versus by label.<sup>26</sup> Needless to say, those are very different kinds of distinctions that implicate different governmental concerns and have different ramifications. On the other hand, if the governmental concern is solely with the message and not with the effects of the particular medium chosen – in other words, if we are dealing with a Track One rather than a Track Two law – then it is hard to fathom why the medium, and whether it is deemed a medium of “public discourse,” should at all matter.

Moreover, the proponents of the public discourse theory apparently require that the medium of expression be calculated to convey ideas to the public at large rather than merely to one’s intimates.<sup>27</sup> Yet, drawing a line between expression that is in public from that which is in private looks hopeless. Suppose I tell a secret to someone I know to be a gossip. Or suppose a government official leaks information to a reporter. Are these instances of expression “in public”? Suppose I write a paper for a group of fifteen scholars. Is that public discourse? They may, of course, reconvey my ideas in their own work. Or they may not. And what if I publish a book that sells only one copy – to my cousin? All expression has the capacity to be conveyed or reconveyed in some form “to the public.” Indeed, no expression would raise an issue of freedom of expression unless it had somehow become public enough to result in a civil or criminal lawsuit.

In sum, the public discourse theory of freedom of expression encounters the problem encountered by any theory that seeks to divide expression into various categories based on content – such as, political expression, religious expression,<sup>28</sup> scientific expression, artistic expression, professional expression, and commercial expression. Those divisions, although they may reflect certain amorphous sociological realities, have no deep metaphysical basis. And borderline instances – instances of expression that arguably fall into more than one category – are, I suspect, the rule rather than the exception. And likewise, what counts as a unit of expression is metaphysically empty – what is a violent cartoon (“entertainment”) that is discussed by sociologists (“academic”), whose findings are debated politically (“political”)?<sup>29</sup>

<sup>26</sup> See notes 23 and 25 *supra*.

<sup>27</sup> See, e.g., Post, “The Constitutional Concept of Public Discourse,” *supra* note 19, at 678.

<sup>28</sup> For a nice discussion of the difficulty of making the distinction between “political” and “religious” speech that the Supreme Court encountered in *Rosenberger v. Rectors and Visitors of the University of Virginia*, *supra* note 17, or the distinction between “morals instructions” and “religious worship” that the Court encountered in *Good News Club v. Milford Central School*, 121 S.Ct. 2093 (2001), see Richard W. Garnett, “A Quiet Faith? Taxes, Politics, and the Privatization of Religion,” 42 *B.C. L. Rev.* 771, 794–5 (2001).

<sup>29</sup> See the discussion at note 18 *supra*.

Dividing speech into content-based categories such as “political,” “religious,” “commercial,” and so forth, and then treating some categories as virtually immune from governmental regulation and others as easily regulable has been a constant temptation for many freedom of expression theorists and for the United States Supreme Court. Of course, that division of expression into content categories is of no use in dealing with Track Two laws, given that every possible set of Track Two laws will have message effects within every category. And the division into categories provides no help in analyzing Track Three issues.

Even confined to Track One, however, the categories approach is ultimately unsuccessful. First, to repeat points made above, expression does not fall into one category or another. Neither the categories nor the determination of what is the relevant unit of expression reflect any metaphysical reality.

Second, the categories approach, with its corollary that some categories of expression warrant more protection (at least on Track One) than others, violates evaluative neutrality. You and I may agree that political speech is more valuable than the typical contents of the *National Enquirer*. Indeed, almost everyone would agree with us, including almost every reader of the *National Enquirer*. Yet, what makes our judgment reasonable, such that we may legitimately impose it on a solitary dissenter, that does not make my judgment that Bill Clinton was superior to George Bush, or that most multiculturalist apologia are rubbish, “reasonable” as well? Controversiality surely does not determine reasonableness as a matter of legitimate governmental action. As an epistemic matter, we can be more confident of judgments with which most others would concur. Nevertheless, if that is what is at stake, freedom of expression looks less like a protection of the lonely dissenter and more like a crude and costly bulwark against entrenching error. Furthermore, a noncontroversiality approach to the relative value of categories of expression does not, in principle, prevent categorization *within* categories such as political or religious expression that would cordon from protection political or religious views that almost all of us believe are worthless.<sup>30</sup>

<sup>30</sup> There are two other aspects of the categories approach worth mentioning. First, where the government regulates speech in a high-value category because the speech causes harm in one step – consider my example of a confidential communication that bears on a political contest – must government leave the speech unregulated? May lawyers and physicians reveal clients’ confidences with impunity if the clients are politicians? May publishers infringe others’ copyrights to print political stories? If not, we are faced with balancing the harms, which will again require an evaluation that is not itself category-based.

The second problem with the categories approach is that to the extent the high value categories are unregulated, the speech within them will become cheapened. For example, political speech today is not regulated by the government to prevent politicians from making false claims. On the other hand, government stringently regulates commercial speech to ensure its veracity. As a consequence, we have a lot more confidence in the label on a can of peas than we do in politicians’ statements.

The question whether speech is part of public discourse is, as Post admits, a deeply evaluative one regarding the relation of the speech to a proper conception of democratic decisionmaking.<sup>31</sup> The problem is that any conception of the autonomy required by democracy will be based on an evaluation regarding autonomy's requisite knowledge, skill, and character that from another angle can be viewed as a heteronymous imposition. Post argues that this paradox of the heteronymous construction of autonomy is, like other antinomies such as that of free will and determinism, unavoidable, and should therefore be embraced. If Post is correct, something like a categorical approach is perhaps inevitable, with only judgment and not algorithms available for drawing lines.<sup>32</sup>

The problems with the category of public discourse are illustrated by Post's own writings. Post takes a capacious view of public discourse, including within it, among other things, racist hate speech<sup>33</sup> and crude and ugly satirical cartoons.<sup>34</sup> But surely the judgment including these items within public discourse is contestable. Indeed, it is difficult to discern how, if these are within public discourse, the latter is not coextensive with all expression within principle (5). What does a heckler's shout of "nigger" contribute to democratic decisionmaking that, say, gossip about Madonna's love life does not?

Moreover, Post does not discuss when the protection of expression within public discourse can be overridden due to the harms it causes both from its production (Track Two) and from the receipt of its messages. Presumably, Post would allow government to punish those who reveal classified information and confidential communications, who infringe others' copyrights, who make dangerous misrepresentations, or who solicit criminal acts, even if the messages fell

<sup>31</sup> See Post, Personal Correspondence with Author, Nov. 23, 1992 (on file with author).

<sup>32</sup> Post believes, contrary to my position, that there is a tenable Track Two jurisprudence. *Id.* Post would not conflate, as I have done, public forum analysis and symbolic speech analysis. His focus would be on the former, which he would recast as analysis of the health of media of communication. The question of what is a medium of communication, like a newspaper, as opposed to an expressive act, like burning a draft card, would be a sociological one addressed to how we, as a society, understand such things. The freedom of expression analysis would ask how a time, place, or manner regulation affects a medium of communication's health.

I am generally less sanguine than Post about entrusting courts with deciding subtle questions of sociology such as whether and when "we" understand an activity to be a medium of communication. Even if I were perfectly happy with entrusting the courts with that question, however, I cannot imagine on what ground they would assess a regulation's effect on a medium's "health." The latter assessment assumes a normative baseline regarding well-functioning media of communication, and no judgment about that baseline can be divorced from judgments of the baseline's information effects. Are newspapers "healthy"? Is television? Has placing graffiti on others' property become a medium of expression, and, if so, is it "healthy"? Post criticizes Owen Fiss's and Cass Sunstein's urge to manage democratic deliberation, but his approach to public forum analysis commits him to precisely the same evaluative judgments with which he saddles Fiss and Sunstein. See Robert C. Post, "Managing Deliberation: The Quandary of Democratic Dialogue," 103 *Ethics* 654 (1993).

<sup>33</sup> See Robert C. Post, "Racist Speech, Democracy, and the First Amendment," 32 *Wm. & Mary L. Rev.* 267 (1990).

<sup>34</sup> See Post, "The Constitutional Concept of Public Discourse," *supra* note 19.

within “public discourse” as Post would define it. If so, then we need some way to balance public discourse concerns against harms to secrecy, confidentiality, property, and bodily integrity. Post provides us with no weights to place in the balance.

### C. *Limiting the Human Right of Freedom of Expression to Democracies*

The democratic theory of freedom of expression is necessarily limited to democratic regimes. Yet most who argue for a human right of freedom of expression do not restrict themselves to such regimes. Indeed, the international human rights conventions that contain the right of freedom of expression do not so limit the right’s application. And it is commonplace to condemn nondemocratic regimes for trampling on human rights, including the right of freedom of expression. If freedom of expression were a right only in a democracy, non-democratic regimes could not violate it.

A proponent of the democracy theory might respond that there is a human right to a democratic form of government, and that the human right of freedom of expression is derived from it. Thus, when we criticize nondemocratic regimes for denials of freedom of expression, we are in actuality criticizing them for their lack of democracy and its corollaries.

I am skeptical about the putative right to a democratic form of government. Jeremy Waldron, Scott Shapiro, and Thomas Christiano, among others, have made strong cases for such a right;<sup>35</sup> but I remain unconvinced that the case for democracy can be anything other than an instrumental one, premised on democracy’s comparative advantage in reaching morally correct decisions.<sup>36</sup> To pose the issue between us starkly, I doubt that a wise and just person who possesses the technological ability to impose his otherwise morally justified decisions on others with impunity violates anyone’s rights when he does so. Despite attempts to support democracy by reference to people’s ability to control their own lives, governmental decisionmaking involves some people’s ability to control the lives of others. Nor does any persuasive notion of moral respect require that one accede to others’ decision to commit what one believes to be an injustice against third parties.

Even if I am wrong, however, and the case for a human right to democracy can be established, I still doubt that the objections we have to the suppression of expression in nondemocratic states derives entirely from their being

<sup>35</sup> See Waldron, *supra* note 13; T. Christiano, *The Rule of the Many* 69–97 (1996); Scott J. Shapiro, “Authority,” in J. Coleman and S. J. Shapiro, eds., *Jurisprudence and Philosophy of Law* 382, 434–8 (2002).

<sup>36</sup> See Larry Alexander, “Is Judicial Review Democratic? A Comment on Harel,” 22 *Law & Phil.* 277 (2003); Larry Alexander, “Are Procedural Rights Derivative Substantive Rights?,” 17 *Law & Phil.* 19 (1998).

nondemocratic. Rather, I believe that the objection, whether or not well-founded, rests on grounds that are independent of the form of government.

#### IV. Freedom of Expression and Distrust of Government

The final theory of freedom of expression that I shall take up can be dealt with in short order. That theory derives the right of freedom of expression from the premise that government cannot be trusted to regulate expression, either because it is unduly error-prone in assessing expression's harms and benefits, or because it has motives for regulating – notably, self-protection – that render it untrustworthy in doing so.<sup>37</sup>

The premise that government is unduly error-prone in regulating expression appears to be an empirical rather than a conceptual one. One might imagine then that governments vary, perhaps considerably, with respect to their capacities to regulate expression well. If so, then the premise seems inadequate to support a general human right of freedom of expression.

On the other hand, to the extent that the premise of governmental incompetence is based on a more universal governmental interest in remaining in power and thus on government's fear of criticism and dissent, the only right of freedom of expression that the premise generates is the very narrow one of a right to criticize the government. Of course, criticism of the government can be given a capacious definition; but the more expression that is deemed to be criticism of the government, the less plausible the claim of governmental untrustworthiness.

Finally, with respect to the claim that government is fallible in assessing the truth and value of messages, such a claim, if true, applies to governmental regulation generally. Every regulation, if it is to be beneficial rather than pernicious, must bring about benefits that exceed its costs (however benefits and costs are gauged). To know whether a regulation is beneficial, therefore, requires government to assess causal and other factual propositions and to weigh values at stake. Regulations of conduct without respect to messages that conduct conveys – in other words, all Track Two regulations, which, as argued, encompass the entire corpus juris beyond Tracks One and Three – are no different in this respect from the message regulations of Tracks One and Three. The benefits and harms of ideas are no harder for government to evaluate than the benefits and harms of laws generally.

#### V. Conclusion

I have briefly surveyed the most popular theories that purport to justify a human right of freedom of expression. To the extent they justify freedom of expression

<sup>37</sup> See Schauer, *supra* note 11, at 80–6.

at all, either they justify narrow, retail rights that will vary over time and space; they do not fit our intuitions about freedom of expression; they are vague and indeterminate; or they cannot distinguish expression from conduct generally. I conclude that we do not have in hand a tenable general theory of freedom of expression.<sup>38</sup>

<sup>38</sup> Unsurprisingly, this is the same conclusion I reached over twenty years ago. See Larry Alexander and Paul Horton, "The Impossibility of a Free Speech Principle," 78 *Nw. U. L. Rev.* 1319 (1983).



## The Paradoxes of Liberalism and the Failure of Theories Justifying a Right of Freedom of Expression

The right to freedom of expression appears problematic through and through. Its potential scope is defined by principle (5), which focuses on whether government's reasons for regulation include a concern with what messages audiences receive. But that scope is either too broad, rendering almost all content-based governmental regulations – and perhaps all governmental speech and speech subsidies – violative of freedom of expression, or it is indeterminate and incapable of principled delineation. Moreover, principle (5) leaves Track Two laws entirely untouched despite the immense magnitude of their message effects. Indeed, paradoxically, principle (5) itself may prevent government from remedying what government considers to be the untoward message effects of Track Two laws, given that any evaluation of and remedy for those message effects will violate evaluative neutrality.

In this chapter I shall attempt to diagnose the cause of the failure to find a cogent and defensible principle justifying and delimiting a right of freedom of expression. I believe that such failure is part and parcel of the failure of liberalism to provide a justification for tolerating illiberal views – which toleration is for many definitive of liberalism. The great liberal freedoms – freedom of religion, association, and expression – are all deeply paradoxical because they rest on the notion of “epistemic abstinence”<sup>1</sup> – the idea that liberal government cannot impose its views of the Good on dissenters; that *qua* liberal government, it cannot know the Good. But operationalizing the idea that liberalism cannot take its own side in an argument is an impossibility. Liberal government cannot help but be partisan, which means that liberalism as governmental nonpartisanship (neutrality) toward religions, associations, and expression is an impossibility.

<sup>1</sup> The term comes from Joseph Raz, “Facing diversity: The Case of Epistemic Abstinence,” 19 *Phil. & Pub. Aff.* 5 (1990).

Much has been written on the paradoxical nature of liberalism as it applies to freedom of religion.<sup>2</sup> And there is a growing body of literature on the paradoxical relation between liberalism and illiberal associations and groups.<sup>3</sup> But with the exception of Stanley Fish, no one seems to have noticed that the same paradox infects that third liberal bulwark, the right of freedom of expression.<sup>4</sup>

### I. Liberalism, Epistemic Abstinence, and the Paradoxes of Evaluative Neutrality

A right of freedom of expression is naturally associated with the political philosophy of liberalism. Human rights documents list freedom of expression alongside freedom of religion, freedom of association, freedom of marriage, and other rights strongly associated with liberalism.<sup>5</sup>

Liberalism is, however, deeply paradoxical at its core. On the one hand, the freedoms that are emblematic of liberalism – the freedoms of expression, religion, and association – all appear to require a governmental stance of evaluative neutrality. As I have argued, freedom of expression requires evaluative neutrality. “Freedom of expression for those with whom the government agrees” is not freedom of expression; and a regime that claims compliance with the human rights conventions on the ground that it allows complete freedom to express ideas with which it agrees, and represses only those who voice opinions contrary to the prevailing orthodoxy, will be subject to ridicule.

Freedom of religion and freedom of association likewise require evaluative neutrality. Freedom to practice only the “correct” religion is not religious freedom. Nor is freedom to associate only along lines the government approves freedom of association. Freedom of religion must mean freedom to practice religions that are “wrong” about religious truths. And freedom of association must mean freedom to associate with the “wrong” people for the “wrong” purposes.

Yet, here is the problem. Any philosophical account of political morality will, perforce, take a stand on what is true, right, and valuable and what is not.

<sup>2</sup> See, e.g., Stanley Fish, “Mission Impossible,” 97 *Colum. L. Rev.* 2255 (1997); Larry Alexander, “Liberalism, Religion, and the Unity of Epistemology,” 30 *San Diego L. Rev.* 763 (1993). See also Larry Alexander, “Good God, Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemptions,” 47 *Drake L. Rev.* 35 (1998).

<sup>3</sup> See, e.g., Larry Alexander, “Illiberalism All the Way Down: Illiberalism and Two Conceptions of Liberalism,” 12 *J. Contemp. Legal Issues* 625 (2002); Lucas Swaine, “How Ought Liberal Democracies to Treat Theocratic Communities?,” 111 *Ethics* 302 (2001); Mark D. Rosen, “The Outer Limits of Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory,” 84 *Va. L. Rev.* 1057 (1998); Jeremy Waldron, “Minority Cultures and the Cosmopolitan Alternative,” 25 *U. Mich. J. L. Reform* 751 (1992).

<sup>4</sup> See Stanley Fish, *There’s No Such Thing as Free Speech, and It’s a Good Thing, Too* (1994).

<sup>5</sup> See, e.g., Articles 9 (freedom of thought, conscience, and religion), 11 (freedom of assembly and association), and 12 (right to marry) of the European Convention on Human Rights, in which freedom of expression is located in Article 10.

It will and must be “partisan” in favor of its own conclusions. Thus, it must regard as error and possibly malign those ideas that it rejects.

Liberalism in any of its renditions is no different. If liberalism is the correct political morality, all positions inconsistent with its tenets are incorrect. There is no neutral ground in these matters.

### *A. Liberalism and Illiberal Religions*

Liberalism as a political philosophy is traceable to the European wars of religion. Unsurprisingly, therefore, freedom of religious practice is central to liberalism. Yet freedom of religious practice demands a governmental stance of evaluative neutrality that, given both extant and conceivable religious tenets, generates paradoxes.

Suppose, for example, that a religious group believes in the necessity of theocratic rather than democratic rule. Liberalism cannot allow that group to actualize what its religion demands. It cannot be “neutral” regarding theocracy. It cannot claim to know that liberalism is the correct political philosophy but at the same time profess “epistemic abstinence” regarding whether this religious group’s tenets are correct. If a liberal form of government is most consistent with the dictates of reason, then theocracy and the precepts of theocratic religions are not.

Theocratic beliefs are not the only religious beliefs the realization of which in practice liberalism cannot allow. Religions take positions on all kinds of issues on which liberalism is partisan. A religion may dictate separation of the races or rigid gender roles. It may demand the repression of sexual speech and the outlawing of abortion. The list of possible “illiberal” positions that religions may hold is endless.

