J. Byron McCormick Lecture

DISCRIMINATION, DISTRIBUTION AND FREE SPEECH*

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I. THE FREE SPEECH FLIP-FLOP

Free speech principles are encountering academic and political challenge at just the moment they seemed no longer controversial at the Supreme Court. Earlier in the century, the Court routinely upheld the prosecution of political dissent. Recently, in contrast, the Court has barred criminal prosecution of white racists who burn crosses or young Maoists who burn the American flag, at least when they are punished for their symbolism.[1] Free speech issues in recent years have commanded a rare judicial consensus, uniting Justices from Brennan to Scalia.

Just as the free speech principle has become settled at the Court, however, it has become unsettled in its intellectual foundations and in its usual grounds of political support. Early in the century, the litigants who invoked the right of free speech against government regulation consisted mostly of communists, anarchists, socialists, syndicalists, pacifists and assorted other "reds." They were convicted for such speech acts as leafleting against the draft during World War I, protesting American military intervention against nascent Bolshevik Russia, and organizing left-wing splinter groups at socialist conventions.[2]

Contrast the roster of leading First Amendment litigants in recent decades. They include a leader of the Ohio Ku Klux Klan convicted of criminal syndicalism for preaching white supremacy at a Klan rally;[3] the head of the American Nazi party, barred from leading his goose-stepping and brown-shirted supporters through the Holocaust survivor population of Skokie,

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1. *See* Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990); R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

2. *See* Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616 (1919); Whitney v. California, 274 U.S. 357 (1927).

3. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

Illinois;[4] and a young skinhead who burned a cross in the yard of an African-American family in the early hours of a St. Paul, Minnesota morning.[5]

Consider too a second contrast between First Amendment litigants earlier in the century and today. In the 1930s and 1940s, the Court struck down bans on the speech media that spread the "poorly financed causes of little people."[6] Today, in contrast, the Court has extended the free speech principle to protect the speech rights of the wealthy. For example, in *First National Bank of Boston v. Bellotti*,[7] the Court struck down a Massachusetts law requiring that corporations abstain from political speech in referendum campaigns. And in *Buckley v. Valeo*,[8] the Court struck down Congress's attempt to place ceilings on candidate expenditures in federal election campaigns, thus setting the stage for the most expensive political candidacies in our history, from California senatorial candidate Michael Huffington to independent presidential contender Ross Perot.

These shifts in the political valence of the free speech principle have led many on the left to question that principle and its premises. In the view of these free speech critics, the First Amendment is no longer a force for liberation but a tool for entrenching the status quo. In their view, the time is now something like 1937 for free speech. On the eve of the New Deal, the Court finally stopped declaring liberty of contract an obstacle to minimum wage, maximum hour, and other redistributive economic laws.[9] So too, they say, the Court should now remove freedom of speech as a constitutional obstacle to at least some kinds of legislative redistribution of speaking power.[10]

Hence the current shift among the players on the scorecard of free speech. It used to be that censorship was associated with the right and free speech libertarianism with the left. Now we hear new calls for speech regulation from the left, and increasing endorsement of free speech from the right. Take five recent examples, which come under the headings, respectively, of sex, hate, money and violence.

First, there has been a movement by some feminists to regulate pornography as sex discrimination against women, on the theory that sexually explicit magazines and videos treat women as objects subordinate to men.[11] This movement has failed to achieve any lasting legal victory, as its one successful legislative victory was thrown out in federal court as thought control.[12]

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4. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).
5. *See* R.A.V. v. City of St. Paul, 112 S. Ct. at 2541.
6. Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (striking down a ban on door-to-door distribution of circulars).
7. 435 U.S. 765 (1978).
8. 424 U.S. 1 (1976) (per curiam).
9. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
10. *See, e.g.*, Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992); Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935 (1993); Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992); Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375.
11. *See, e.g.*, Catharine A. MacKinnon, *Pornography Left and Right*, 30 HARV. C.R.-C.L. L. REV. 143 (1995); CATHARINE A. MACKINNON, ONLY WORDS (1993).
12. American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