Some liberals believe, contrary to what has just been said, that a liberal government *can* reject illiberal religious practices without at the same time taking a position on the truth of the religious tenets that underlie them. On this view, a liberal government can say to the frustrated adherents of illiberal religions, “Your religious views may be correct or incorrect. The government – the liberal majority – is not in a position to say. What the government *is* in a position to say is that your views are ‘reasonably rejectable’ by those outside your religion on whom you wish to impose the practices your views support, and that for that reason they may not be practiced. But they are not, for that reason, ‘wrong.’”<sup>6</sup>

This type of response is unavailing. It requires that there be beliefs that are, on the one hand, correct, but are, on the other hand, “reasonably rejectable.” Now there is one sense in which correct beliefs can be reasonably rejectable, but it is

<sup>6</sup> See, e.g., Thomas Nagel, *Equality and Partiality* 161–4 (1991). See also Susan Mendus, *Impartiality in Moral and Political Philosophy* 41–2 (2002). Nagel has recently evinced some doubts about this position. See Thomas Nagel, *Concealment and Exposure* 98–9 (2002).

not a sense that is helpful to liberal neutrality. There are many propositions about the world that, given the evidence before me, I should reasonably conclude to be false. Yet some of those propositions will turn out to be true. If I am unfamiliar with Einsteinian physics and the evidence that supports it, I might reasonably reject the proposition that nothing can exceed the speed of light. After all, in the experience of ordinary people, the idea of a finite limit to speed – or to space and time – is counterintuitive. Similarly, one who knew only that O. J. Simpson was a wealthy ex-football star, announcer, and actor, and who did not watch or read about his trial, could reasonably reject the proposition that O. J. killed Nicole.

Obviously, this commonplace sense of reasonable rejectability does not help the case for liberal neutrality because it cannot account for the distinctiveness of religious beliefs within liberalism. *Any* belief could be reasonably rejectable by someone in this sense. Liberalism itself could be reasonably rejectable.

The only other sense of reasonably rejectable that the liberal might invoke is one that assumes that the “truth” of religious propositions rests on an epistemology that is different in kind from the epistemology underlying claims of truth for ordinary factual and moral propositions. Yet for the typical religious adherent, her religious beliefs are continuous with her beliefs about other matters, and all her beliefs are mutually reinforcing to the extent they cohere. There is no separate sphere of religious beliefs that is hermetically sealed off from nonreligious beliefs and that rests on a distinctively religious epistemology. Religious beliefs, if they are true, for most adherents, are true in exactly the same sense that the deliverances of science are true, or that the proposition “liberalism is the best justified political philosophy” is true.

As I said, the above argument should be uncontroversial. If liberalism or the set of propositions to which it can be reduced is true, then religious tenets that conflict with the propositions of liberalism are false. Liberalism is in this respect just one more sectarian position, and those who decry the “religion” of secularism that they find characteristic of modern liberal societies have surely affixed the correct label to their concern, even if what disturbs them is something they should instead welcome. If, however, liberalism is a sectarian position, then is it in fact better justified than its competitors?

The problem arises with respect to religious and other comprehensive theories of the Good that are nonindividualistic or other-regarding in nature. According to such theories, an individual’s good is inextricably dependent upon the good of others, such as the salvation of their souls or their adherence to norms regulating behavior not directly harmful to others. Because an individual’s good is dependent on others in this way, the individual can be just as harmed by others’ failures to attend to their souls or their virtue as by direct physical assaults, theft, deception, or sensory offense. And just as an individual may legitimately employ the coercive apparatus of the state to protect against physical harm, theft, and offense, so too on these views of the Good may the

individual employ that coercive apparatus to save souls, enforce virtue, and so forth.

The liberal tries to refute these views. The liberal, however, does not face these views head on and show that the salvation of souls is meaningless or incapable of being accomplished through force, or that no one is harmed in any way other than through physical assault, theft, deception, or offense. Instead, the liberal argues that even if these views are correct, enforcing them against those who reject them is unfair or nonimpartial in some trumping sense. For even those who hold such views should see that those views could be reasonably rejected by others and, therefore, should not be enforced.

To assess the justifiability of liberalism as it relates to religious views, let me move from the abstract treatment of liberalism's logical implications and look at a concrete case. Ann has been brought up in a religion within the Judeo-Christian family of religions. She believes in the existence of a God, whom she pictures vaguely as a person, and in the moral authority of the leaders of her church. She perhaps also believes in the divinity of the biblical Christ. Although Ann first came to these beliefs by accepting the teachings of her parents, she now holds these beliefs based on what she views as independent and superior reasons. For example, she believes most of the accounts of God's and Christ's miraculous deeds in the Old and New Testaments are credible. She holds these beliefs based on the number of witnesses, their independently tested reliability, and the number of intelligent people who accept these accounts as true. The miracles for her establish the authority of the moral teachings in the Bible, which are in turn independently verified by their consonance with her own feelings about moral issues and with the teachings of people she finds admirable. Moreover, these mutually reinforcing beliefs for Ann make sense of human existence in general and her own life in particular.

The purpose of this portrait of Ann is to show how continuous Ann's religious epistemology is with her epistemology in general, and how all of her beliefs, evidentiary criteria, and methods of reasoning cohere.<sup>7</sup> Ann's religious beliefs are supported in exactly the same way as are her beliefs that George Washington was the first President of the United States, that Nairobi is the capital of Kenya, that Barry Bonds hit seventy-three home runs, and that nothing can exceed the speed of light. She does not believe any of these things based on first-hand observation, and the last item she finds counterintuitive and impossible to conceptualize, though she nonetheless believes it to be true.<sup>8</sup>

Further, no reason exists for not portraying Ann as a person who entertains the possibility that many of her beliefs, including her religious beliefs, might

<sup>7</sup> See also Kent R. Greenawalt, *Religious Convictions and Political Choice* 57–76, esp. 71–5 (1988).

<sup>8</sup> See generally, John Hardwig, "The Role of Trust in Knowledge," 88 *J. Phil.* 693 (1991). See also C. A. J. Coady, *Testimony* 6–9, 12–13, 16–17 (1992).

be wrong (though, of course, she does not currently believe they are wrong, or else they would not be her beliefs). Ann may worry about the veracity of biblical sources, or about the coexistence of a benign, all-powerful God with evil. She may wonder why the truth of Christianity was revealed at a particular time and place in a manner that could not fail to make its acceptance local, or whether, had she been reared in Tehran, she would believe in Islam even if she were given all the above evidence of Christianity's truth.

I have written thus far about Ann's beliefs and the reasons she has for holding them. I have not mentioned faith, much less contrasted it with reason. For one thing, I am not sure how to make an epistemological distinction between faith and reason.<sup>9</sup> Ann has "faith" in modern physics, in her personal physician, and in her husband's fidelity. Of course, her faith in these is grounded in reasons she has or believes she has. Likewise, Ann's religious faith is not a faith in just anything. She does not believe she could have faith in whatever she wants to believe, religiously or otherwise. Her "faith" is, for her, a product of her reason.

Ann holds various views on public policy that rest in part on her religious beliefs. She believes that fetuses are morally protectable and have a right to life that trumps women's rights regarding reproduction. She believes that animal life is worthy of protection, and that meat-eating and vivisection should be illegal. She believes that pornography is blasphemous because it degrades sexuality that God intends be ennobled; she, therefore, wants pornography legally banned. She believes that public money should be used to support the private schools that teach her religious beliefs.

Now, there are various versions of liberalism, and not all of them would find all of Ann's public policy recommendations illicit. Versions that I shall label "purist" – the versions endorsed by Bruce Ackerman,<sup>10</sup> Ronald Dworkin,<sup>11</sup> Charles Larmore,<sup>12</sup> Thomas Nagel,<sup>13</sup> and John Rawls<sup>14</sup> – would reject all four of Ann's policy recommendations if they can be "justified" only by Ann's religious beliefs. "Impure" liberalisms, such as that of Kent Greenawalt,<sup>15</sup> would reject only the latter two, because "secular" reasoning can reach no conclusions regarding issues such as abortion and animal rights. Both pure and impure versions of liberalism are subject to my critique.

**1. IMPURE LIBERALISM.** The impure liberal would allow religious arguments to shape public policy whenever "secular" arguments cannot resolve the issues at stake. Greenawalt argues that two of Ann's concerns, abortion and

<sup>9</sup> On the distinction or lack thereof between faith and reason, see Marcus Hester, ed., *Faith, Reason, and Skepticism: Essays by William P. Alston* (1992).

<sup>10</sup> Bruce Ackerman, *Social Justice in the Liberal State* (1980).

<sup>11</sup> Ronald Dworkin, *Sovereign Virtue* 120–83 (2000); Ronald M. Dworkin, "Liberalism," in S. Hampshire, ed., *Public and Private Morality* 113–43 (1978).

<sup>12</sup> Charles Larmore, *Patterns of Moral Complexity* (1987).

<sup>13</sup> Nagel, *supra* note 5.

<sup>14</sup> John Rawls, *A Theory of Justice* (1971).

<sup>15</sup> Greenawalt, *supra* note 7.

animal rights, raise issues that secular reasoning cannot resolve. Thus, liberalism must permit religious views to shape the resolution of these issues.<sup>16</sup>

Impure liberals such as Greenawalt seriously underestimate the degree to which religion's nose is inside the liberal's tent on their account of impure liberalism.<sup>17</sup> Greenawalt at times appears to believe that only a modest number of issues lying at the periphery of liberalism's agenda will be incapable of secular resolution, and that, therefore, religion's influence on public policy will be, in principle at least, limited and well-defined.<sup>18</sup> Greenawalt, though, does recognize that core issues, such as the just distribution of wealth, seem to involve not only "secular" reasons that are "neutral" regarding theories of the Good, but also reasons that are partisan regarding the Good. Neutral reasons are incapable of adjudicating whether resources, objective welfare, subjective welfare, or something else is the object of liberal distributive policies.<sup>19</sup> Moreover, among partisan reasons, Greenawalt does not distinguish between the secular and the religious, much less favor the former over the latter.<sup>20</sup>

<sup>16</sup> See Kent R. Greenawalt, "Religious Convictions and Political Choice: Some Further Thoughts," 39 *DePaul L. Rev.* 1019, 1029–33, 1042 (1990).

<sup>17</sup> See Michael J. Perry, *Love and Power* 19–20 (1991). Perry notes that the line between secular and religious will be a hard one for Greenawalt to draw. *Id.* at 19. If religious and secular epistemologies are but a single epistemology, then it follows that the line between "secular" and "religious" will be arbitrary and at best a matter of convention.

<sup>18</sup> Thus, to illustrate his thesis that religious arguments may sometimes be resorted to in a liberal democracy to determine public policy, Greenawalt points to issues of moral status that he labels as "borderline" issues – for example, the issues of abortion and animal rights. See Greenawalt, *supra* note 7, chs. 6, 7.

<sup>19</sup> *Id.* at 173–87.

<sup>20</sup> See Greenawalt, *supra* note 7, at 191–92. For an attack on Greenawalt's impure liberalism from a more purist direction, one arguing that "secular" beliefs are capable of resolving all of Greenawalt's hard issues, see Peter S. Wenz, *Abortion Rights as Religious Freedom* 112–13, 119–31, 135–9 (1991). Wenz distinguishes secular from religious beliefs as follows:

Religious beliefs are those that cannot be established by appeal merely to secular premises and methodologies. Secular premises and methodologies include what passes for common-sense knowledge in our society (e.g., fire burns people, punishment deters crime), the scientific beliefs that underlie our technology (e.g., electrons and bacteria exist), the methodology accepted in our society for the generation of scientific and technological knowledge (e.g., observation, microscopes, carbon dating, and mathematical calculations can be useful), and the values considered essential to society (e.g., peaceful coexistence among its members, limits on assault and murder) or essential to our type of society (e.g., individual liberty, private property, pluralism, and hard work). More generally, secular premises are drawn from secular beliefs. I term "secular beliefs" all those agreements of belief, thought, and practice that are the basis of the cooperation and mutual understanding needed among people to maintain and perpetuate our society.

Religious beliefs are those that cannot be supported cogently with arguments or demonstrations whose premises include only secular beliefs. What is more, for First Amendment purposes, all religious matters are religious because of their relationship to religious beliefs. For example, "creation science" is religious because it results from an interpretation of the Bible. The Bible is a religious text because of its relationship to belief in the existence of God, whose actions in history it is supposed to record. Belief in the existence of God cannot be supported cogently by the use of common sense, science, technology, or accepted scientific methodologies, so it is a religious belief.

Indeed, the impure liberal's notion of what issues are underdetermined by secular arguments, and thus the legitimate subjects of religious ones, threatens to bring the entire liberal tent crashing down. The impure liberal seems to take controversy among self-proclaimed liberals as a sign that secular reasoning has gone as far as it can go and must be supplemented by alternative brands of reasoning, such as religious reasoning.<sup>21</sup> Abortion, animal rights, and what is to be distributed are highly controversial among liberals, none of whom has committed an error of syllogistic inference or has relied on incorrect accounts of empirical facts. Therefore, according to the impure liberal, these are issues that can only be resolved by recourse to sectarian views. If, however, the impure liberal is correct about this, then the dam of principle holding back thoroughgoing religious influence on policy making is completely breached. For on almost every policy issue – the meaning and scope of freedom of speech, economic freedom, privacy, free exercise of religion, equal treatment, community self-determination, the justification of punishment, procedural rights, and so on – self-proclaimed liberals are deeply divided. Although one cannot be a “liberal” if one rejects all conceptions of free speech, privacy, and so forth, no liberal party line exists on any aspect of liberalism. Impure liberalism as a theory is too skeptical about the power of secular reasoning to resolve issues that are controverted among liberals to provide a convincing argument against wholesale admission of religious arguments in policy making.<sup>22</sup>

Finally, and perhaps most importantly, the impure liberal's breach of the dam barring religious arguments fails to take into account the interconnectedness of beliefs. If religion can “get it right” about, say, abortion, why can it not “get it right” about such things as, say, sin, or other matters that the impure liberal would make the exclusive province of the secular? The grounds that support accepting a religion's view on one issue are quite likely to support accepting its

I call this the *epistemological definition* of religion because religion is defined in terms of how we gain knowledge and how we support our claims to knowledge.

Id., at 112–13.

Wenz's distinction between “secular” and “religious” is unconvincing, both as to matters of material fact and as to matters of value. Both common-sense and scientific factual knowledge, as well as common moral beliefs, rest ultimately on undemonstrable metaphysical views. As Ronald Dworkin puts it, “[Wenz's] test is not acceptable, because government must make and impose decisions on a wide variety of moral issues about which people disagree profoundly, and which cannot be decided on empirical grounds or by appeal to any convictions shared by everyone or by methods that are in any other way “integral” to any collective way of life.” Ronald M. Dworkin, “Unenumerated Rights: Whether and How Roe Should Be Overruled,” 59 *U. Chi. L. Rev.* 381, 421–2 n. 60 (1992).

<sup>21</sup> See Raz, *supra* note 1, at 42.

<sup>22</sup> See generally id. at 23, 42–3. See also Thomas Spragens, Jr., *The Irony of Liberal Reason* (1981). Spragens argues that liberalism has been undermined by its celebration of technological conceptions of reason and its value noncognitivism. Enlightenment-based animus to religious authority may have resulted in placing technocratic “reason” in an exalted status; “reason's” failure to resolve value disputes may have left liberalism vulnerable to attack.



views on other issues. Put differently, one cannot buy religious views at retail, specific issue by specific issue; they are available only at wholesale.

**2. PURE LIBERALISM.** The pure liberals – Ackerman, Dworkin, Larmore, Nagel, and Rawls – believe that secular reasons should resolve all issues in the public sphere, including how the line defining that sphere is to be drawn. The issues of abortion and animal rights can and must be resolved without recourse to religious views. The pure liberal would find all of Ann’s policy recommendations unjustifiable to the extent that they are based on the arguments Ann provides for them.

What grounds does the liberal have for finding Ann’s policy recommendations unjustifiable except for competing religious beliefs or beliefs that *all* religious beliefs are untrue, or at least unjustifiable? The liberal’s rejection of religion-based policies suggests some sort of epistemological divide or discontinuity between what we can claim justifiably to know secularly, so to speak, and what we can claim justifiably to know religiously, the latter being an inferior form of knowledge for purposes of public policy, though perhaps not for other purposes. No such epistemological divide exists, however, that will give liberalism its justification for rejecting the legitimacy of Ann’s proposals.

It is easy to dispose of one possible basis for rejecting Ann’s policies, namely, that the religious beliefs she relies on are not empirical. Without entering the epistemological thicket surrounding the status of empirical knowledge and its connection to theories that ultimately rest, in part, on nonempirical norms, it is obvious that liberalism cannot avail itself of any empirical/nonempirical divide. For the propositions of liberalism are not empirical, but metaphysical and normative.

More likely, the liberal will want to argue that religious beliefs are less subject to reasoned assessment than moral beliefs, such as those of liberalism. If this argument is not just another way of rejecting the justifiability of religious beliefs altogether, which itself would require that other religious beliefs – skeptical ones such as agnosticism or atheism – *are* justifiable, then the argument is implausible. Moral reasoning rests either on nonempirical premises or on inferences that are not matters of logical entailment. This is surely the case with liberalism. Reason in the narrow sense that might be employed to discredit religious arguments equally discredits normative arguments.<sup>23</sup> And reason in the broader, reflective equilibrium sense that might make one moral view more reasonable than another, seems just as applicable to religious views.<sup>24</sup>

Liberals attempt to disenfranchise religious arguments on other grounds. Some, such as Ackerman and Nagel, believe that reliance on religious

<sup>23</sup> See William Galston, *Liberal Purposes* 111–12 (1991).

<sup>24</sup> See Frederick M. Gedicks, “Public Life and Hostility to Religion,” 78 *Va. L. Rev.* 671, 693–4 (1992).

arguments, such as Ann's, to establish public policy is inappropriately non-neutral or nonimpartial and therefore "unfair" to those who do not share Ann's religious views.<sup>25</sup> This tack is question-begging at two levels. First, to repeat an earlier point, the demonstration that the Ackerman/Nagel conception of fairness trumps religious grounds would require arguments for that conception and against the competing religious grounds that liberals such as Ackerman and Nagel fail to make. How could they make them, though, without doing theology as well as moral philosophy?

Second, Ann would dispute the claim that acting on her religious views in effecting public policy is in any way unfair to those who reject her religious views. Fairness, neutrality, and impartiality are concepts, like equality, that are empty vessels for substantive norms. If abortion is the killing of a being that should be legally protected, then in what sense is it unfair to those who reject this truth to outlaw abortion? If fairness requires placing legal duties on persons only if those duties are truly morally required, then from Ann's perspective, passing laws against abortion is not unfair. Of course, from the perspective of those who disagree with Ann, such a law *is* unfair, but its unfairness lies in its error and not its source. This conflict of views about fairness is, therefore, inevitable. Unless Ackerman/Nagel liberals advocate, in the name of fairness, a unanimity requirement for public policy – and why is *that* "fair" (and what public policies are the default policies in case no unanimity exists, anyway?) – then public policies are fair if they are morally correct. Moral correctness may truly be the function of some forms of equal treatment or equal regard, but if Ann's views are correct, then it follows from their correctness that they already incorporate the correct conception of equal regard.<sup>26</sup>

The Ackerman/Nagel liberal is arguing that Ann's views *are* incorrect, at least the component of them that dictates that they be coercively imposed. The liberal is using the unfairness of the coercive imposition as grounds for claiming Ann's views are incorrect. I have shown that some senses of unfairness fail to support the liberal's argument.

Nagel, for example, argues that coercive imposition of norms is unfair (in a morally overriding sense) if such norms are reasonably rejectable. Norms are reasonably rejectable in this disqualifying sense if they rest on grounds that are not publicly accessible. Religious grounds are not publicly accessible to those outside the religion. Therefore, it is morally true – contrary to the teachings of Ann's religion – that it is morally wrong for Ann to seek to impose coercively her views on abortion, support of religious schools, and so on.<sup>27</sup>

Let me skip the question of whether Nagel's reasonable rejection conception of fairness fails its own test, that is, whether someone like Ann could reasonably reject *it*, or find the arguments for it inaccessible given her religious beliefs.