Second, there have been various initiatives to regulate "hate speech" that conveys messages of racial or other group-based inferiority in a persecutory, degrading or insulting way.[13] In common with the anti-pornography feminists, hate speech regulators view such speech as part of a practice of subordination, and believe "more speech" to be an inadequate remedy. Advocacy of such regulation has split old liberal coalitions, and opposition to such measures has come largely from the political right. These regulations too have been struck down as abridgments of free speech.[14]

Third, consider calls, again largely from the left, for greater regulation of money in politics. The Supreme Court has, since the mid-1970's, recognized that money talks, and held such "speech" constitutionally protected—for example in *Buckley* and *Bellotti*. Advocates of greater campaign finance regulation say that such holdings give too much leeway to the distortive political influence of aggregated wealth.

Fourth, consider calls for the curtailment of television and other media violence coming not only from "family values" groups but also from the Democratic Administration.[15] Here the argument is that violent programming creates a violent people. Violent images inure people to violence and condition them to its use. This argument parallels those for the regulation of pornography and hate speech: it holds that speech must be regulated to protect the liberty, including the expressive liberty, of those exposed to it.

Fifth and finally, consider the issue of speech outside abortion clinics. The federal Freedom of Access to Clinic Entrances Act[16] as well as various local "bubble" ordinances[17] have been passed with the aim of preventing anti-abortion demonstrations from obstructing patient access or escalating into violence. The concern with terrorism in this context is a real one, as illustrated by the fatal shootings of health care workers at Florida and Massachusetts clinics.[18] But Operation Rescue and other anti-abortion groups say that laws limiting their demonstrations stray from the appropriate realm of conduct to the inappropriate realm of speech. They say they are being singled out for expressing an unpopular viewpoint, and that loose predictions that protest will turn violent should no more stop Randall Terry from peaceful protest than they once did civil rights demonstrators. Liberal advocacy groups, though, have been loathe to provide amicus support in these challenges—understandably, given the privacy interests on the other side. When the Supreme Court upheld several speech restrictions in a Florida abortion clinic injunction last July, it was the "conservative" Justice Scalia who wrote a scathing dissent in support of

13. *See* MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

14. *See, e.g.*, Corry v. Stanford University, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (striking down prohibition on group-based "harassment by personal vilification" and reviewing analogous cases).

15. *See* Michael Wines, *Reno Chastises TV Networks on Violence in Programming*, N.Y. TIMES, Oct. 21, 1993, at A1.

16. 18 U.S.C. § 248 (1994).

17. *See, e.g.*, SAN JOSE, CAL., CODE § 10.08.030 (1993); BOULDER, COLO., REV. CODE § 5.3.10 (1981 & Supp. 1987).

18. *See* Christopher B. Daly, *Gunman Kills 2, Wounds 5 in Attack on Abortion Clinics*, WASH. POST, Dec. 31, 1994, at A1.

the protesters, and the "liberal" Justice Stevens who would have gone farthest in upholding the regulatory power of the state.[19]

II. ERODING FOUNDATIONS

Crude political explanations alone cannot account for these shifts in the political valence of free speech. It is tempting to think that the free speech principle is simply a tool to be used by whatever group is at the moment out of intellectual power. On this view, if government is conservative, then the left will defend free speech as the vehicle of opposition. If government moves left, for example through hate speech prohibitions, then free speech advocacy will move right. But this view that what goes around comes around is far too simple. The current free speech critics attack the very theories and rhetoric of the free speech principle, not just the direction of its short-term deployment.[20]

Deep doubts about the intellectual foundations of the free speech principle underlie this shift. The now-conventional free speech consensus depends on three fundamental distinctions: between mind and body, public and private, and purpose and effect. The new speech regulators challenge all three of these distinctions. Let me describe each of them before offering the beginnings of a response.