<sup>25</sup> See Ackerman, *supra* note 10, at 44, 110–11; Nagel, *supra* note 5, at Ch. 14.

<sup>26</sup> See Galston, *supra* note 23, at 108–9; Greenawalt, *supra* note 7, at 55.

<sup>27</sup> See Nagel, *supra* note 5, at 161–4.

Assume Nagel's test is not self-undermining in this way. Does it render illegitimate Ann's policy recommendations if we assume the absence of unanimity, and if we prescind the question whether, as matters of substantive morality and religious truth, abortion, pornography, and so forth should be condemned?

Two senses in which grounds and arguments might be reasonably rejectable or publicly inaccessible exist. One sense is too strong to help Nagel, the other too weak. In the strong sense, Ann's beliefs are reasonably rejectable and publicly inaccessible if we can understand why others do not share those beliefs. Ann has had a unique life, with unique experiences. She, but not others, witnessed certain events from a specific point of view. She, but not others, was taught certain things by particular people. Her particular beliefs – on all sorts of matters – are as reasonably rejectable by and inaccessible to others as, say, our beliefs about air travel, television, and the historical Christ are reasonably rejectable by and inaccessible to Stone Age tribes in New Guinea who have never seen an airplane, a television show, or a Christian.

This sense of reasonable rejectability/public inaccessibility is obviously too strong to serve Nagel's purpose, for it rules out imposition of any norms whose rejection is understandable in this way. We can surely understand how a "reasonable" slave owner in the Antebellum South could reject imposition of a norm of racial equality. From his perspective – given the web of his other beliefs – blacks were inferior human beings. Nonetheless, Nagel would surely not think it illegitimate to eradicate slavery coercively in the face of opposition by such "reasonable" slave owners.<sup>28</sup>

The other sense of reasonable rejectability/public inaccessibility is too weak to serve Nagel's purpose. That sense would exclude the imposition of only those norms that can be reasonably rejected by someone after being privy to all the experiences of those who accept the norms. Clearly, Ann will not accept rejection of her norms as reasonable in *this* sense; her acceptance means that she thinks acceptance is reasonable and rejection unreasonable. From the point of view of the one whose norms they are, *no* accepted norms can be reasonably rejected.<sup>29</sup>

<sup>28</sup> See Galston, *supra* note 23, at 113–17, 152; Stephen A. Gardbaum, "Why the Liberal State Can Promote Moral Ideals After All," 104 *Harv. L. Rev.* 1350, 1357, 1364–9 (1991); Raz, *supra* note 1, at 42–6.

<sup>29</sup> For other attempts, similar to Nagel's, to locate a sense of reasonable rejectability that is neither too strong nor too weak, see Steven Macedo, *Liberal Virtues* 47–49 (1990); Samuel Freeman, "Original Meaning, Democratic Interpretation, and the Constitution," 21 *Phil. & Pub. Aff.* 3, 23–4, 31 (1992); Rawls, *Justice As Fairness*, *supra* note 9, at 243–9; Lawrence B. Solum, "Pluralism and Modernity," 66 *Chi.-Kent L. Rev.* 93, 96–9 (1990). Richard Arneson agrees that my position is correct if one is not a skeptic regarding religious claims, but he ultimately endorses skepticism (subjectivism). See Richard Arneson, "Neutrality and Utility," 20 *Can. J. Phil.* 215, 234–6 (1990).

For general support of the position I am taking opposing Nagel's position, see Galston, *supra* note 23, at 108–9, 111–12; Scott C. Idleman, "The Role of Religious Values in Judicial Decision Making," 68 *Ind. L. J.* 433, 445–8, 464–7, 482–4 (1993); Raz, *supra* note 1, at 36, 39–40. See also Greenawalt, "Religious Convictions," *supra* note 16, at 1042–3.

One gets the same results if one substitutes some sort of dialogic test for the reasonable rejectability/public accessibility test, that is, if one allows coercive imposition of only those norms accepted through dialogue among all the affected parties. Dialogic tests for the legitimacy of coercive imposition of norms come in two types: those requiring actual dialogue among the affected parties, and those requiring only a hypothetical, idealized dialogue. An actual dialogic test is, in effect, a requirement of unanimity. Requiring unanimous acceptance of coercive norms, however, cannot be morally justified for two reasons. First, the reasons for failure of unanimity can include antisocial motives, ignorance of factual matters, illogic, deception, misunderstanding, immaturity, fatigue, linguistic incompetence, and a myriad of other factors that should discredit the objector.<sup>30</sup> (No actual dialogue ever occurs in an “ideal speech

Suppose someone in control of the coercive apparatus of government encounters aliens from another planet who warn him, based on research that is beyond human capacities, that the Earth faces annihilation if nations do not disarm. (See *The Day the Earth Stood Still*, 20<sup>th</sup> Century Fox, Farmington Hills, Mich., 1951.) Would it be “illiberal” in Nagel’s sense for him to rely on this knowledge, given that others are universally skeptical when he tells them about the encounter? His claims are reasonably rejectable in the strong sense I have identified, though not in the weak sense. Which sense should govern his actions, and does some third sense exist that is intermediate between the two I’ve identified? Is his encounter with space aliens any less accessible to others than his knowledge of any nonreplicable historical event, such as that a spider crawled upon his bathroom mirror at 2:15 p.m. Tuesday? If not, may he rely upon his knowledge of such historical events, and what if they are “miraculous”?

Note that impure liberals like Greenawalt, while they would allow Ann to consult her religious views on some issues, nonetheless require that she be able to distinguish those views from purely secular ones. For Greenawalt, the latter are to govern decision making on most issues and are to govern public argument on all issues. See Greenawalt, *supra* note 7, at 215–28. How is Ann, though, to distinguish her religious views from her secular ones? No sharp divide separating one set of her beliefs from another exists, and why would it matter whether she is influenced by Aristotle or by Christ? And where does Aquinas fit? It looks as if “secular” can only be distinguished from “religious” using criteria like Nagel’s “publicly accessible reasons.” However, I have argued these criteria do not work because they are either too strong or too weak.<sup>30</sup> Actually, although all of these factors may prevent achievement of unanimity, some of them will vitiate the results of unanimous agreement even if unanimity *is* achieved.

The problem, pointed out by Walzer, is how to constrain actual dialogue to obviate these problems without at the same time leaving the parties to the dialogue with nothing left to discuss:

For the rules of engagement are designed to ensure that the speakers are free and equal, to liberate them from domination, subordination, servility, fear, and deference. Otherwise, it is said, we could not respect their arguments and decisions. But once rules of this sort have been laid out, the speakers are left with few substantive issues to argue and decide about. Social structure, political arrangements, distributive standards are pretty much given; there is room only for local adjustments.

Michael Walzer, “Moral Minimalism,” in W. R. & A. Spadafora, eds., *From the Twilight of Probability* 3, 11 (1992). See also Herlinde Pauer-Studer, ed., *Constructions of Practical Reason* 129–30 (2003); Richard Rorty, “The Advantages of Moral Diversity,” 9 *Soc. Phil. & Pol’y* 38, 53 (1992) (“[T]he conditions that are necessary to assure just and fair debate in the public sphere appear to presuppose the happy outcome of just those debates.”) Put differently, we have to know how the dialogue should come out substantively in order to know how to constrain it procedurally.

situation.”<sup>31</sup>) Second, and more fundamentally, an actual dialogue/unanimity requirement necessitates some sort of default position, coercively imposed (as well as an allocation of resources to maintain the actual dialogue, collected from someone), to govern the parties unless and until they unanimously agree on a new set of coercively imposed norms.<sup>32</sup> Yet, no set of default norms has itself passed the test of unanimity in actual dialogue. Requiring a dialogue about the default position, therefore, leads to an infinite regress of default positions and dialogues.<sup>33</sup>

For these reasons, most dialogic tests for justifying coercive imposition of norms rely on a hypothesized and idealized dialogue among parties who are rational, well-motivated, and dialogically constrained in certain ways. Because such dialogues are hypothetical, they can be replicated monologically without devoting resources to bringing parties together, ensuring actual communication, and sustaining a dialogue over time. Moreover, the results of the monological exercise can be known virtually instantaneously, thus obviating the need to have, and thus to justify, a coercively imposed default position. The key to imagining the idealized hypothetical dialogue lies in what types of knowledge, reasoning ability, emotional responses, motivations, and so on one envisions the parties to the dialogue possessing. If one allows for differences among the parties, then one faces the possibility that they would not agree to any particular set of norms. A dialogic test that allows for differences is functionally like the strong reasonable rejectability/public accessibility test. One – and Ann – can understand why those who have had different experiences from Ann’s would disagree with her norms were they to engage in dialogue. One can also understand, though, why slave owners would disagree with norms of racial equality.<sup>34</sup>

<sup>31</sup> The principal proponent of a dialogic test for morality, a test which endorses moral propositions that are acceptable to all dialogic participants in an “ideal speech situation,” is Habermas. Jurgen Habermas, *Communication and the Evolution of Society* (1979); Jurgen Habermas, *Legitimation Crisis* (1973). For a good account of Habermas’s “discourse ethics,” see Douglas B. Rasmussen, “Political Legitimacy and Discourse Ethics,” 32 *Int’l Phil. Q.* 17 (1992).

That a moral proposition is accepted in a dialogue occurring in the “ideal speech situation” is usually conceived of, not as definitive of its moral truth, but as the best justification of the belief that it is true. In other words, the dialogic test is epistemological, not metaphysical. See also Carlos S. Nino, “The Epistemological Moral Relevance of Democracy,” 4 *Ratio Juris* 36, 42–3 (1991).

<sup>32</sup> See Terrence Sandalow, “A Skeptical Look at Contemporary Republicanism,” 41 *Fla. L. Rev.* 523, 542–3 (1989).

<sup>33</sup> Another reason why dialogue might fail to produce correct moral beliefs, even if it produces unanimity, is that the language of the participants privileges some moral beliefs and forecloses others. This would appear to render it impossible that any actual dialogue could occur in an “ideal speech situation.” See Margaret Jane Radin & Frank Michelman, “Pragmatist and Post-structuralist Critical Legal Practice,” 139 *U. Pa. L. Rev.* 1019, 1041 (1991).

<sup>34</sup> Moreover, not only do constraints that preserve differences make too many political outcomes reasonably rejectable, but the nature of the constraints themselves must be “reasonable” in some non-question-begging way. For example, a constraint excluding religious arguments from the actual dialogue would be question-begging in the context of my disagreement with the pure

If one assumes complete interpersonal transparency among those in the hypothesized dialogue, then Ann's experiences are everyone's. This type of hypothesized dialogue is no different from the monologue of the solitary thinker and the weak sense of reasonable rejectability/public accessibility. If Ann conducts *this* imaginary dialogue, she will conclude that her norms *would* be unanimously accepted, for everyone would share her experiences and thus her (from her view reasonable) beliefs.<sup>35</sup>

Nagel wants to deny the epistemological continuity of religious beliefs and those beliefs that should govern public policy. He argues that there are some beliefs, most notably religious beliefs, that are reasonable for someone to accept who at the same time recognizes that rejection of those beliefs by others is also reasonable.<sup>36</sup> As I pointed out above, however, in saying that it is reasonable for others to reject what one believes, one is only saying that one can understand how others, possessed of reason, have fallen into error. One does not conclude from this that it is reasonable for the world to be ruled by error.<sup>37</sup>

liberals. See H. Jefferson Powell, "Reviving Republicanism," 97 *Yale L. J.* 1703, 1709 (1988). Ackerman, for example, argues that neutral dialogue precludes asserting that one's conception of the Good is superior to others'. Ackerman, *supra* note 10, at 37. If, however, someone *argues* that her conception of the Good is superior *and gives evidence of its superiority*, is she violating this constraint? See Perry, *supra* note 17, at 10. If not, then the dialogic test doesn't exclude religious arguments. If so, then the dialogic test rejects political positions that no one would want rejected.

On the indeterminacy of dialogic tests generally, see George W. Dent, Jr., "The 'Tensions' of Liberalism," 38 *Phil. Q.* 481, 484–5 (1988).

<sup>35</sup> See David Estlund, "Book Review," 20 *Pol. Theory* 694, 696 (1992). If one is to imagine a dialogue that is without limits on time, in which the participants are all similarly motivated, and in which all information – including the personal experience kind – is equally available, then one will envision a convergence of beliefs. Religious beliefs will be no different in this respect from other beliefs, including (self-referentially) the belief that normative truth is what emerges from such an interpersonally transparent dialogue regarding what ought to be done. See Nagel, *supra* note 5; see also Richard Arneson, "Socialism as the Extension of Democracy," 10 *Soc. Phil. & Pol'y* 145, 170–1 (1993) (arguing that dialogic tests are really just monologic counterfactual thought experiments regarding what all rational, informed, etc., people would agree to).

The tendency among followers of Habermas is, indeed, to build all of the substantive positions they themselves accept as correct into the preconditions for the idealized dialogue. See Walzer, *supra* note 30, at 11. The "dialogue" then will produce "agreement" on precisely those substantive positions. How could it not do so? In the end, this merely shows that however much we acknowledge that points of view exist different from our own, points of view that are in some way reasonable for those whose points of view they are, we are stuck inside our own point of view, which for us is the measure of truth of all other points of view. Even the "postmodern" recognition that our point of view is just that – a point of view – and that it has been socially constructed, has no practical consequence for us. No available alternative to our point of view exists.

<sup>36</sup> See Nagel, *supra* note 5, at 161–4.

<sup>37</sup> It may be useful at this point to rehash what I am attempting to demonstrate by arguing for epistemological unity. My first point is that liberalism's truth entails the falsity of some of Ann's beliefs. Pure liberalism entails that all of Ann's beliefs regarding public policy of those that we have mentioned are false. Impure liberalism entails that her beliefs regarding public support and endorsement of her religion are false, and perhaps also her beliefs that pornography should be banned. My second point is that liberalism's claim to its truth and the falsity of Ann's opposing

Nagel clings to the hope that someone like Ann, with her beliefs, can see that others are reasonable in rejecting her beliefs, and that, in some trumping sense of “reasonable,” not having her beliefs imposed on them is also reasonable, even though her beliefs about, say, abortion (obviously reasonable from her point of view) include the belief that her belief about abortion should be imposed. Nagel thinks erroneously that the “reasonable” alternative to coercive imposition of Ann’s beliefs is governmental neutrality or relegation of the matter to private choice.<sup>38</sup> However, given what Ann’s views *are* regarding abortion – or

beliefs cannot rest on the claim that liberalism’s supporting epistemology is different from – and fairer than, more respectful of autonomy than, more consistent with our free and equal nature than, etc. – Ann’s religious epistemology.

My point is that if liberalism is correct and illiberal religious views, therefore, are incorrect, then liberalism is correct not by virtue of its operating in a separate epistemological domain, one in which it does not have to meet the evidence supporting illiberal religious views head-on. No meta-epistemological vantage point exists from which it is possible both for illiberal religious views to be correct and also for liberalism to be correct that imposing correct religious views is unfair in some trumping way (where a component of such views is that imposing them is all right).

In addition to offering the reasonable rejectability/public accessibility test and the dialogic test as grounds for excluding religious positions from determining public policy, the liberal might offer the Rawlsian veil of ignorance as a conceptualization of fairness that supports such an exclusion. Would persons behind the Rawlsian veil eschew reliance on religious convictions? They would not want to have false views forced upon them, but likewise they would not want to be prevented from acting on true views. Moreover, risk aversion does not solve this dilemma, because without doing theology, one cannot meaningfully compare the two risks. One cannot determine the position regarding religious beliefs that would emerge from behind the Rawlsian veil without specifying what persons behind the veil believe religiously. Furthermore, if one so specifies, each specification will produce a different outcome. Persons behind the veil would exclude illiberal religious beliefs only if their religious beliefs were liberal, i.e., only if their religious beliefs held the beliefs’ coercive imposition wrong in principle (or held such imposition to be wrong in practice because unlikely to succeed). See Galston, *supra* note 23, at 146–9.

The instinct among liberals to place religious claims on a different epistemological level is so powerful that it affects even those who expressly repudiate such a move. Marshall forcefully asserts that religion is on the same epistemological level as the political theory of liberalism but then, in the same article, argues that admitting religion into the public forum should be resisted. His reason is that religion, as the answer to humanity’s anxiety over death, evokes such powerful and often dark emotions that it must not be given access to state power. Compare William Marshall, “The Other Side of Religion,” 44 *Hastings L. J.* 843, 845–7 (1993) with *Id.* at 858–9, 863. Interestingly, Marshall’s position assumes that religious answers to the mysteries of life and the terror of death are either false or unknowable. For his proto-utilitarian argument against religious participation in the public square is advanced from no particular point of view, and surely not the point of view of religions that deny that Marshall’s dangers justify their exclusion from the public square. Put differently, even if Marshall’s gloomy forecasts are well-founded, the consequentialism animating Marshall’s arguments is of no higher status as an argument than religious arguments that deny the value he attaches to outcomes. He would surely fail to convince one who was willing to shed blood to save souls.

For a liberal position similar to Marshall’s, see Galston, *supra* note 23, at 177–82. For an acceptance of Marshall’s premise regarding the need to avoid violence, but a rejection of his estimation of the threat posed by admitting religion to the public square, see Gedicks, *supra* note 24, at 696 n.122.

<sup>38</sup> Nagel’s view is that some beliefs are objective in that they appeal to more than the fact that they are believed and to a common ground of justification. See Nagel, *supra* note 5, at 159–62.

pornography, animal rights, and public funding of religious education – obviously the “neutral” or private choice position is nothing more than rejection of Ann’s views.<sup>39</sup> Ann does not believe that abortion, viewing pornography, eating meat, or failing to fund religious education is wrong *just for her*, but that these acts and omissions are wrong for everyone.<sup>40</sup> No neutral position, intermediate between Ann and those who reject her views, exists.<sup>41</sup>

Perhaps the strongest argument the liberal might use against Ann without engaging Ann’s views frontally, other than one based on practical impossibility, would be an argument that denies that we can ever be sufficiently certain about any religious beliefs, or beliefs about the Good, to justify their coercive imposition. According to this argument, we must allow diversity of such beliefs to flourish as an experiment to test which beliefs ultimately gain universal assent, the best gauge of their truth.<sup>42</sup> The view is analogous to the marketplace of ideas justification of freedom of expression and has analogous theoretical difficulties. Universal assent as a test of truth of religious views is unproblematic, not because universal assent establishes truth, but because universal assent leaves no dissenters to object to its coercive imposition. Short of universal assent, we are faced with the fact that the number of possible experiments yet untested is, and always will be, infinite; yet coercive decisions are, in fact, always and inevitably being made, always potentially in error, and always foreclosing experiments that might have led to views commanding universal assent. Permitting abortion, if in error, costs millions of lives. Moreover, permitting abortion prevents

Raz points out that no one appeals to the fact of his own belief to justify the belief. Raz, *supra* note 1, at 37–9. Either all beliefs satisfy Nagel’s criterion of appealing to a common ground of justification, or his criterion is far too strong and rules out direct perceptions and experiences as legitimate bases for imposing beliefs. Much of science and all of morality would be excluded as legitimate grounds for coercion. See Raz *supra* note 1, at 45–6; Perry, *supra* note 17, at 12, 120. Actual consent is too strong a condition to demand for coercion, and reasonable consent makes consent superfluous: No gap exists between what is a reasonable principle and a principle to which it would be reasonable to consent. See Raz, *supra* note 1, at 37–9.

<sup>39</sup> The same point can be made with respect to the education of children. Whether conducted by the state or by parents with the coercive backing of the state, education cannot be neutral regarding religion. Pure liberalism has real difficulty handling the education of children without assuming that education does not affect the later adult’s ability to choose among theories of the Good.

<sup>40</sup> “Privatization” of Ann’s views – translating them from “it is wrong *for anyone* to abort” to “it is wrong *for me* to do so” – is nothing other than rejecting them.

<sup>41</sup> As Patrick Neal puts it,

Liberalism understands itself as a political theory which permits no substantive conception of what constitutes the good life for individuals to take public, political priority over any other; it is hence neutral with regard to the question of the good. . . . The politics of neutrality is conducted within a language which is, like its competitors, non-neutral; those who do not speak it as a matter of course in liberal societies are provided, sometimes against their wishes, with a translator. In the last analysis, that translator is the state.

Patrick Neal, “A Liberal Theory of the Good?,” 17 *Can. J. of Phil.* 567, 578–9 (1987).

<sup>42</sup> See D. A. Lloyd Thomas, *In Defense of Liberalism* 36–8 (1988).



us from carrying on the experiment of living in a society without abortion. More obviously, certain views of the Good requiring everyone to conform to certain norms cannot be tested in the liberal marketplace of diverse individual lifestyles. On some religious views, the costs of their not being coercively imposed are quite high (for example, millions of innocent lives lost, millions of souls unsaved), and no “neutral” ground is available.

I come to the conclusion, then, that liberalism and religion are on the same epistemological level, and that the knowledge each claims, if it be knowledge, has the same pedigree in experience and reason. There are not two ways of “knowing,” religious and secular/liberal; there are not both sectarian and secular/liberal “truths.” As a consequence of epistemological unity, liberalism must establish its tenets by rejecting conflicting religious ones, not by the illusion of “neutrally” banishing them to the “private” realm, where they can somehow remain “true” but impotent, but by meeting them head on and showing them to be false or unjustified.<sup>43</sup> Liberalism is, as many critics claim it to be, the “religion” of secularism. That does not mean that liberalism is false or that antiliberal religious views are true. What it does mean is that both liberalism and antiliberal religious views inhabit the same realm and make conflicting claims within it. Liberalism is not at a different level, where it can remain neutral and impartial with respect to religious controversy that is truth-seeking within a restricted domain, but not within the domain of liberalism.<sup>44</sup>

That liberalism and religion are epistemological rivals has two basic implications. One, obvious and banal, is that the truth of those core, defining tenets of liberalism entails the falsity of all conflicting religious tenets. That much follows from the law of noncontradiction. More importantly, and the burden of the bulk of my argument, liberalism cannot establish its core tenets and its repudiation of illiberal religious ones (and banishment of religion from public policy making) by claiming to inhabit a different epistemological realm from that occupied by religion, a realm whose truths not only trump those of religion, but whose truths can be seen to be reasonable even by those whose religious truths they trump. No epistemological perspective exists from which one can simultaneously hold Ann’s views and, barring a belief that to do so would be self-defeating, hold that the state should not impose them.<sup>45</sup> Furthermore, to the extent that liberalism defines itself by the proposition that religious views can be “true” and important enough to protect, but cannot be fairly imposed through public policy, a public policy that draws its “truths” from a different

<sup>43</sup> See Galston, *supra* note 23, at 276–9.

<sup>44</sup> See Stanley Fish, “Liberalism Doesn’t Exist,” 1987 *Duke L. J.* 997, 1000; Neal, *supra* note 41, at 577–9; Raz, *supra* note 1, at 40, 43.

<sup>45</sup> For some of the arguments given on behalf of and against the proposition that imposition of religious views is self-defeating, see Alexander, “Liberalism, Religion, and the Unity of Epistemology,” *supra* note 2, at 791 n.63.

epistemological well, to that extent the unity of epistemology undermines liberalism.<sup>46</sup>

Liberalism can rest on agnosticism regarding some truths, but not regarding its own truth. Toleration of illiberal religions may rest on the value of autonomy (so long as those religions do not threaten autonomy), or toleration of illiberal religions may rest on a prediction that intolerance would provoke a backlash that would threaten liberalism to a greater extent than toleration. The case for toleration of illiberal religions, however, cannot rest upon their possible truth without self-contradiction.<sup>47</sup>

Ultimately, then, the only reason to exclude religious views from the realm of coercive public policy – for the liberal or anyone else – is because those views are wrong. And the liberal’s particular problem is that he believes it wrong to extirpate erroneous views coercively.

In the end, the source of the liberal’s regard for autonomy is that each of us has a particular point of view from which we cannot escape. The source of the liberal’s dilemma is that some points of view will be closer to the truth than others, including the truth about the value of autonomy itself.

Liberalism’s attempt to claim neutrality vis-a-vis religious views through some sort of epistemic abstinence is a failure. And from the failure issues a paradox: Liberalism can be neutral only toward those religions and religious views that are compatible with the tenets of liberalism. Which is to say that if liberalism is defined in part by neutrality toward religious beliefs, liberalism is impossible.

### *B. Liberalism, Freedom of Association, and Illiberal Groups*

I turn now to that second pillar of political liberalism, freedom of association. It is my contention that the same paradox that bedevils liberalism’s stance

<sup>46</sup> What the unity of epistemology undermines is liberalism as a political theory resting on a distinction between the epistemology of political theory and the epistemology of religious and other comprehensive world views. The unity of epistemology does not undermine concerns for autonomy, social harmony, fairness, etc. Those concerns must, however, be defended within the same epistemological domain as their contradictories. Furthermore, they cannot be correct if their interpretation denies this unity of epistemology. See also Stanley Fish, “The Dance of Theory,” in L. C. Bollinger and G. R. Stone, eds., *Eternally Vigilant* 199, 227, 231 (2001); Fish, *supra* note 44, at 997:

[Liberalism] is therefore committed at once to allowing competing world views equal access to its deliberative arena, and to disallowing the claims of any one of them to be supreme, unless of course it is demonstrated to be at all points compatible with [its] principles. . . . It follows then that liberalism can only “cherish” religion as something under its protection; to take it seriously would be to regard it as it demands to be regarded, as a claimant to the adjudicative authority already decided in liberal thought to reason.

<sup>47</sup> On Locke’s arguments for toleration of false religions and the limits of those arguments, see Jeremy Waldron, “Locke: Toleration and the Rationality of Persecution,” in Susan Mendus, ed., *Justifying Toleration* 61, 69–81 (1988).

toward illiberal religious bedevils its stance toward associations formed around illiberal principles. There are many historical and contemporary examples of such groups. To take two, a gated community might organize around precepts that include: sex-segregated schools; exclusion of television programs, movies, and print media that contain violent or sexual material; mandatory religious observance; rule by a nondemocratic community government; and so on. Or a Native American tribe might mandate various forms of sexual inequality within tribal life and practice racial inequality with respect to tribal membership.

To this point I have been treating liberalism as a rather univocal political/moral conception. It will be useful to complicate that picture somewhat in showing the paradoxical relation between liberalism and freedom of illiberal associations.

**1. TWO PHILOSOPHICAL LIBERALISMS.** There are two basic philosophical conceptions of liberalism that are in tension with one another. On one conception, the conception that has been dominant in the discussion of religion, liberalism demands “neutrality” among choices of the Good – choices about how to live, with whom to associate, and what to believe.<sup>48</sup> On the other conception, liberalism itself represents a choice of the Good – in this case, the choice of a cosmopolitan way of life.<sup>49</sup> Both conceptions of liberalism are problematic, each exposing the principal theoretical weakness of the other.

*a. Liberalism as a “Neutral” Umbrella for Illiberal Persons, Associations, and Communities.* As individuals, we cannot be neutral about what is good and what is true. To live is to make choices – to pick A over B because we prefer A, or value A, or believe A to be right. We practice a particular religion and not others. We choose to read some things and not others, and to say some things and not others. We choose to associate with some people and not others. At the individual level, no one lives the life of a neutral liberal, one who does not side with any particular points of view, values, or persons. There is no such life. Such a life is a theoretical as well as practical impossibility. At the individual level, all lives must be “illiberal.” This is the most fundamental illiberal bedrock upon which liberalism as neutrality must build.

If the individual may choose – because he must choose – a version of the Good, liberalism as neutrality demands that he not be legally prohibited from acting on that choice. That is, on liberalism as neutrality, it is the state and its laws that must be neutral in the required sense of neutrality.<sup>50</sup>

The picture then is of a neutral state umpiring among the myriad beliefs, values, and ways of life that necessarily illiberal individuals might choose. But the picture is in fact more complicated than that. If an individual may choose

<sup>48</sup> See authorities cited *supra* at notes 10–14.

<sup>49</sup> See Waldron, *supra* note 3.

<sup>50</sup> This is the view of liberalism subscribed to by those cited in notes 10–14 *supra*.

a conception of the Good, may he not associate with like-minded others – in families? in cities? in nations? Indeed, if the individual’s conception of the Good itself dictates these associations, then his choice of conceptions of the Good is really a choice of in which illiberal society to live. His choice may, of course, be as limited as a choice of mate or friends, or a choice of a particular religious congregation with which to associate for a couple of hours weekly. But it may be as total a choice as one to live within a gated community that subscribes to a code regulating religion, reading matter, education, and dress, or to live within an even larger society with similar rules.<sup>51</sup>

Liberalism as neutrality then is consistent with everyone living very illiberal lives. Everyone might opt into total communities, communities in which religion, speech, occupation, and association are completely regimented. Indeed, it is possible that everyone would opt into the *same* total community. Could such a society truly be a “liberal” one?

The defender of liberalism as neutrality might reply that as long as everyone freely consents to such regimentation and can opt out of total communities at any time, then total communities and liberalism can co-exist. In other words, as long as the state preserves the freedom to exit any community, relationship, and so forth as the corollary of the freedom to enter those communities and relationships, we have a liberal state.

This picture of liberalism raises several issues. First, what if someone chooses a community or relationship that precludes later opting out – for example, a marriage that is indissoluble, or a community that requires a pledge of lifetime fidelity as condition of membership? This is the problem of freely entered contracts of slavery with which liberals from J. S. Mill on have wrestled. On the one hand, “liberal enslavement” seems oxymoronic. On the other hand, all contracts restrict future choices; and the refusal to enforce freely chosen restrictions of future choices would not be liberating but would instead limit liberty, given that the ability to enter into liberty-restricting enforceable covenants is itself liberty-enhancing.

Second, if the ability to opt out of total communities preserves liberalism, how is that ability to be gauged? It is insufficient merely to provide a legal permission to exit. For exit from a group might be very costly. One might have to forfeit property. One might have to move. One might need to acquire information about available alternatives to one’s current way of life, and what sacrifices one would have to make to choose them. (If, for example, all land belonged to gated communities of different flavors, exiting one would require joining another.)

Interestingly, American constitutional law doctrines take these concerns into account. For example, not only state governments, but also all sub-units thereof – counties, cities, school districts, water districts – are bound to adhere

<sup>51</sup> See Rosen, *supra* note 3; Swaine, *supra* note 3.

to liberal constitutional tenets. One cannot have a municipality or a school district restricted to members of a particular religious creed or race.<sup>52</sup>

Moreover, in the United States, constitutional and other legal doctrines limit the powers of private communities and organizations. Company towns cannot restrict free speech.<sup>53</sup> Private racial zoning cannot be legally enforced.<sup>54</sup> Large organizations can ordinarily be statutorily forbidden to be racially or sexually restrictive.<sup>55</sup> Moreover, it is doubtful that one can, by contract, give private communities or associations the power to punish rule violators with fines or imprisonment, given that states themselves are constitutionally forbidden to punish for breaches of contracts, even if the contracts provide for punishment.<sup>56</sup>

Some liberals criticize at least some of these constitutional doctrines. Mark Rosen, for instance, would permit municipalities, possessed of ordinary police powers, to be organized along religious lines.<sup>57</sup> And indeed it is at least plausible to argue that many of these constitutional limitations are fundamentally inconsistent with liberalism as neutrality. Perhaps we should assume, then, that if constitutional doctrine were aligned with a proper conception of liberalism as neutrality, individuals could consent to all sorts of illiberal restrictions on their liberty, and the government could and would permit such restrictions, at least through self-help, and perhaps with the backing of its own coercive mechanisms.

Let us put aside the single total community and ask how liberalism as neutrality bears on a world of more than one illiberal group. First, different illiberal groups might make conflicting claims regarding land, resources, and activities. They might, for example, claim the same mountain as a sacred site leading to conflict over who may use it, how, and when. Or one group might believe in the moral necessity of hunting eagles, while another believes in the moral necessity of protecting them. And, of course, one group might believe that abortion is murder, and that it has a moral duty to prevent it, by force if necessary, while another believes that its members are morally at liberty to have abortions.

Is there a “neutral” way for government to adjudicate these intergroup controversies? None that I can see. After all, government must at the end of the day side with one group or the other, at least if neither of the opposing groups has been convinced of the error of its beliefs and values. And to side with one group on the matter in dispute is the antithesis of neutrality, at least from the point of view of the losing group. Put differently, because there is no view from nowhere, the “neutral” position will be as partisan as any other. Or put still

<sup>52</sup> See, e.g., *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994).

<sup>53</sup> See *Marsh v. Alabama*, 326 U.S. 501 (1946).

<sup>54</sup> See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>55</sup> See *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

<sup>56</sup> See, e.g., *Taylor v. Georgia*, 315 U.S. 25 (1942); *Bailey v. Alabama*, 219 U.S. 219 (1911).

<sup>57</sup> See Rosen, *supra* note 3, at 1056–9.

another way, all views appear neutral to those who hold them and partisan to those who do not.<sup>58</sup>

Second, as stated above, liberalism as neutrality requires that no illiberal group exercise control over a person's liberty or property without that person's consent. This means that government must monitor the quality of people's consent to the terms of entry into and exit from illiberal groups.<sup>59</sup> Such consent can only be valid if the person giving it has (morally) adequate alternatives to submitting to an illiberal group's discipline and morally adequate information about alternatives to such submission. That means that government must ensure a level and breadth of education sufficient for understanding the stakes in joining an illiberal group and for making rejecting that group a viable alternative.<sup>60</sup> For example, if group A speaks language A, and the only alternative to joining group A is joining group B, whose language is B, X's consent to join A is arguably vitiated if X has not been educated in B, or has not been taught of B's existence or its creed, and so forth. Or if the only alternative to A is B, but B is a long way away or has poorer resources or is otherwise extremely costly to join, consent to joining it may be vitiated.

It is commonplace, however, that no educational program can be neutral among groups.<sup>61</sup> The only "neutral" truth of liberalism as neutrality is that liberalism as neutrality is correct. All other truths – all possible curricula – will be partisan along some axis or another. Because we are finite beings, with finite minds, finite attention, and finite time, our education must perforce be selective. And the criteria of selection can never be neutral. Just to take one well-known example from American constitutional law, one cannot educate Amish children about the world beyond their community sufficiently to make their consent to remain in that community meaningful without instructing them in values and information that the Amish will view as quite partisan.<sup>62</sup> Indeed, the very worldliness required to satisfy the liberal of the validity of the Amish's consent to the norms governing their way of life might be fundamentally inconsistent with that way of life.<sup>63</sup> How are you going to keep them down on the farm, once they have seen the world beyond? But how can they give morally meaningful consent to being down on the farm if they have never seen the world beyond?

Liberalism as a neutral umbrella for illiberal persons, associations, and communities therefore faces a predicament that appears to undermine it completely.

<sup>58</sup> See Fish, *supra* note 2, at 2299–2300.

<sup>59</sup> See Hanoch Dagan and Michael A. Heller, "The Liberal Commons," 110 *Yale L. J.* 549, 568–71 (2001); Rosen *supra* note 3, at 1127; Mark D. Rosen, "Establishment, Expressivism, and Federalism," 78 *Chi.-Kent L. Rev.* 669, 703–5 (2003).

<sup>60</sup> See Swaine, *supra* note 3, at 329–30, 341 n.110; Rosen, *supra* note 3, at 1103–5.

<sup>61</sup> See Larry Alexander, "Liberalism as Neutral Dialogue: Man and Manna in the Liberal State," 28 *U.C.L.A. L. Rev.* 816, 853–8 (1981).

<sup>62</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 241–2 (1971) (Douglas, J., dissenting). See also Amy Gutmann, "Civic Education and Social Diversity," 105 *Ethics* 557 (1995).

<sup>63</sup> 406 U.S. at 209–13, 232.

On this conception of liberalism, government must permit illiberal choices and communities and relegate its own role to that of neutrally umpiring the conditions of entry and exit. However, the role of neutral umpire is completely chimerical.

*b. Liberalism as Cosmopolitanism.* The second conception of liberalism admits to being itself a way of life, a vision of the Good, a partisan view among partisan views. On this conception, a liberal society is one that has within it a diversity of religions, associations, occupations, ideas, and so forth to provide its members with a rich menu of ways of life from which to choose.<sup>64</sup> The liberal on this conception values pluralism, diversity, openness, and tolerance. He may rule as out of bounds certain values and associated ways of life because he thinks they are degraded or counterfeit; but in general his motto is “Let a thousand flowers bloom.”

On this conception, liberalism is not the above-the-fray values of a neutral umpire but is rather a particular way of life, namely, that of the cosmopolitan.<sup>65</sup> There are, however, both conceptual and constitutional problems with liberal cosmopolitanism.

Conceptually, one cannot be a liberal cosmopolitan without there being illiberal choices and ways of life toward which to be cosmopolitan. As stated at the outset, at the level of individual choice, no one is a “liberal.” Everyone prefers value A over value B or value B over value A. Cosmopolitanism then must envision individuals’ tolerating and appreciating ways of life but not being deeply committed to them. Deep commitment to A would imperil tolerance and appreciation of B. But this has two unwelcome implications. First, cosmopolitanism as a way of life is shallow, denatured, bereft of deep commitments. Second, cosmopolitanism as a way of life is parasitic on noncosmopolitan ways of life; for without the latter, there is nothing for the cosmopole to be cosmopolitan about.

One might think that both of these points are overstated, and in some sense, they are. After all, there are “liberal” religions, religions that teach that there are many paths to salvation, that tolerance of other creeds is a virtue, and so forth. And many ways of life are not so total and exclusionary that they cannot coexist with and, indeed, foster appreciation of alternative ways of life. The farmer and the urbanite, the artist and the doctor, the Francophone and the Anglophone need not seek dominance over or eradication of the opposing way of life but can coexist and even relish one another.

Nonetheless, cosmopolitanism inevitably tends to homogenize and shallow out the various ways of life. If there are many paths to truth or salvation, then little is at stake in finding a path. After all, the path you are on is probably just as

<sup>64</sup> See, e.g., Joseph Raz, *The Morality of Freedom*, Part VI (1986); Waldron, *supra* note 3. See also Galston, *supra* note 23.

<sup>65</sup> See Waldron, *supra* note 3.

good as any other. And if you had chosen another path, the same would have been true of it. Without “fighting faiths,” faiths worth fighting for, there will be little spice in the variety that the liberal cosmopole celebrates. As the Boy Scouts’ brief to the United States Supreme Court in *Boy Scouts of America v. Dale*<sup>66</sup> stated, “A society in which each and every organization must be equally diverse is a society that has destroyed diversity.”<sup>67</sup> That is, indeed, the indictment of liberal cosmopolitanism’s greatest engine of conquest, the global commercial culture, namely, that it produces a shallow homogeneity and supplants a richer, deeper, but more antagonistic diversity.