The distinction between mind and body, speech and conduct, expression and action, holds that speech is privileged above conduct; government may regulate the clash of bodies but not the stirring of hearts and minds. Speech may be curtailed to prevent material harm, but only if it is real and nearly nigh. If speech offends your sensibilities, or causes you anger, resentment or alarm, the solution is not to call the sheriff but to turn the other cheek. Physical violence is a different matter. While the Court struck down St. Paul's punishment of racist symbols, it upheld Wisconsin's aggravated penalties for throwing a racist punch.[21] Current First Amendment law conceives the two cases as involving very different degrees of harm.

The new critics question this mind/body distinction. They say that "sticks and stones can break your bones *but* words can *also* hurt you." Taking this proposition to the extreme, one Planned Parenthood advertisement in the wake of the Boston clinic shootings recently proclaimed, "Words Kill."[22] But the critics' argument goes further than merely equating psychic with physical injuries. They argue that speech constructs us and conditions our actions; it makes us who we are. We are not only what we eat; we are what we read, what fashion tells us to be, what we see on television, whether it be the gospel station or MTV. Culture determines power; it is not the other way around. Pornography or hate speech or television violence do not just cause fights,

19. Madsen v. Women's Health Center, 114 S. Ct. 2516 (1994).

20. *Compare* NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE (1992) *with* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO (1994).

21. *See* Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993).

22. The full page advertisement that was taken out by Planned Parenthood of New York City in the *New York Times* on January 5, 1995 began with the headline, "WORDS KILL, Words are like bullets—they can be used to kill." *See also* Mary Ann Glendon, *When Words Cheapen Life*, N.Y. TIMES, Jan. 10, 1995, at A19.

fright or flight, but actually construct a bad society—more sexist, racist and violent than it would be if a different rhetoric prevailed. If we are socially malconstructed, they say, government should be free to reconstruct us in a better light—by regulating not only our actions but our speech.

The second distinction crucial to the modern free speech consensus is that between public and private. Censorship is narrowly understood as the restriction of speech by the government. If a private publisher rejects my novel, that is not censorship but rather editorial judgment, social responsibility, market forces, or just plain taste. Why the different treatment? The government alone has a monopoly of force. If Simon and Schuster rejects my novel, I can go to Random House. If the government bans my novel, I may have to flee to France.

As with the mind/body distinction, the new speech regulators charge that this public/private distinction greatly oversimplifies the situation. In their view, private power can be even more censorial than the awesome power of the state. If pornography silences women, hate speech silences minorities, and corporate spending drowns out other voices in political campaigns, then, they say, government should be free to silence the silencers, and the First Amendment should not stand in its way. We have long accepted that other inequalities, such as of bargaining power, may be regulated by the state. A little cultural trust-busting might now likewise be in order. In this view, government should be regarded as enhancing, not restricting, speech when it tunes down the voice of the rich in political campaigns, or shuts up campus bigots. For such regulation will lower barriers to entry and enable the voices of the once-excluded to be heard. After all, if we abandoned laissez-faire in the marketplace for goods and services back in 1937, why keep faith in the invisible hand in what Justice Holmes once called the "marketplace of ideas"? It is time, Professor Cass Sunstein has suggested, to institute a "New Deal for speech."[23]

The third key distinction in contemporary free speech law is that between a law's purpose and effect. It matters what government aims at, not what it merely happens to hit. Government must not "aim at the suppression of dangerous ideas." Viewpoint discrimination is the cardinal First Amendment sin. Content-based laws are suspect, but if a challenged law is content-neutral, then the fact that it hurts some speakers more than others does not trigger equally serious First Amendment concern. Disparate impact is not decisive; speaker exemptions from general laws are not compelled. I may not park my car in a no-parking zone just because I cover it with bumper stickers advocating various candidates or world peace. The no-parking law is not aimed at my political slogans, but rather at my car. Government's benign purpose here is enough to immunize it from serious First Amendment review.

Some free speech revisionists again find fault with this distinction. In their view, effects might matter more than purpose—the reverse of current doctrine. Some content-based laws might be desirable. And some content-neutral laws might not. It all depends on whether they bring about consequences that are conducive or harmful to the overall system of freedom of speech.[24] If

23. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 16 (1993).