Liberal cosmopolitanism also fits uneasily with the American constitutional tradition, which, in line with liberalism as neutrality, is protective of illiberal groups. If Catholics believe that priests should be male, or if some fundamentalist sect believes that its congregation should be racially segregated, the American constitutional right of religious free exercise would likely trump antidiscrimination laws. And the constitutional right to freedom of association that the Supreme Court believes is implicit in First Amendment freedom of speech protects the Boy Scouts’ right to exclude gay scout masters and Irish-American groups’ right to exclude gay Irish groups from their St. Patrick’s Day parade.<sup>68</sup> If liberalism is a way of life, then in the United States, it is not constitutionally enshrined to the extent that would permit government to outlaw illiberal ways of life.

**2. YALE UNIVERSITY, COED DORMITORIES, AND ORTHODOX JEWS: A CASE STUDY IN THE PROBLEMS OF LIBERALISM.**<sup>69</sup> Yale University is a private university that adopted policies requiring all students to reside in university dormitories and making those dormitories coeducational. Yale undoubtedly believed that liberal education is best promoted if men and women, as well as students of different races, ethnic groups, religions, geographical origins, social classes, and so forth, live side by side. In a very real sense, Yale’s vision of a good educational community is one of liberal cosmopolitanism.

A group of Orthodox Jewish students at Yale objected on religious grounds to being forced to reside in coeducational dormitories. Eventually Yale relaxed its rule and allowed these students to live elsewhere. But the incident provides a lens on the two versions of liberalism and how they deal with illiberal groups.

<sup>66</sup> 530 U.S. 640 (2000).

<sup>67</sup> Brief for Petitioners, *Boy Scouts of America v. Dale*, id. See also Galston, *supra* note 23, at 255 (“The greatest threat to children in modern liberal societies is not that they will believe in something too deeply, but that they will believe in nothing very deeply at all.”).

<sup>68</sup> See *Boy Scouts of America v. Dale*, *supra* note 66; *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).

<sup>69</sup> The description of the conflict between Yale University and a group of Orthodox Jews is taken from Michael C. Dorf, “God and Man in the Yale Dormitories,” 84 *Va. L. Rev.* 843 (1998).



The proponent of liberalism as neutrality would ask whether the Orthodox Jewish students could be deemed to have consented to Yale's policies. That question would lead to examining the students' information about their alternatives and the viability of those alternatives. But unless Yale possessed an unfair share of the resources required for a first-rate liberal arts education, the students would almost surely be regarded as having all the alternatives to Yale to which they were entitled, which in turn would mean that the costs of rejecting Yale would not vitiate their consent to Yale's rules. And unless one believes that the students cannot validly consent to live off-campus unless they have experienced the coeducational alternatives – which would argue *against* their being allowed to live off-campus rather than in favor of it – there seems to be no problem under liberalism as neutrality with permitting Yale to run its dormitories as it wishes. The liberal neutralist's response to the Orthodox students' complaint is that they are free to reject Yale but not to change it.

Of course, if Yale itself is a liberal society, then the liberal neutralist's response must change. Now the Orthodox students have a right to secede and form their own illiberal society within the greater liberal society that is Yale. So, too, might the black students or the gay students be entitled to their own housing. Only if Yale is a unit *within* liberal society rather than a unit *of* liberal society may it call the shots.

The cosmopolitan liberal's take on the Yale controversy is different. By requiring integrated dormitories and rejecting group secession, Yale is furthering cosmopolitanism. By living together, all will come to tolerate and even appreciate the diverse viewpoints, values, and traditions that the students bring to the table. A Yale education, including its living arrangements, will be transformative and will produce cosmopolitan liberals out of the parochial, sectarian students who enroll.

The problem, of course, is that to the extent Yale succeeds in transforming its students into cosmopolitan liberals, there will be little for them to be cosmopolitan about. Perhaps the Orthodox Jews will, after experiencing coed dormitory life, change their beliefs about sexual modesty and the like and come to think about such matters much as the rest of the students do. But if they do so – and other students lose *their* parochialisms – the result will be not diversity, but homogeneity. Thin gruel for a cosmopolitan.

Indeed, it is no coincidence that the move to greater diversity on college campuses has proceeded in lockstep with the move to orthodoxy known as “political correctness.” Real cosmopolitanism is unstable and self-undermining. It must domesticate and mute the diversity it celebrates. As Nomi Stolzenberg puts it:

The fundamentally agnostic attitude that underlies [the cosmopolitan's] principle of toleration strains against the respect for individual beliefs that the principle also requires. The inescapable tension between agnosticism and respect for religious beliefs is another

manifestation of the opposition between the fundamentalist principle of biblical inerrancy and modern, critical approaches to religious claims. The doctrinal treatment of a [religious proponent's] beliefs *as that individual's beliefs and nothing more* denies them respect, or serious consideration, on their own terms.<sup>70</sup>

**3. WHITHER LIBERALISM AND ILLIBERAL GROUPS?** If liberalism is an outgrowth of and response to the European wars of religion – the quintessential conflict among illiberal groups – has it succeeded? In one sense, surely the answer is that it has. Religious freedom and toleration are well established in the West and are at least aspirational for a great many outside the West.

In another sense, however, liberalism's victory is more doubtful. For it has been accomplished largely through liberalizing and privatizing religions. Most Christians and Jews differ on matters that have few public implications. They are now taught to respect or at least tolerate those who hold different beliefs, and that the ethical prescriptions of their religion are mainly private and in any event not worth fighting about. Even the issue of abortion, the issue with perhaps the most potential for toppling liberalism's peace, has not done so.

Liberalism has thus solved the problem of illiberal groups – to the extent it has – mainly by eliminating illiberal groups, not by the sword, but by offering peace and prosperity as powerful temptations to abandon illiberal outlooks. The homogenization brought about by commercialization, globalization, and the relegation of religion to once-a-week private observance has been liberalism's main instrument in achieving its victory.

So liberalism has not so much solved the problem of illiberal groups as it has eliminated the problem by reducing their number and membership. In doing so, however, liberalism has not truly triumphed. For without “illiberalism” – differences in beliefs and mores that are deep and conflicting – liberalism has nothing about which to be liberal. On the other hand, neither liberalism as neutrality nor liberalism as cosmopolitanism has the conceptual resources to deal with illiberal groups. Both versions of liberalism try to stand above the partisan fray, but neither can succeed. There is only partisanship – illiberalism if you will – at both the bottom and the top of the stack of turtles on which liberalism attempts to rest.

John Gray, on the other hand, believes that because of the truth of value-pluralism, there are diverse and incompatible good lives, and that this rules out any political theory, including liberalism, that posits one fundamental set of freedoms, rights, and principles of justice.<sup>71</sup> The best we can aspire to, argues Gray, is a *modus vivendi* among different ways of life, the diverse and incompatible goods they make possible (and impossible), and the freedoms, rights, and

<sup>70</sup> Nomi Maya Stolzenberg, “‘He Drew a Circle That Shut Me Out’: Assimilation, Indoctrination, and the Paradox of a Liberal Education,” 106 *Harv. L. Rev.* 581, 630 (1993).

<sup>71</sup> John Gray, *Two Faces of Liberalism* (2000).

principles of justice they require.<sup>72</sup> Even John Stuart Mill and Isaiah Berlin, the two political philosophers most appreciative of the plurality of real values, erred in believing that those values could be reconciled at some fundamental level such as utilitarianism (for Mill) or negative liberty (for Berlin).<sup>73</sup> The *modus vivendi* that Gray advocates is one achievable not philosophically but only politically.<sup>74</sup> For Gray, liberalism is not a unified, coherent political philosophy but a family of political systems that resemble one another in certain respects but not others and that carve out to a greater or lesser extent room for different, antagonistic ways of life.<sup>75</sup> On Gray's account, when society is faced with conflicts among groups, there is no liberal algorithm available for resolving them, nor is there any resolution that does not sacrifice some values for the sake of others that are incommensurable.<sup>76</sup> We are all members of illiberal groups, and there are no principles for sorting out our differences. It's politics all the way down.

## II. Freedom of Expression: Replaying the Paradoxes of Liberalism and Epistemic Abstinence

Liberalism, as a political philosophy or family of political philosophies, takes partisan positions on freedom of religion, freedom of association, and, of course, freedom of expression. Indeed, whether the liberalism at issue is the liberalism of Rawls,<sup>77</sup> or Nozick,<sup>78</sup> or Dworkin,<sup>79</sup> or Raz,<sup>80</sup> or Barry,<sup>81</sup> it will take partisan positions on a multitude of other issues. It will have a position on how property ought to be distributed, taxed, and regulated. It will have a position on what harms and risks of harms people should be protected against. It will have a position on contractual enforcement and on what counts as consent sufficient to alter rights and duties. And so on. (Indeed, arguably, it will have a position on every possible law that might be under consideration.)

So let us assume that the entire corpus juris is exactly what the liberal theorist would advocate. People have their fair-according-to-liberalism share of resources and pay the liberalism-prescribed rate of taxation for public goods. Their environment is protected to the proper extent from pollution, noise, visual blight, and so forth. Activities that risk bodily, property, and environmental harm

<sup>72</sup> *Id.* at 19–22.

<sup>73</sup> *Id.* at 84–5, 94–6.

<sup>74</sup> *Id.* at 134–9.

<sup>75</sup> *Id.* at 20.

<sup>76</sup> *Id.* at 34–68.

<sup>77</sup> See Rawls, *supra* note 14. See also John Rawls, *Political Liberalism* 340–63 (1993) (presenting a characteristically liberal account of free speech).

<sup>78</sup> See Robert Nozick, *Anarchy, State, and Utopia* (1974).

<sup>79</sup> See Dworkin, *supra* note 11; Dworkin, *supra* note 11.

<sup>80</sup> See Raz, *supra* note 64.

<sup>81</sup> See Brian Barry, *Liberal Equality: An Egalitarian Critique of Multiculturalism* (2001).

are regulated to the precise degree that liberalism demands. In short, all of the Track Two laws are what liberalism mandates.

In such a case, no one could plausibly claim a liberalism-derived right of freedom of expression that would immunize her violation of those Track Two laws. That was the conclusion drawn in Chapter Two. And if liberalism is the progenitor of both the right of freedom of expression and the Track Two laws at issue, then if the Track Two laws are proper, freedom of expression must necessarily be consistent with their observance. Conversely, if a particular Track Two law is inconsistent with liberalism, then the liberal's complaint should be directed against the Track Two law itself, and not against it only insofar as it has effects on messages that themselves have nothing to do with law's inconsistency with liberalism. For example, if liberalism demands equality of resources, and A has more resources than B, then the wrong to B is *not* that he cannot afford a full-page ad advocating his vision of world peace; rather, it is that he does not have the resources to which he is entitled, however he might employ them.

But what is true of Track Two laws is also true of laws that come within principle (5) – laws that government enacts in order to affect the messages people receive. Consider, first, those laws that are aimed at preventing receipt of messages because such receipt causes harm without further action by the audience. The harm may be that of revealing an attorney-client confidence, an embarrassing private fact, a trade secret, or a military secret. Or it may be the harm of taking someone's intellectual property or causing emotional distress.

If liberalism dictates that people should be protected from these harms, then messages whose receipt produces such harms cannot be protected under the auspices of liberalism without contradiction. Liberalism cannot be evaluatively neutral regarding itself.

Of course, liberalism might reject laws that protect against messages that directly cause harm by revealing confidences, secrets, and private facts, by infringing property and contractual rights, by inflicting emotional injury, and so on. But to do so, liberalism either would have to assert that the communication of any message is more important in the liberal calculus than freedom from those harms, or it would have to assert that messages that harm those interests are or are not immunized from government sanction, depending on what the message is. The latter alternative is, of course, inconsistent with evaluative neutrality. And it results in a liberalism that protects one from message-caused harms unless the message is more important – true, and otherwise consistent with liberalism in what it advocates or endorses – than those harms. The resulting right of freedom of expression then is a right that no one would want to deny – a right to convey messages that are consistent with liberalism and that cause only harm that liberalism deems less important than the messages. But that is a “right” so internal to particular renditions of a partisan political philosophy that it fails to capture what anyone regards as freedom of expression.

Now consider those harms that are produced when the audience receives a message, evaluates it, and then acts harmfully, to others or to itself, in response. The audience may be deceived by a false or misleading message. It may be provoked by advocacy, incitement, solicitation, or insult. It may be given information that facilitates producing preexisting harmful ends. And so on.

Within principle (5), laws that are aimed at messages causing harms in such a two-step manner – laws against advocacy of illegal acts, against “fighting words,” against deception and defamation, and against publishing dangerous information – are the laws that have most engaged liberal theorists of freedom of expression. Yet, as we saw in Chapter Four, the theories of Scanlon, Strauss, and Mill are unpersuasive. They cannot provide a principled distinction within the class of laws aimed at causing harm in two steps between those laws they would prohibit and those they would allow.

It is easy to see why no such liberal theory can succeed. If the harms caused by deceit, advocacy, insult, and information release are harms that, according to liberalism, people have rights that others not cause, then liberalism cannot but value negatively the messages that cause such harms, just as it cannot but value negatively religions that seek to impose their illiberal views on others. If, per liberalism, violence against African Americans is wrong, then advocacy of such violence is wrong, and the message that such violence is justified has no (positive) value.

Therefore, if someone advocates illiberal actions, and the government fears that an audience may be persuaded to take those actions and cause wrongful harms as a consequence, government cannot be both committed to liberalism and agnostic about the positions advocated, nor can it view such agnosticism as a justification for refraining from suppressing the expression in question. If liberalism is the correct political philosophy, then it cannot attach value to messages that undermine it, just as if freedom of expression is valuable, advocacy of its abolition cannot be.<sup>82</sup>

On the other hand, if a liberal government were to suppress speech because it feared the audience would be led to illiberal conclusions, in what sense would that government be “liberal”? For the core of anything recognizable as freedom of expression does seem to be what Justice Jackson said it was, namely, the prohibition of establishing an official orthodoxy. Freedom of expression perforce rests on evaluative neutrality with respect to what is being expressed.

Finally, what about the autonomy of those whom the government fears will misassess the truth or value of a message? Does not censorship of such messages violate the audience’s deliberative autonomy, and cannot a right against such violations of autonomy generate a substantial right of freedom of expression?

<sup>82</sup> See Carl A. Auerbach, “The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech,” 23 *U. Chi. L. Rev.* 173 (1956).

I believe that focusing on autonomy merely replays the paradox with a different label attached. First, most regulations under principle (5) – those designed to prevent direct harm (to privacy, secrecy, confidentiality, ownership, contractual rights, and emotional peace) – do not involve violations of audience autonomy. The harms these regulations are meant to prevent will occur no matter how the audience deliberates about the messages.

Secondly, even where government does seek to prevent harm through audience action taken in response to the message, *autonomy is on both sides of the equation*. On the one hand, the government is restricting the audience's ability to receive messages because it fears audience misassessment – arguably, a case of disrespect of the audience's deliberative autonomy. On the other hand, government believes that because the message is wrong (in the facts or values it asserts), it will only be misassessed by the audience because of some defect in the audience's ability to deliberate rationally about the message, a defect that impairs the audience's autonomy. If the message asserts a fact that is untrue, the audience's ability to assess the situation rationally is no different from a case in which someone deliberately lies to it. For the harm that a lie does to an audience's autonomy is not due to its being a *lie* but rather to its being *untrue*. If the message makes a value claim that is false, then it will only persuade its audience to the extent that the audience is mistaken about matters of fact or matters of logic, which again will suggest defects in the audience's autonomy. Suppression of messages that will cause audiences to misassess what to do then can be seen – and from government's perspective, will be seen – as enhancing rather than violating the audience's autonomy.

Put differently, autonomy, like the liberalism that gives it pride of place, is a Janus-faced value that looks both at the process of belief-formation and at the substance of what is believed. Bypassing the individual's own rational deliberation and brainwashing her appears inconsistent with autonomy, even if she is brainwashed to hold correct views. But the individual who misunderstands his world both factually and normatively also seems to lack autonomy, no matter how independent the deliberations that led him to error. As Joseph Raz correctly points out, autonomy is of value when it is exercised in choosing between options that are truly good, not when it is exercised to choose the base or the wrong.<sup>83</sup> And the value of autonomy can never countenance the value of undermining autonomy.

### III. Beyond Liberalism: The General Paradox of Evaluative Neutrality and Normative Theory

The paradoxical relation between the putative right of freedom of expression and the political philosophy of liberalism that is the natural home of such a right

<sup>83</sup> See Raz, *supra* note 64, at 380, 412.

is not just a product of liberalism's internally paradoxical stance with respect to illiberal religion, association, and expression. Freedom of expression is paradoxical within *any* plausible normative theory. That is because the requirement of evaluative neutrality is the core of any right of freedom of expression, but evaluative neutrality cannot coexist with *any* normative theory. Any normative theory, liberal or not, will perforce take positions on what ought to be done given our best judgment of what the world is like. To the extent that expression through its message or through its Track Two effects threatens to produce states of affairs inconsistent with those the normative theory prescribes, to that extent the normative theory must, as a matter of logical consistency, rule the expression to be pernicious and of negative value. To paraphrase Locke regarding religion, every normative theory is orthodox unto itself.<sup>84</sup> And no orthodoxy can treat heterodoxy as acceptable. The only expression that a normative theory can regard as valuable is expression that produces effects consistent with what the theory demands. And from no normative theory can one derive a right to engage in activities, expressive or otherwise, that will undermine the theory. Only a normative theory that ranked the right to freedom of expression as lexically superior to all the other rights and interests that expression might undermine is logically capable of underpinning a human right of freedom of expression. And even that theory would face a paradox in dealing with expression that threatened to undermine *it*.

Steve Smith labels Justice Jackson's endorsement in *West Virginia State Board of Education v. Barnette* of the principle of evaluative neutrality "*Barnette's* big blunder."<sup>85</sup> As he puts it, "[F]or all of its initial appeal, the 'no orthodoxy' position [evaluative neutrality] is self-contradictory, impossible to implement, and radically incongruent with the way governments in this and other countries have behaved or could behave."<sup>86</sup> The previous discussion has shown Smith to be correct, not only with respect to freedom of expression, but with respect to freedom of religion and association as well. And yet, evaluative

<sup>84</sup> See John Locke, "A Letter Concerning Toleration" (1689), reprinted in J. Horton and S. Mendus, eds., *John Locke: A Letter Concerning Toleration* 24 (1991): "For every church is orthodox to itself; to others, erroneous or heretical."

<sup>85</sup> Steven D. Smith, "*Barnette's* Big Blunder," 78 *Chicago-Kent L. Rev.* 625 (2003).

<sup>86</sup> *Id.* at 642. See also T. M. Scanlon, *The Difficulty of Tolerance* 162–3 (2003):

My theory not only proposed a set of constraints that prevented certain kinds of balancing in the application of the right of freedom of expression but also carried this hostility toward balancing into the theoretical justification for these constraints themselves. Accordingly, I claimed that the Millian Principle was a constraint on the justification of restrictions on expression that arose from the idea of autonomy itself and did not depend on judgments about the relative value of different forms of expression. This claim now seems to me to have been mistaken. . . .

The lesson of all this is that we cannot understand or interpret the idea that content-based regulation is impermissible without ourselves drawing distinctions between different forms of expression on the basis of their content (or at least their subject matter) and making judgments about the relative value of these forms of expression.

neutrality is central to our understanding of freedom of expression. To repeat, if a government states that it will permit only that expression that it believes promotes the values it endorses, it would not be viewed as respecting the right of freedom of expression.

It is for these reasons – the impossibility of evaluative neutrality, but its centrality to freedom of expression – that Stanley Fish maintains “there’s no such thing as free speech.”<sup>87</sup> As one of Fish’s interpreters puts it,

The keystone of Fish’s . . . argument is the claim that, as a matter of philosophical or conceptual analysis, freedom can only be important to people because it produces consequences they value. If freedom is important only because it produces such consequences, then, Fish argues, it follows logically that actions which undermine those consequences have no claim to be protected as free actions. Not only are they not entitled to protection, such actions must actively be constrained by those who are committed to freedom and the consequences it is valued for producing. Such constraint is an expression of the commitment to freedom, not a falling away from it.

The passages where Fish makes this counterintuitive point most forcefully occur in his analysis of freedom of speech. In liberal societies, free speech is important because it is believed to produce valuable consequences such as more truth, better democratic politics, and more individual self-development. But this means that any freedom of speech principle carries with it a commitment to constrain speech that destroys these things. Alternatively put, a commitment to free speech necessarily carries within it a commitment to censorship.<sup>88</sup>

If free speech is only important because of its consequences, those consequences that are valued and disvalued will necessarily reflect partisan positions, not evaluative neutrality.

Consider again the reasons liberals typically give for the importance of free speech, i.e. its positive consequences for truth, democratic functioning, and self-expression. These rest upon some fundamental liberal beliefs which are not accepted by everyone. Liberals believe that reasoned debate between competing viewpoints is the only sure way to achieve truth. But this belief is not shared by those who believe in the compelling truth of a divine authority which does not await validation by mere human reason. Liberals believe that democracy is the only proper form of political order, but this will have no force for those who see democracy as producing disorder and a confused babble of ignorant voices. Finally, liberals believe that individuals are the fundamental unit of concern, but not everybody accepts that the self-development and self-actualization of individuals is more important than the coherence and survival of the family, tribe, or community of believers. Fish holds that because humans cannot transcend the state of being constituted by local commitments, any freedom of speech regime will be at bottom an attempt to advance some community’s particular and contestable partisan positions. It can never

<sup>87</sup> See Fish, *supra* note 4.

<sup>88</sup> Michael Robertson, “Principle, Pragmatism, and Paralysis: Stanley Fish on Free Speech,” 16 *Legal Theory* 287, 292 (2003).



achieve a position above the fray, because it is always one of the contestants within the fray. Again we reach the conclusion that toleration of opposing partisan positions will be limited. In its expanded form, Fish's argument is that if "free speech" means what the liberals say it means (i.e. the absence of constraints, neutrality as between partisan positions), the free speech does not exist because nothing could have those characteristics. Freedom of speech does exist, but only because it is essentially connected with the very qualities (constraint, partisan bias, non-neutrality) that are excluded from the liberal account. It is thus a "good thing" that freedom of speech isn't what liberals say it is, and that we are constrained in ways that their account ignores, otherwise we wouldn't have freedom of speech at all. Fish is therefore not arguing against the existence of free speech, as most of his critics suppose, but offering a different, non-liberal account of the nature of the free speech which does exist. His project is essentially descriptive, not destructive.<sup>89</sup>

Fish maintains that when speech that is directed against the prevailing values is tolerated, it is either because government believes pragmatically that suppressing the speech will on balance be worse *in terms of the prevailing values* than tolerating it.<sup>90</sup> To urge toleration of speech that one truly believes will destroy what is valuable is an incoherent position.

Nor does taking into account fallibility about facts or values render it coherent. It does not advance the case for a human right of freedom of expression to point out that all human institutions, and surely governments, are fallible in assessing what the world is like and thus whether the effects of expression will be good or ill. Although governments are indeed fallible in this way and in others, any government must act on the view of the world it holds. There is a risk any time a message is suppressed. But as we saw in Chapter Two, no matter what the government does, messages are inevitably going to be suppressed to some extent. Moreover, just as there is a risk in suppressing messages, there are all sorts of risks in not suppressing them. Fallibility does not as a general matter make out a case for tolerance of either acts or ideas.

Fish does not believe that his antifoundationalist, postmodern critique of liberalism's principle of evaluative neutrality regarding expression, religion, and association has any necessary implications for practice. His critique, he believes, leaves everything exactly where it was.<sup>91</sup> And, of course, he is correct in the sense that what is true of liberalism is true of any of its opponents. They are as much ideological constructs as liberalism. In one sense, absolutely nothing follows from the postmodern critique.

But, of course, that is not entirely accurate. Something *does* follow. The critique is deflationary. It takes the wind out of liberalism's sails, even if it

<sup>89</sup> Id. at 293.

<sup>90</sup> Id. at 296–7.

<sup>91</sup> See Fish, *supra* note 4; Stanley Fish, "Almost Pragmatism: Richard Posner's Jurisprudence," 57 *U. Chi. L. Rev.* 1447, 1464–9 (1990). See also Larry Alexander, "What We Do, and Why We Do It," 45 *Stan. L. Rev.* 1885, 1896–8 (1993).

provides nary a breeze to liberalism's competitors. It induces – not more toleration, as Fish fiercely and correctly denies – but a sort of normative torpor.<sup>92</sup> If the critique were completely inconsequential, it would be hard to see why Fish would so often and fervently push it.<sup>93</sup>

Finally, the paradox of evaluative neutrality that undermines a human right of freedom of expression cannot be parried by following Richard Posner and adopting, as one's normative "theory," a cost-benefit approach to freedom of expression.<sup>94</sup> First, as a normative theory, a cost-benefit approach is either empty and banal – "do not suppress speech unless the benefits of doing so, however characterized and determined, outweigh the costs of doing so, similarly characterized and determined" – or it takes a controversial position on what costs and benefits are and how they are weighed. If the cost-benefit approach adopts such a partisan view – if it determines costs and benefits by the effect of policies on subjective welfare, objective welfare, or some other basis, and on its distribution – then expression that threatens to undermine the cost-benefit preferred consequences should be suppressed. There is nothing distinctive about expression under a Posnerian cost-benefit approach, an approach which Posner applies to all activities, expression or otherwise. And Posner's approach is surely not evaluatively neutral. Quite the contrary. To assess the benefits of expression, government must evaluate the messages conveyed, the very antithesis of what a "right" of freedom of expression would permit. The cost-benefit approach cannot provide the foundation of a human right of freedom of expression.

Of course, even the most developed political philosophy will fail to answer some questions about the world – how safe are the 2004 Toyotas, how many genes are on the chimpanzee's genome, who killed Jon Benet Ramsey, and so forth. And for these questions, it may indeed be the case that government regulation of messages will impede the search for answers. Uncensored exchange of research data, freedom to publish academic articles in peer-reviewed journals, and investigative reporting by the news media all probably usefully contribute to the production of specific, retail truths, at least relative to centralized control by government of all scientific research, academic publication, and investigation of wrongdoing. But these retail truths about the best procedures for answering certain kinds of questions cannot be generalized into anything recognizable as a universal human right to freedom of expression. They represent practices that have a rule-consequentialist structure of justification specific to particular

<sup>92</sup> See George Sher, "But I Could Be Wrong," 18 *Soc. Phil. & Pol'y* 64, 65:

My awareness that I would now have different moral convictions if I had had a different upbringing or different experiences . . . makes it . . . *harder* for me to act on my moral convictions when these conflict with the moral convictions of others.

<sup>93</sup> See Larry Alexander, "Theory's A What Comes Natcherly," 37 *San Diego L. Rev.* 777, 781 (2001).

<sup>94</sup> See Richard A. Posner, *Law Pragmatism, and Democracy* 357–83 (2003).

kinds of questions and to particular cultures, eras, and technologies. Rather than representing a general human right that transcends political, cultural, and historical boundaries and preexists any particular institutional arrangements (such as adversarial trials, democratic voting, or university research), retail, rule-consequentialist justification for particular freedoms of expression have a “good for this time and destination only” quality.



## EPILOGUE



## Muddling Through: Freedom of Expression in the Absence of a Human Right

In the previous chapters we have searched in vain for an argument that would support a human right of freedom of expression. Although there may be a case for a presumption in favor of liberty of action – a case that we did not seek to establish – such a presumption, should it exist, is both far too broad in scope and far too weak to support a recognizable human right of freedom of expression. It is far too broad because liberty of action comprehends much more than expression. And it is far too weak because it takes only a legitimate governmental interest to overcome it.

A more robust liberty, one worthy of being called a human right, that is at the same time restricted to expression, lacks any theoretical grounding. In Chapter [Seven](#) we saw that candidate consequentialist and deontological theories for a special right of freedom of expression are inadequate to the task. And in Chapter [Eight](#), we saw the source of the problem: Evaluative neutrality is the hallmark of freedom of expression, but no moral theory can support evaluative neutrality without generating a paradox. Any moral theory will deem certain states of affairs to be desirable and demanding of legal promotion, and certain interests to be demanding of legal protection from acts that threaten those interests. But both the media of expression and the messages conveyed may cause undesirable states of affairs and threaten protectable interests (per the moral theory in question); and conversely, suppression of expression by reference to its content (Track One) or its media (Track Two) may cause desirable states of affairs and safeguard protectable interests (per that moral theory). Therefore, government cannot permit the harmful expression without contravening the moral theory, which means, in turn, that the moral theory cannot demand protection of the harmful expression without generating a paradox. It must, instead, demand suppression of the harmful expression and permit only that expression that is consistent with the goals of the theory. But that evaluative *nonneutrality* is the antithesis of freedom of expression.

Where does that leave us with respect to freedom of expression? Surely it leaves us with something less than a human right of freedom of expression.

But it does not leave us without more limited arguments for circumscribed domains of freedom of expression. Those arguments will likely have an indirect-consequentialist structure. That is, they will contend that content-neutrality within the circumscribed domain will lead to better consequences (however determined) than having government restrict expression in that domain to those specific tokens of expression it thinks likely to produce good consequences or unlikely to produce bad ones. Moreover, such arguments are likely to be time and place specific rather than universal. That is, the amount and types of freedom of expression that produce good consequences will vary with the form of government, the degree of political stability, the level of wealth, the state of technology, the general level of education, the culture, the structure of the news media and other media of expression and communication, and numerous other factors. The expression that the United States should permit in 2005 will differ from the expression that Uganda should permit, or even perhaps that Canada should permit. There is no reason to think that the indirect-consequentialist case for domains of freedom of expression will be impervious to differences of governmental form, technology, wealth, and so on, and thus impervious to time and place.

There are, of course, many things to be said on behalf of many types of expression, although the virtues of expression will necessarily vary with the more general normative theory by which outcomes are ultimately evaluated. If that theory supports a democratic form of government, it will perforce support that degree of freedom of expression required for conveying the information without which that form of government could not exist. (If one is, as I am, persuaded that the case for democratic government is purely instrumental, then the case for freedom of expression and its scope and limits will be instrumental in the same way, although it is theoretically possible in any particular instance for those values to which both democracy and expression are instrumental to conflict with either democracy, freedom of expression, or both, or for democracy and freedom of expression to conflict.)

Aside from its connection with democracy, some degree of freedom of expression will undoubtedly contribute to the realization of other things that we value positively. Thus, some degree of freedom of expression promotes knowledge that is useful to us in our roles as consumers or producers in the marketplace. Some degree of freedom of expression contributes to a flourishing artistic life (again, as either a producer or a consumer). Some degree of freedom of expression is necessary for scientific and technological progress. Most importantly, some degree of freedom of expression contributes to the knowledge we require to function as responsible moral agents. And there are numerous other goods – and also, of course, “bads” – that some degree of freedom of expression promotes instrumentally or constitutively.<sup>1</sup>

<sup>1</sup> See Richard A. Posner, *Law, Pragmatism, and Democracy* 369 (2003).



In the absence of a human right of freedom of expression, we have no choice but to engage in quite speculative and hunch-driven predictions about whether some degree of freedom of expression will produce good results that, in terms of whatever normative theory we hold, will outweigh the bad results it produces. I should emphasize that by asking whether some degree of freedom of expression will produce good results on balance, I am not asking whether any particular token of expression will produce such results. A jurisprudence of asking whether any particular token of expression will be on balance beneficial in terms of some background normative theory is not a jurisprudence of freedom of expression because it cannot distinguish its approach to tokens of *expression* from its approach to act-tokens generally. If an act-token produces good results on balance (and contravenes no moral side-constraints), it should be permissible (or mandated) regardless of whether it is an act of expression or a token of some other act type. Only if some set of tokens of expression is assessed in terms of its consequences *as a set* and not token by token do we have a form of freedom of expression. Case by case balancing of the costs and benefits of particular expressive acts is inconsistent with freedom of expression rightly so-called.<sup>2</sup>

With these thoughts in mind, let us revisit the major types of government interferences with freedom of expression and see what can be said about them now that we have jettisoned the search for a general human right.

### I. Track Two Laws

Track Two laws – those that have message effects in that they affect what gets said, by whom, to whom, and with what effect, but that are not enacted *because* of those message effects – are, as we noted in Chapter Two, the entire corpus juris except for laws enacted *because* of their message effects (Track One and Track Three). And, as we also noted, the message effects of Track Two laws in their totality are probably much more significant than those of Track One and Track Three laws. Is there some right of freedom of expression that would be desirable from an indirect-consequentialist standpoint that can be applied to Track Two laws?

I am extremely skeptical about this. As I argued in Chapter Two, the Track Two jurisprudence of the United States Supreme Court almost never results in a victory for those challenging the legal restrictions on expression grounds; and when it does, it is difficult to find a principled basis for the victory. The Court has tended to protect sidewalks, streets, and parks – and their close analogues

<sup>2</sup> That is why Richard Posner's cost-benefit approach to tokens of expression cannot be the basis of a right to freedom of expression, leaving aside the information difficulties of such an approach. See Richard A. Posner, "The Speech Market and the Legacy of *Schenck*," in L. C. Bollinger and G. R. Stone, eds., *Eternally Vigilant: Free Speech In The Modern Era* 121, 125–37 (2002); Posner, *supra* note 1, at 358–68. For a critique of Posner's cost-benefit approach to expression, see Matthew D. Bunker, *Critiquing Free Speech* 46–53 (2001).

such as airport terminals – which provide some limited loci for face-to-face expression. But changes in technology and culture have made those protections less and less significant relative to, for example, the mass media with respect to large audiences, and relative to shopping malls with respect to face-to-face encounters.

Nor do I see any hope for a principled delineation of a Track Two right. That is so, even if we drop the requirement of evaluative neutrality. For even if we are allowed to evaluate the message effects of various Track Two laws, *we do not and cannot know what those message effects will be* (except application by application, case by case, and even then without great confidence).

Does a law that prevents sit-ins in libraries produce better consequences than would obtain in its absence? Even without the constraint of evaluative neutrality, we cannot answer that question with any confidence because we do not know what information will be lost to what audience if the law is in force. On one side of the balance are the interests – quiet, privacy, and so forth – that the law serves. On the other side of the balance are all the unknowable instances when those who wish to communicate some message through a library sit-in will be forced to utilize some alternative that in terms of the audience it reaches and its relevant impact are thought to be inferior. Because we cannot know what that information and its impact will be, we cannot intelligently assign a value to place in the balance and weigh against the values the law serves. At most, we can go case by case and ask in each one whether the information that will be lost to that audience on that occasion is more important than the value of a peaceful library on that same occasion. (Remember, we are dropping the requirement of evaluative neutrality.) But as we said, case by case balancing, even if possible, is inconsistent with a *right* of freedom of expression. It is, rather, an approach applicable to all legal restrictions.

It would, I believe, be good social policy in advanced countries for the government to ensure the existence of a wide variety of cheaply accessible media and perhaps some media, such as the Internet, that are open to all speakers. Of course, there are problems of getting the correct balance between having too many speakers, which results in either cacophony or cascading (audiences tuning in to only like-minded speakers), and having too few, which results in exclusion of worthwhile ideas.<sup>3</sup> And the problems with finding the right balance vary depending upon whether the ideas we are concerned with are political, scientific, artistic, cultural, or commercial.

In any event, I think any Track Two freedom of expression jurisprudence – one enforceable by courts against laws incidentally affecting messages – is hopeless. Legislative actions regarding media of expression, on the other hand, may well be warranted, although it will always be difficult to assess whether they are. For in the absence of the future message effects that changes in Track

<sup>3</sup> See Cass R. Sunstein, *Why Societies Need Dissent* (2003).

Two laws will bring about, we cannot know whether those message effects will be worth the sacrifices required to produce them.

## **II. Track One Laws Concerning Messages That Cause Harm in One Step**

Recall that in Chapter [Four](#), we divided Track One laws – laws designed to suppress expression the message of which causes harm – into those that were concerned with messages that caused harm upon receipt by the audience (one-step harms) and those that cause harm through inducing the audience to engage in harmful actions (two-step harms). In this section, I shall address the first type of Track One law, reserving discussion of the second type for the following section.

The Track One laws of concern here include the laws protecting government and trade secrets, the laws protecting confidential communications, the laws protecting informational privacy, the laws protecting intellectual property, the laws protecting sensibilities from offense, the laws enforcing promises not to reveal information, and so on. All of these laws apply legal sanctions to expressive acts defined by the content of the expression. All of these laws protect against harms that are suffered as soon as that content is expressed to an audience. In some instances, the harm in question might be protected by a deontological right. (This might be the case for intellectual property rights that have Lockean justifications, or for contractual rights with respect to expression, and perhaps even for some privacy rights or rights against offense.) In other cases, the protection from message-caused harm might be based on an indirect-consequentialist argument to the effect that prohibiting expression will lead to a greater amount of such expression or to other benefits that outweigh the losses of information. Copyright laws, for example, are frequently justified, not by appeals to a Lockean right of the creator, but by appeals to the incentives for producing copyrightable works that copyright protection provides. And the laws protecting clients' confidential communications from disclosure by lawyers or physicians are usually justified by citing the benefits, in terms of legal justice and medical treatment, of clients' being forthcoming to and candid with lawyers and physicians, better enabling the legal system to function properly.

When expression is prohibited because its content renders it violative of a deontological constraint, there is no work for a right of freedom of expression to do other than to ensure that the legal protections against such expression do not extend beyond those necessary to enforce the deontological constraint. When restrictions on expression have an indirect-consequentialist justification, the question is whether the costs of suppression over the specified range of cases – for example, the costs represented by the loss of information that would have been revealed but for the rules protecting confidential communications – exceed the benefits from suppression. In the case of the rules protecting confidential

communications, to do the cost-benefit analysis, one would have to know how much information would be lost to lawyers and physicians were confidentiality not protected and what would be the effects of that loss on the administration of justice or on health care. The most one can do is make a guess about these effects. On the other side of the balance, one would have to weigh the benefits of revealing confidential communications. But even without a requirement of evaluative neutrality, calculating those benefits will be arbitrary. That is so because we lack the information that would be revealed and so cannot assess its value. Nor do we have an actuarial table that would tell us that we are X percent likely to discover that a candidate for senate committed a murder, Y percent likely to discover that a famous scientist committed fraud, and so on. We are in a realm of pure uncertainty with respect to the informational benefits of eliminating the protection of confidential communications. And the same problems of constructing an indirect-consequentialist balance beset us if we subdivide confidential communications in various ways, for example, distinguishing revelations of crimes of violence from revelations of fraud, or revelations by candidates for political office from revelations by others, or revelations to lawyers from revelations to doctors or priests. Both sides of the balance involve uncertainties.