24. *See, e.g.*, Schauer, *Political Incidence*, *supra* note 10; C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1995 SUP. CT. REV. 57

free speech is valuable only insofar as instrumental to some end—truth, self-government, autonomy, tolerance, or deliberative public discourse—then consequences are all that matter. The end is prior to the means. Content regulation may or may not be an evil; it depends on whether or not it impedes or enhances the relevant instrumental end. Content-neutral regulation may impede those ends too, and if it does, it should enjoy no First Amendment immunity.

III. RESURRECTING FREE SPEECH

Do these three lines of attack leave First Amendment law in a rubble? Not if we can answer them in a way that resurrects free speech. I have addressed the mind/body and the public/private distinctions elsewhere,[25] and so will abbreviate my responses here, in order to spend more time on the purpose/effect distinction.

On the mind/body point, suffice it to say that I believe the critics overstate the extent to which we are socially constructed. True, we do not spring fully formed, like Athena from the head of Zeus, into the fully informed and rational, self-determining consciousness idealized in most liberal thought. But we are not the mechanical product of culture either; we are not simply mass-produced by the invisible conveyor belts of sex in movies or violence on TV. If we were, then anti-pornography feminists could not have managed to escape false consciousness under patriarchy long enough to draft their proposed laws. Rather the structures of social construction work imperfectly; there are many cracks and fissures through which resistance and creativity seep out.

But even if we were as socially constructed as the new speech critics say, it is surely a non sequitur to say that therefore *government* should reconstruct us. Epistemology does not entail polity. To see ourselves as socially constructed does not tell us institutionally what to do. Why trust the state—the source, after all, of some of the bad old social structures—to get the new ideology right? There might be strong reasons to distrust the state to reorder our ideological preferences even if we trust it to solve other problems in our collective life.

For example, government, by definition, centralizes, standardizes, and homogenizes. Those are the very functions of law. Government thus suppresses the diversity of approaches to social interaction that might otherwise obtain. If the problem with the private order is that silencing has reduced the diversity of voices, that problem is not necessarily solvable by government edict. It might not be possible to command centrally that people "think diversely." For another example, government has a structural bias in favor of the prevailing distribution of power. There is no clear reason to trust government to produce a different mix of speech than the existing unofficial structures of power have done.[26] It is difficult to change power before culture in an unequal world; a law

(forthcoming) (arguing that content-based regulation of media corporations should be permissible if it contributes to a "robust communications environment").

25. *See* Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971 (1995); Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 U.C.L.A. L. REV. 949 (1995).

26. Fred Schauer argues that the free speech principle is loaded in favor of groups that are socially and economically dominant in the private sphere, but fails to explain why those same groups will not capture government as well, precluding successful legislative redistribution of speaking power. *See* Schauer, *Political Incidence, supra* note 10.

forbidding graphic images of sexual subordination will in practice be more likely to ensnare Robert Mapplethorpe's photographs than "Deep Throat."

On the public/private point, suffice it to say that even if we conceive speech as a market, it does not follow that we should regulate it just the same as commercial markets for goods and services. Here, let me clarify that I am distinguishing between markets in ideas and markets in products that convey ideas. Of course, many goods and services convey ideas—in the words of a former FCC chairman, a television is a "toaster with pictures on it."[27] In their purely economic attributes, these markets may be regulated like any other. For example, newspapers may be barred from owning radio stations, just as AT&T may be forced to allow local phone services to compete. Antitrust laws may constitutionally be applied to sellers of words as well as widgets.[28]

But regulating the "marketplace of ideas" for the content of its "transactions" amounts to a very different proposition. A new idea or a proposal for law reform does not trade in purely private exchanges like cars or fast food. Ideas are, if anything, a kind of public good that confers a benefit on many persons other than their immediate "consumer."[29] And ideas can likewise be a public "bad" by which the "producer" causes external harms for which he never has to pay.[30] Economic resources are scarce. Ideas are not as scarce as resources are, though there may be scarcity in the available means for their dissemination. For all these reasons, we might expect regulation of the marketplace of ideas to be a good deal trickier than the regulation of air travel, trucking, or industrial pollution. Whatever the complexity of administering microeconomic policy at the Federal Trade Commission, a Department of Cultural Trust-Busting would have no analogous policy science.