My conclusion is that with respect to Track One laws involving one-step even if the requirement of evaluative neutrality is dropped, the area is much too speculative for any countermajoritarian (constitutional) right of freedom of expression. At most, courts could prevent the notions of privacy and offense from becoming so capacious that practically all expression could be deemed violative of privacy or offensive. Or courts could prevent intellectual property rights from being extended beyond any conceivable Lockean justification or point of optimal incentives for creativity. In the United States, under the First Amendment, the protection of privacy is limited by the notions of “newsworthiness” (surely not evaluatively neutral) and “embarrassing” (ditto); the protection against offense is limited by the public figure/private figure distinction, by social conventions regarding what is “offensive,” and by some sort of public interest or newsworthiness standard (that ties into conventions regarding offense); intellectual property is limited by doctrines of “fair use” and the “idea/expression” distinction; secrecy is limited to national security matters; and confidentiality protection is limited to the particular relationships in which legislatures have to date allowed it to be invoked (lawyer-client; physician-patient; priest-penitent; in camera official proceedings; and occasionally others).

### **III. Track One Laws Concerning Messages That Cause Harm in Two Steps**

Some messages cause harm to the audience or to third parties only if the audience takes the message as providing reasons to undertake the harmful conduct. A false

or deceptive message may cause those who believe it to rely to their detriment (“the bridge is safe to drive over”) or the detriment of others (“John Doe is a lush and should therefore be avoided”). An insulting message may provoke the audience to engage in violence. Advocacy or solicitation of crimes may cause the audience to believe that criminal acts against others are warranted.

In Chapter Four we sought in vain for a principled justification that would neither insulate all expression of this type from legal suppression nor insulate none of it. The line-drawing the courts in various countries have engaged in to distinguish advocacy from incitement, solicitation, and “fighting words,” or ordinary accounts of criminal activity from how-to-books on crime, or false statements of “fact” from false expressions of “opinion” or “value,” were, I argued, ultimately without principled foundations.

Nevertheless, even in the absence of principled lines of demarcation, much less the foundation provided by a human right, there are good reasons to carve out some domain where government is prohibited from suppressing messages because the content of those messages is false, deceptive, or otherwise likely to cause audiences to engage in harmful conduct. Surely, and particularly in democracies, messages that are critical of the government and its policies should be protected to some extent, even if the government regards them as dangerously false or misleading. Even with a defense of truth permitted, prosecutions for seditious libel run the risk of deterring accurate criticisms of the government along with false or misleading ones. And even though we cannot in advance of receiving those messages assess whether the number and value of deterred accurate messages – remember, we are dropping the evaluative neutrality constraint – outweigh or are outweighed by the number and *disvalue* of the suppressed ones, there are dangers in giving the government power to suppress criticism on grounds that it is false or misleading and dangerous. Government may not act in good faith, but may try to cover up its misdeeds and embarrassments; and even adjudicative processes may not reveal all such cover-ups. And even if government does act in good faith and goes after only those messages that it sincerely believes are false or misleading or dangerous, it will quite naturally tend to overestimate the dangers of such messages, to devalue the benefits for public awareness and debate of even misguided criticisms, and to misassess the accuracy of those criticisms.

Moreover, even if government is correct about the falsity and danger of the messages, it may underestimate the negative indirect consequences of suppression. Suppression may impede valuable enterprises out of which the erroneous criticisms of government emerged: for example, the quests for social and natural scientific truth, or for moral and religious truth.<sup>4</sup> Suppression may infantilize

<sup>4</sup> Speech that facilitates crime, for example, frequently has many beneficial uses. See, e.g., Eugene Volokh, “Crime-Facilitating Speech” (unpublished). And speech that advocates or celebrates crime may generate useful moral and intellectual insights.

the population and stunt its moral and intellectual virtues (an essentially Millian point<sup>5</sup>). Perhaps even more importantly, suppression is frequently ineffectual or worse. It may draw attention to and make martyrs of the dissenters, glamorizing and spreading rather than suppressing their ideas. It may drive criticism and dissent underground, which breeds resentment, alienation, and conspiracy. It is frequently better to allow dissent and know who the dissenters are than to suppress it and have dissent circulate in secrecy.

These are a few of the consequentialist arguments that can be marshaled against suppression of speech that might mislead audiences about the probity, justness, or wisdom of the government and its policies and induce the audience to commit harmful acts, ranging from subversion and criminality to replacing good governors with bad ones. Many of those arguments apply in some measure to suppression of false or deceptive messages beyond those critical of the government, and even beyond politics. Thus, there are reasons *not* to suppress false and misleading scientific claims, religious claims, cultural claims, moral claims, and even medical claims and commercial claims. In the United States, the First Amendment has been invoked to protect false and misleading scientific, religious, cultural, and moral claims but not to protect false and misleading medical or commercial claims. The somewhat perverse result is that because they are subject to penalty if false or misleading, we do – and can, justifiably – rely on the latter claims; on the other hand, because they are immune from government sanctions, the former claims are regarded as likely to be dishonest or baseless and thus unreliable.

One commentator has characterized the consequentialist considerations for freeing up some speech that might be suppressed because of two-step harms in the following way:

First, being able to speak our minds makes us feel good. True, we tailor our words to civility, persuasion, kindness, or other purposes, but that is our choice. Censors claim the right to purge other people's talk – all the while insisting that it is for our own good.

Second, much censorship appears irrational and alarmist in retrospect because the reasons people choose and use words are vastly more interesting than the systems designed to limit them. It's not hard to make a list of absurdities – I'm particularly fond of a rash of state laws that forbid the disparagement of agricultural products – but simplistic explanations and simple-minded responses are as dangerous as they are ditzy. In one of the few places that postmodern theory and common sense intersect, it is obvious that the meaning and perception of words regularly depend on such variables as speaker and spoken to, individual experience and shared history, and the setting, company, and spirit in which something is said. To give courts or other authorities the power to determine all this is, to put it mildly, mind-boggling.

<sup>5</sup> See John Stuart Mill, *On Liberty* (E. Rapaport, ed., 1978), Ch. 2. The argument from fallibility can be overstated. As Woody Allen in *Sleeper* reminds us, even claims like "meat larded with fat is good for your health" *might* turn out to be true. *Sleeper* (Metro-Goldwyn Mayer/United Artists, 1973).

Third, censorship is inimical to democracy. Cloaking ideas and information in secrecy encourages ignorance, corruption, demagoguery, a corrosive distrust of authority, and a historical memory resembling Swiss cheese. Open discussion, on the other hand, allows verities to be examined, errors to be corrected, disagreement to be expressed, and anxieties to be put in perspective. It also forces communities to confront their problems directly, which is more likely to lead to real solutions than covering them up.

Fourth, censorship backfires. Opinions, tastes, social values, and mores change over time and vary among people. Truth can be a protean thing. The earth's rotation, its shape, the origins of humankind, and the nature of matter were all once widely understood to be something different from what we know today, yet those who challenged the prevailing faith were mocked and punished for their apostasy. Banning ideas in an attempt to make the world safe from doubt, disaffection, or disorder is limiting, especially for people whose lives are routinely limited, since the poor and politically weak are the censor's first targets.

Finally, censorship doesn't work. It doesn't get rid of bad ideas or bad behavior. It usually doesn't even get rid of bad words, and history has shown repeatedly that banning the unpalatable merely drives it underground. It could be argued that that's just fine, that vitriolic or subversive speech, for example, shouldn't dare to speak its name. But hateful ideas by another name – disguised as disinterested intellectual inquiry, or given a nose job like Ku Klux Klansman David Duke before he ran for governor of Louisiana – are probably more insidious than those that are clearly marginal.<sup>6</sup>

There are many good reasons for governments not to regulate expression for the purpose of affecting messages, but that freedom of expression is a human right is not one of them.<sup>7</sup> There is no human right of freedom of expression. Nor is there an indirect-consequentialist justification for a domain of freedom of expression, whether with respect to Track One, Track Two, or Track Three laws, that is constant across time and place. Rather, there are indirect-consequentialist arguments that might justify the special treatment of expression, but that treatment will vary from place to place and from time to time. Justified rights regarding expression will always be limited, local, and based on hunches about consequences.<sup>8</sup> That is not as grand and inspiring a basis for freedom of expression as deeming it to be a human right. It does, however, have the virtue of realism.

<sup>6</sup> Nan Levinson, *Outspoken* 18–19 (2003).

<sup>7</sup> See, e.g., Allen Buchanan, "Political Liberalism and Social Epistemology," 32 *Phil. & Pub. Aff.* 95 (2004).

<sup>8</sup> Hunches are the best we can do. What we aim for is that set of rules regulating expression that maximizes the quantity and quality of "good" speech – speech that promotes things we value – and that minimizes the amount of "bad" speech. That quest is hampered both by inevitable disagreement over values and hence over what speech is "good" and "bad," and by the fact that we do not know what ideas will be expressed under alternative sets of rules. We often must allow expression in order to discover whether we should have done so; and if we disallow some expression, as we must – think of Track Two – we shall never know what ideas we might have received had we done otherwise.





# Index

The phrase “used as example” which qualifies some subject headings in this index indicates that the topic was discussed to illustrate a point rather than being a discussion of the freedom of expression merits of the topic *per se*.

- Abood v. Detroit Bd. of Educ.*, 102  
abortion rights, 19, 65, 112, 152, 155, 172  
Ackerman, Bruce, 152, 155–6  
administrative laws, 17  
advertising, 88, 90, 98, 100  
advocacy-incitement distinctions, 75–7, 79, 81, 191  
*Ahmed and Others v. United Kingdom*, 109  
*Albertson’s, Inc. v. Young*, 120  
Alien and Sedition Act, 74  
Al Qaeda operatives (used as example), 77  
*Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 120  
animal rights, 152, 155  
anonymous speech, xii, 118–19  
antidiscrimination laws, 46, 105–6, 115–18, 170  
*Arkansas Educ. Television Comm’n v. Forbes*, 86, 98  
*Arkansas Writers’ Project, Inc. v. Ragland*, 89  
Arons, Stephen, 91  
artistic speech, 137, 138, 141  
association, freedom of, xii, 107–11, 115–18, 123, 147–8, 164–73  
attorney/client communications. *See* confidentiality  
audiences: hostile, 23, 76, 112, 113;  
responsibility of, 77–9, 80; rights of, 8–9.  
*See also* Principles 3, 4, and 5  
authors, dead (used as example), 8, 10  
autonomy, xii, 130–2, 133; balancing/  
weighing tests and, 131; evaluation of  
information and, 35, 74, 80; liberalism  
and, 175–6; Principle 5 and, 176;  
public discourse and, 143; Strauss on, 68,  
70  
*A v. Germany*, 108  
*Bailey v. Alabama*, 167  
Baker, Edwin, 58  
Bakke, Allan, 44  
balancing/weighing tests, 20–37, 57–9, 61,  
66, 106, 131, 188  
*Barfod v. Denmark*, 69  
*Barnes v. Glen Theatre, Inc.*, 60  
*Barnette, West Virginia State Board of  
Education v.*, 11, 28, 91, 97  
Barry, Brian, 173  
*Bartinicki v. Vopper*, 58  
*Batchelder v. Allied Stores Int’l, Inc.*, 120  
belief, freedom of, 107–11, 123  
Benzanson, Randall P., 91  
Berlin, Isaiah, 173  
Berman, Mitchell N., 84

- Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 116
- Board of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 89
- Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 167
- Board of Educ. v. Pico*, 9, 15
- Board of Regents of the Univ. of Wisconsin v. Southworth*, 102
- Bobo v. Spain*, 106
- bomb building (used as example), 76
- Bonneville v. Frazier*, 69
- Boos v. Barry*, 19
- Bork v. Westminster Mall Co.*, 120
- Boy Scouts of Am. v. Dale*, 115–18, 170
- Brandenburg v. Ohio*, 66, 69, 70, 75, 76–7, 107
- Branti v. Finkel*, 109
- Brink, David, 72–3
- broadcasting, xii, 19, 21, 74, 113–15, 123
- Brown v. Hartlage*, 69
- Brown v. Socialist Workers*, 118
- Buchanan, Allen, 3, 6
- Buckley v. Valeo*, 35
- Burson v. Freeman*, 85
- Buss, William G., 91
- Butler v. Southam, Inc.*, 69
- C, Re* (German court case), 58
- California Democratic Party v. Jones*, 117
- campaigns. *See* election campaigns
- Carey v. Brown*, 35, 86, 93–4
- cartoons, satirical, 143
- Case of Appleby and Others v. The United Kingdom*, 120
- Chamberlain v. Surrey Sch. Dist. No. 36*, 89
- Chaplinsky v. New Hampshire*, 76
- Christiano, Thomas, 144
- City Council of Los Angeles v. Taxpayers for Vincent*, 19
- City of Cleburne v. Cleburne Living Center*, 110
- City of Montreal v. Buczynsky*, 19
- City of Renton v. Playtime Theatres*, 60
- Clark v. Community for Creative Non-Violence*, 23
- Cohen v. California*, 16, 59, 115
- Cohen v. Cowles Media Co.*, 59, 65
- Coles Book Stores Ltd. v. Ontario*, 19
- collective action problems, 26
- commercial speech, 138, 140, 141–2
- Committee for the Commonwealth of Canada v. Canada*, 14, 19
- Communist Party, 108–9
- “compelling interest” arguments, 61
- Conant v. Walters*, 78
- Condon v. Prince Edward Island*, 109
- confidentiality: attorney/client (for example) relationships and, 56, 57, 140; contract law and, 65; liberalism and, 174; public discourse and, 143; Rubenfeld on, 61; Schauer on, 81; speaking the truth and, 135; Track One laws and, 189–90
- congestion, regulation of (used as example), 17
- Connick v. Myers*, 104
- Connolly v. Comm’n of the European Communities*, 106
- Conrad, Southeastern Promotions Ltd. v.*, 86, 87, 89
- consequentialist theories, xii, 6, 127–34, 185
- content-neutral regulations, 18, 19, 20, 35, 39, 82
- content regulations: balancing/weighing of, 20–37, 57–9, 61, 66, 106, 131; broadcasting and, 114–15; categories of speech and, 29, 95–6, 141–2; “compelling interest” arguments and, 61; direct harms and, 56–66, 80, 135, 174, 189–90; speech-specific laws as, 19, 113; time/place/manner and, 35; two-step harms and, xii, 66–81, 111, 135, 175, 190–2. *See also* Track One laws
- contract law, 17, 56, 59, 61, 65, 189
- copyright. *See* intellectual property
- Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 14
- Corporation of Presiding Bishop of the Church of Latter-Day Saints v. Amos*, 117
- cosmopolitanism, 165, 169–70, 171
- Costco Companies, Inc. v. Gallant*, 120

- counter-speech, 75, 76, 79
- Cox Broadcasting Corp. v. Cohn*, 58
- crimes, incitement/solicitation of, 67–70, 75, 77, 135, 143, 175, 191
- criminal laws, 17
- cross burnings, 85, 94
- Curtis Pub. Co. v. Butts*, 69, 107
- Daggett v. Comm'n on Governmental Ethics and Election Practices*, 88
- Dandridge v. Williams*, 43
- Day v. Holahan*, 88
- deceptive speech, 67, 68–70, 119, 143, 175, 191
- defamatory speech, 67, 68–70, 105, 107, 175. *See also* libel
- democracy, 136–45, 186; associations and, 117; human rights limited to, 5, 144–5; informed citizenry and, 136–9; public discourse theory and, 136, 139–44; Track Three laws and, 101; virtues and, 132
- demonstrations. *See* protests and demonstrations
- deontological theories, xii, 6, 134–5, 185
- DiGuida, People v.*, 120
- discrimination: antidiscrimination laws and, 46, 105–6, 115–18, 170; employment, 70, 117; private prejudices and, 109–10; religious, 117; sexual, 105–6, 115–18; subject matter, 93–8; viewpoint, 14–15, 25, 93–8
- distortion, of messages, 98–9
- Douglas v. Hello!*, 58
- draft card burning (used as example), 16, 17, 23
- drug use, 75
- Due Process clauses, 45
- Dworkin, Ronald, 152, 154, 155, 173
- economic theory, 24–6
- education, public, 21, 33, 89–90, 94, 97, 103
- election campaigns: advertising and, 88, 98; candidates' debates and, 98; public financing of, 21, 33, 35, 74
- Elrod v. Burns*, 109
- Ely, John, 42
- embarrassing personal facts, 56, 57, 81, 135, 174
- emotional distress, infliction of, 56, 58, 105, 174
- employees, government, xii, 103–11, 123
- employment discrimination, 70, 117
- “epistemic abstinence,” xii, 147
- Equal Protection Clause, 45, 121
- Erie v. Pap's A.M.*, 60
- Erznoznik v. City of Jacksonville*, 115
- Estes v. Kapiolani Women's and Children's Med. Center*, 120
- European Convention on Human Rights, 116, 148
- evaluative neutrality: autonomy and, 131; balancing/weighing and, 28; as core of freedom of expression, 11–12, 148, 175, 176–81, 185; democracy and, 139; direct harms and, 61, 66, 174; “fair use” and, 62; freedom of association and, 148; freedom of religion and, 148, 149; government employee speech and, 106–7; inconsistency in application of, 86; liberalism and, 148–9, 165–9, 171, 174; “matters of public concern” and, 105; normative theory and, xii, 176–81, 185; Principle 4 and, 35–7; Principle 5 and, 147; Track One laws and, 101, 106–7, 190; Track Two laws and, 20–1, 28, 112, 188; Track Three laws and, 85, 91, 97, 101
- evidence, admissibility of, 56
- expressivist harms, 41
- Express Newspapers v. Keys*, 69
- F. C. C. v. League of Women Voters*, 84, 87
- F. C. C. v. Pacifica Found.*, 59, 115
- fact-opinion distinctions, 70–1, 72–3, 75, 79, 135, 191
- fact-value distinctions, 70, 71–5, 79, 135, 191
- “fair use,” 62, 107
- false assertions-beliefs distinctions, 77–9

- Faurisson v. France*, 69  
 feeble-minded persons, 3  
*Feiner v. New York*, 76, 112  
 fighting words, 76, 85, 105, 175, 191  
 Finnerty, Kevin, 92  
 Fish, Stanley, 79, 148, 164, 178–80  
 Fiss, Owen, 29–31, 138, 143  
 flag burning (used as example), 16, 38–9,  
 41, 42, 45, 46, 47–8, 49  
*The Florida Star v. B. J. F.*, 58  
 Fourteenth Amendment, 42, 121  
*Fraser v. Canada*, 106  
*Frieson v. Hammell*, 69  
*Frisby v. Schultz*, 19
- gag orders, 56  
 gambling, 75  
 genetically-engineered foods, 74, 138,  
 140  
*Gertz v. Robert Welch, Inc.*, 69, 107  
*Glaser v. Germany*, 108  
*Goduto, People v.*, 120  
*Golden Gateway Center v. Golden Gateway  
 Tenants Ass'n*, 120  
 Golove, David, 3, 6  
*Good News Club v. Milford Central Sch.*,  
 94–5, 97, 141  
 governments: distrust of, 145; as  
 duty-bearer, 7; employees of, xii, 103–11,  
 123; evaluative neutrality and, 11–12, 28,  
 33, 85, 86, 91, 97, 105; libeling of, 74;  
 means of expression and, 4, 7; optionality  
 and, 40, 42–3, 44–6, 48, 50–1; regulatory  
 purposes of, xi, 9–11, 13, 38–41, 45–6,  
 48–51, 55; speech by, xii, 89–91, 99,  
 101–2; subsidies granted by, xii, 22–3,  
 33, 35, 37, 87–9, 95–9, 101–2  
 Gray, John, 172–3  
 Greenawalt, Kent, 77, 152–3  
*Green Party v. Hartz Mountain Indus., Inc.*,  
 120  
*Greer v. Spock*, 86  
*Groppera Radio AG v. Switzerland*,  
 114  
 group homes, 109  
 group intentionality, 40
- Habermas, Jürgen, 29–31, 160  
*Harper & Row Publishers, Inc. v. Nation  
 Enters.*, 60, 107  
*Harris v. McRae*, 113  
 hate speech, 58–9, 110, 143  
*Hazelwood Sch. Dist. v. Kuhlmeier*, 15  
*Herceg v. Hustler Magazine, Inc.*, 77  
*Hill v. Colorado*, 19  
 Holmes, Oliver Wendell, 42  
 hostile audiences, 23, 76, 112, 113  
*Hudgens v. NLRB*, 14, 120  
 human rights, 3–7, 48–51, 111, 144–5, 185,  
 193  
*Hurley v. Irish-American Gay, Lesbian,  
 and Bisexual Group of Boston*, 79, 116,  
 170
- ideal speech situations, 158  
 incitement. *See* advocacy-incitement  
 distinctions; crimes, incitement/  
 solicitation of  
 income inequality, 17, 73  
 indirect consequentialist theories, 186,  
 187–8, 189–90, 193  
 information effects: evaluative neutrality  
 and, 28, 33; ignorance of, 20, 24–7, 57;  
 knowledge of, 20, 24, 26–32, 57; public  
 goods problem and, 25–6  
*Informationsverein Lentia v. Austria*, 102  
 “innocent instrumentality” scenarios, 78  
 insane/deranged persons, 3, 67, 81  
 intellectual property: liberalism and, 174;  
 limits on, 190; Principle 5 and, 62–5;  
 public discourse and, 143; speaking the  
 truth and, 135; violation of, as direct  
 harm, 56, 58, 107, 189  
 intentionality, 40, 76  
 International Covenant on Civil and  
 Political Rights, 4–5, 116  
*International Society for Krishna  
 Consciousness, Inc. v. Lee*, 14, 23, 27, 29,  
 34, 35, 85  
 interracial adoptions, 109  
 irresponsible actors, 67, 81, 135  
*Islamic Unity Convention v. Independent  
 Broadcasting Auth. and Others*, 69

- Jackson, Robert H., 11, 175, 177
- Jacobs, Leslie, 92
- Jewish students, Orthodox, 170–2
- “judgmental necessity” subsidies, 95, 96–8
- Kamenshine, Robert, 91
- Keller v. State Bar of Calif.*, 102
- Kessler, Daryl, 95–8
- Kleindienst v. Mandel*, 9
- K Mart Canada Ltd. v. U.F.C.W., Local 1518*, 19
- Konigsberg v. State Bar*, 108
- Kosiek v. Germany*, 108
- Ku Klux Klan (used as example), 86
- Lacey, State v.*, 120
- Laguna Publ’g Co. v. Golden Rain Found.*, 120
- Laguna Publ’g Co. v. Golden West Publ’g Co.*, 120
- Lamb’s Chapel v. Moriches Union Free Sch. Dist.*, 94–5, 97
- Lamont v. Postmaster General*, 9
- Landmark Communications, Inc. v. Virginia*, 58
- Lange v. Atkinson*, 69
- Lange v. Australian Broadcasting Corp.*, 69
- Larmore, Charles, 152, 155
- Leathers v. Medlock*, 25
- Lee, International Society for Krishna Consciousness, Inc. v.*, 14, 23, 27, 29, 34, 35, 85
- Legal Servs. Corp. v. Velazquez*, 86, 88, 89
- legislative motivation, 45–6, 49
- Lehman v. City of Shaker Heights*, 86
- Levinson, Nan, 192–3
- Levy v. State of Victoria*, 23
- libel, 69, 74, 191
- liberalism: autonomy and, 175–6; as cosmopolitanism, 165, 169–70, 171; evaluative neutrality and, 148–9, 165–9, 171, 174; illiberal groups and, 164–73; illiberal religions and, 149–64, 172; Principle 5 and, 174–5; Track Two laws and, 174
- libertarianism, 31, 50, 63
- liberty: of action, 185; harms and, 60, 72; human/moral rights and, 4, 6; Rawls on, 5; restriction of, 19, 82, 101–2; subsidies and, 101–2
- libraries, 89–90, 95
- litter, regulation of, 20, 22
- Lloyd Corp. v. Tanner*, 120
- Lochner v. New York*, 42
- Locke, John, 63, 177
- lying, 70
- Madsen v. Women’s Health Center, Inc.*, 19
- Maher v. Roe*, 113
- Marshall, William, 161
- Marsh v. Alabama*, 14, 120, 167
- Martin v. City of Struthers*, 9
- McIntyre v. Ohio Elections Comm’n*, 118
- means of expression, 4, 7
- media of expression, regulation of, 7–8, 19, 22–3, 59, 188
- Melvin v. Reid*, 57
- Miami Herald Publ’g Co. v. Tornillo*, 114
- military secrets. *See secrets*
- Milkovich v. Lorain Journal Co.*, 70, 72
- Mill, John Stuart, 72–3, 166, 173, 175, 192
- “Millian Principle,” 68, 177
- Minister of Foreign Affairs v. Magno*, 19
- Ministry of Attorney-General, Corrections Branch & British Columbia Government Employees’ Union, Re*, 106
- Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 19, 25
- Minnesota State Bd. for Community Colleges v. Knight*, 15, 86
- minors, 3
- misrepresentations. *See deceptive speech*
- moral rights, 3–7, 12, 111
- Mt. Healthy City Bd. of Educ. v. Doyle*, 39
- N. A. A. C. P. v. Alabama*, 118
- N. E. A. v. Finley*, 87
- Nafria v. Spain*, 106
- Nagel, Thomas, 152, 155–7, 160–1

- National Ass'n for the Advancement of Psychoanalysts v. Cal. Bd. of Psychology*, 69
- National Endowments for the Arts/Humanities, 96–8
- National Enquirer* stories (used as example), 77–8, 142
- natural rights, 63
- Neal, Patrick, 162
- New Jersey Coalition Against the War in the Middle East v. J. M. B. Realty Co.*, 120
- New York State Club Ass'n, Inc. v. City of New York*, 116
- New York Times Co. v. United States*, 130
- New York Times v. Sullivan*, 69, 107
- noise, regulation of (used as example), 10, 17, 83
- nonappropriation theory, 134
- normative theories, comprehensive, xii, 31–2, 33, 50, 176–81
- Nozick, Robert, 43, 173
- Obligations of Contracts Clause, 44
- O'Brien, United States v.*, 15, 22–3
- offensive speech, 56, 58–9, 115, 189, 190
- O'Hare Truck Serv., Inc. v. City of Northlake*, 109
- Olivia N. v. Nat'l Broadcasting Co.*, 77
- Ontario Attorney Gen. v. Dieleman*, 19
- Ontario Public Serv. Employees Union v. The Nat'l Citizens' Coalition, Inc.*, 61
- opinions. *See* fact-opinion distinctions
- optionality, 40, 50–1; legislative motivation and, 45–6; rules and, 42–3; switching and, 44–5, 48
- Osborne v. Canada*, 109
- “owned” content (used as example), 56
- P. G. A. Tour, Inc. v. Martin*, 118
- Palmore v. Sidoti*, 109
- pamphleteering, 19, 22, 35
- partisanship, 33, 109, 147, 172
- patronage, political, 109
- Peel Bd. of Educ. v. O. S. S.T. F.*, 108
- Pentagon Papers* case, 130
- People v. DiGuida*, 120
- People v. Goduto*, 120
- People v. Sterling*, 120
- permissibility, moral, 40, 41–2, 46
- Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 14, 86
- Personnel Adm'r of Mass. v. Feeney*, 46
- “Persuasion Principle,” 68
- physician/patient communications. *See* confidentiality
- Pickering v. Bd. of Educ.*, 104
- picketing. *See* protests and demonstrations
- Planned Parenthood v. Am. Coalition of Life Activists*, 65
- poisoning of water supplies (used as example), 77
- Police Dept. v. Mosley*, 35, 86, 93–4
- political association, right of, 117
- political correctness, 171
- political speech, 28–9, 69, 137–8, 140, 141–2
- Posner, Richard, 36–7, 72, 180
- Post, Robert, 128–41, 143–4
- Post, Robert C., 31
- preemptive actions, 111
- prejudices, private, 109–10
- priest/penitent communications. *See* confidentiality
- Principle 1 (suppression of expressive conduct), 9–10, 55
- Principle 2 (suppression of conduct intended to communicate a message), 9–10, 55
- Principle 3 (audience prevented from receiving a message), 9, 10–11, 55
- Principle 4 (suppression of conduct intended to communicate a message that results in audience being prevented from receiving it), 9, 11, 13, 35–7, 55, 139
- Principle 5 (suppression of conduct for the purpose of preventing audience reception of a message), 9, 11, 13, 80–1; autonomy and, 176; direct harms and, 56–66, 80, 174; evaluative neutrality and, 147; government purpose and, 38, 55, 60–1, 147; intellectual property law and, 62–5; liberalism and, 174–5; message effects and, 48, 120–1; private regulation of

- speech and, 119; Rubenfeld on, 36, 61; satirical cartoons and, 143; Track One laws and, 37, 39; Track Two laws and, 31, 147; two-step harms and, 67, 80–1, 175
- privacy, 118–19; Rubenfeld on, 61, 65; Track One laws and, 190; Track Two laws and, 17, 119; violation of, as direct harm, 56, 57, 189
- private regulation of speech, xii, 105–6, 119–23
- professional speech, 98–9, 138, 140–1
- Progressive, Inc., United States v.*, 77
- ProLife Alliance v. British Broadcasting Co.*, 115
- property law, 17
- Proposition 209 (Calif.), 46
- protests and demonstrations, 16, 19, 20, 35, 93
- publication of dangerous information, 76–7, 175, 191
- “public concern” exceptions, 104, 105, 106
- public confidence, damage to, 104
- public discourse theory, 136, 139–44
- public fora, 14–16, 33, 35, 86–7, 92–3
- public goods problems, 25–6
- publicness of speech, 77, 79, 141
- R. A. V. v. City of St. Paul*, 85, 94, 97
- R. v. Lucas*, 69
- racial discrimination, 105–6
- Ramsden v. Peterborough*, 21
- Rankin v. McPherson*, 104
- Rawls, John, 5, 43, 152, 155, 161, 173
- Rawlsianism, 31–2, 50
- Raz, Joseph, 173, 176
- reading, 10
- reasonable rejectability, 149–50, 156–62
- recklessness, 50
- Redish, Martin, 92, 95–8
- Red Lion Broadcasting Co. v. F. C. C.*, 114
- Reform Party of Canada v. Attorney Gen. of Canada*, 98
- Regan v. Taxation with Representation of Washington*, 89
- Regents of the Univ. of Calif. at Davis v. Bakke*, 44
- Regina v. Lewis*, 19
- Regina v. Richards*, 19
- regulatory laws, 17
- relationship-damaging speech, 104–6, 110
- religion, freedom of, xii, 147–8, 149–64, 172
- religious discrimination, 117
- religious speech, 141–2
- research grants/subsidies, 21, 33
- resource allocation decisions, 23, 75, 112–13, 123
- Reynolds v. Times Newspapers Ltd.*, 69
- Rice v. Paladin Enters.*, 77
- Robel, United States v.*, 108
- Roberts v. U. S. Jaycees*, 116, 167
- Robins v. Pruneyard Shopping Center*, 120
- Roe v. Wade*, 113
- Rosen, Mark, 167
- Rosenberger v. Rector & Visitors of the Univ. of Va.*, 15, 89, 94–5, 97, 138, 141
- Ross v. New Brunswick Sch. Dist. No. 15*, 109
- Rubinfeld, Jed, 27–8, 36–7, 39, 61–5, 72
- Rust v. Sullivan*, 87–8
- Rutan v. Republican Party of Ill.*, 109
- S. O. S., Inc. v. Mirage Casino-Hotel*, 120
- Sable Communications of Calif. v. F. C. C.*, 59
- Sam Andrews’ Sons v. Agric. Labor Relations Bd.*, 120
- Scalia, Antonin, 94, 95, 118
- Scanlon, Thomas, 68–70, 78, 80, 81, 134–5, 175, 177
- Schauer, Frederick, 80, 81, 91, 137
- Schmid, State v.*, 120
- Schneider v. State*, 19, 21–2, 29, 35
- schools and universities. *See* education, public
- scientific speech, 137, 138, 140, 141
- secrets: contract law and, 65; disclosure of, as direct harm, 56; liberalism and, 174; public discourse and, 143; Rubenfeld on, 61; Schauer on, 81; speaking the truth and, 135; Track One laws and, 189, 190

- Sedition Act (1798), 74
- senile persons, 3
- sexual discrimination, 105–6, 115–18
- Shapiro, Scott, 144
- Shelley v. Kraemer*, 121–2, 167
- Shiffrin, Steven, 92
- Sidis v. F-R Publ'g Corp.*, 57
- significant government interest test, 15–16, 18–19
- Simon Fraser University and Ass'n of Univ. & College Employees, Re*, 106
- Smith, Steven, 129–32, 177
- Smith v. Daily Mail Publ'g Co.*, 58
- Snepp v. United States*, 65
- Southeastern Promotions Ltd. v. Conrad*, 86, 87, 89, 93
- speakers: discrimination against certain, 93–8; preferential treatment of, 86, 114; protection of, xii, 23, 111–13, 123; responsibility of, 77–8; rights of, 8–9; subsidies for, 98
- speech, freedom of, 7–8
- speech-acts, 79
- Speiser v. Randall*, 84
- Spencer, Herbert, 42–3
- Spragens, Thomas, Jr., 154
- standing, 44
- Stanley v. Georgia*, 9
- State v. Lacey*, 120
- State v. Schmid*, 120
- State v. Wicklund*, 120
- Sterling, People v.*, 120
- Stevens, John Paul, 94
- Stolzenberg, Nomi, 171–2
- Stranahan v. Fred Meyer, Inc.*, 120
- Strauss, David, 68–70, 75, 78, 79, 80, 81, 134–5, 175
- subject matter discrimination, 93–8
- subsidies, xii, 22–3, 35; liberty and, 101–2; of media, 35; message distortion and, 98–9; research grants and, 21, 33; Rubenfeld on, 37; for speakers, 98; of subject matter, 95–8; Track Three laws and, 87–9, 95–8. *See also* public goods problems
- Sunstein, Cass, 18, 138, 143
- swimming pool segregation (used as example), 41–2, 45
- symbolic speech, 8, 14, 15–16
- Takings Clause, 44
- Talley v. California*, 118
- Tashjian v. Republican Party*, 117
- tax law, 17, 18
- Taylor v. Georgia*, 167
- Terry v. Adams*, 117, 118
- Texas v. Johnson*, 16, 41
- threats, 56, 65
- time, effects over, 41–2, 47–8
- Time, Inc. v. Bernard Geis Assocs.*, 58
- time, place, and manner tests, 15–16, 35, 85
- tolerance, 132–3
- Toronto v. Quickfall*, 21
- tort law, 17
- Track One laws, xi–xii, 82, 83–4; broadcasting and, 114; confidentiality and, 189–90; direct harms and, 56–66, 80, 135, 174, 189–90; evaluative neutrality and, 101, 106–7, 190; government employee speech and, 106–7, 111, 123; hostile audiences and, 113; indirect-consequentialist theories and, 189–90; liberty, restriction of, and, 82, 101–2; nonappropriation theory and, 134; Principle 5 and, 13–14, 37, 39; privacy and, 190; public discourse and, 139, 141; secrets and, 189, 190; two-step harms and, xii, 66–81, 111, 135, 175, 190–2
- Track Two laws, xi, 13–37, 82, 187–9; balancing/weighing and, 20–37, 57–9, 61, 66, 188; broadcasting and, 113–14, 123; content categories and, 142; courts and, 33, 35; evaluative neutrality and, 20–1, 28, 112, 188; freedom of association and, 116, 118, 123; governmental purpose and, 39; indirect-consequentialist theories and, 187–8; legislation and, 33–5; liberalism and, 174; liberty, restriction of, and, 82; message effects and, xi, 17–18, 23–4, 48, 120; nonappropriation theory and, 134;



- normative theories and, 31–2, 33, 50;  
Principle 4 and, 11, 13; Principle 5  
and, 147; privacy and, 17, 119;  
private regulation of speech and, 120–2,  
123; public discourse and, 139, 141;  
public fora and, 14–16, 33; public  
goods problems and, 26–7; resource  
allocation decisions and, 23, 112–13,  
123; symbolic speech cases and, 14,  
15–16; tests applied to, 15–16, 18–19;  
ubiquity of, 13–19; as violation of  
freedom of expression, 33
- Track Three laws, xii, 82–102, 113;  
approaches to, 91–9; broadcasting and,  
114–15; comparisons of, 84–91; content  
categories and, 142; democracy and, 101;  
evaluative neutrality and, 85, 91, 97, 101;  
liberty, restriction of, and, 82, 101–2;  
subsidies and, 87–9, 95–8; varieties of,  
82–3
- trade secrets. *See* secrets
- traffic laws. *See* congestion, regulation of
- traumatic content (used as example), 56, 58
- Tribe, Laurence, 11, 13, 82
- truth, xii, 73, 128–30, 133, 135
- United States Civil Serv. Comm'n v. Nat'l  
Ass'n of Letter Carriers*, 109
- United States v. O'Brien*, 15, 22–3
- United States v. Progressive, Inc.*, 77
- United States v. Robel*, 108
- Universal Declaration of Human Rights,  
4–5, 116
- utilitarianism, 31–2, 50, 173
- value-pluralism, 172–3
- values. *See* fact-value distinctions
- Vancouver v. Jaminer*, 19
- viewpoint discrimination, 14–15, 25, 93–8
- Virginia v. Black*, 66, 85
- virtue, xii, 132–3
- Vogt v. Germany*, 108
- Waldron, Jeremy, 144
- Walzer, Michael, 158
- Ward v. Rock Against Racism*, 14
- Washington v. David*, 46
- Wasserman, Howard, 92
- Waters v. Churchill*, 104
- Wayte v. United States*, 39, 46
- Weinstein, James, 139, 140–1
- welfare grants (used as example), 43
- Wenz, Peter, 153
- West Virginia State Board of Education v.  
Barnette*, 11, 28, 91, 97, 177
- Wicklund, State v.*, 120
- Widmar v. Vincent*, 15, 35
- Williams, Susan, 16, 17–18
- Wisconsin v. Yoder*, 168
- work relationships. *See*  
relationship-damaging speech
- Yale University, 170–2
- Young v. American Mini-Theatres*, 60
- Yudof, Mark, 91
- Zacchini v. Scripps-Howard Broadcasting  
Co.*, 58
- Ziegler, Edward, 92