Even if the analogy between ideas and commodities were more perfect, there might be institutional reasons to mistrust government regulation of the former more than the latter. The incumbent regime is prone to exaggerate the dangers of its competitors in order to keep itself in power. The stakes of error can sometimes be, literally, quite high; hence Justice Brandeis' admonition, "Men feared witches and burnt women"[31]—a history he thought counseled in favor of liberal toleration of allegedly subversive political dissent. And attempts at regulation may backfire. Consider the "banned in Boston" phenomenon, whereby attempts at repression only serve to escalate demand. The public may have an incorrigible taste for controversy that causes censorship to have perverse effects.

Finally, the marketplace of ideas metaphor may be even more deeply flawed. When we speak our ideas, we might not, properly understood, be "selling" them to others at all. There is a difference in kind, not degree, one might argue, between wearing a t-shirt with a protest message, and selling piles

27. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 212 (1993) (citing Bernard D. Nossiter, *The FCC's Big Giveaway Show*, THE NATION, Oct. 26, 1985, at 402 (quoting Commissioner Mark Fowler)).

28. *See, e.g.*, Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994) (holding that statute requiring cable operators to carry broadcasters in order to preserve competition was subject only to the level of First Amendment scrutiny appropriate to content-neutral laws).

29. *See* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991).

30. *See* Schauer, *Uncoupling*, *supra* note 10.

31. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

of that same t-shirt, "7 for $20" in the public square.[32] Sales may facilitate speech, but speech is not the same as selling. When we speak we try to govern others, to change their preferences rather than satisfy them. If we have a political rather than an economic conception of speech, then analogies to market regulation will be misguided.

IV. DISCRIMINATION, DISTRIBUTION, AND FREE SPEECH

Finally, consider some arguments for retaining the last of the conventional distinctions: the presumption that laws aimed at speech are worse than laws limiting speech merely in effect. Current First Amendment law reflects this judgment in its distinction between content-based and content-neutral laws.[33] If Lady Godiva rides naked on horseback through Coventry market to protest local tax policy, she may be punished for public nudity but not for protesting against the tax. Laws these days quite rarely ban viewpoints so explicitly as California did when it banned red flags as a "symbol...of opposition to organized government."[34] Viewpoint discrimination is so clearly the cardinal First Amendment sin that legislatures now will take pains not to be caught at it. For example, Congress couched a more recent flag-protection act in terms of protecting the physical integrity of the flag. The Court struck down that law too, but it had to perform a small exercise in semiotics to discern that a flag is a symbol and nothing but a symbol, so that prohibiting its destruction amounts to viewpoint discrimination by another name.[35]

More frequently the Court reviews laws regulating the subject matter rather than the viewpoint of speech. These too are considered content regulation and typically struck down. For example, the Court has held that government may not limit picketing outside schools to labor issues,[36] may not exclude religion as a topic from university or high school forums,[37] and may not attach the proceeds of books that criminals might write about their crimes.[38]

In contrast, the Court has upheld, as justifiably content-neutral, laws banning destruction of draft cards, as applied to antiwar protesters;[39] regulations banning camping in Lafayette park, as applied to anti-homelessness demonstrators;[40] and, speaking of Lady Godiva, public nudity laws as applied to topless dancers at the Indianapolis Kitty Kat Lounge.[41] Government is also free to regulate the time, place and manner of speech—for example, by limiting

32. *See* One World One Family Now v. City and County of Honolulu, Civ. No. 94-00395 HMF (D. Haw. July 7, 1994), appeal pending (9th Cir.); 36 C.F.R. Part 7, 60 FR 17639 (1995) (anti-vending regulations promulgated by the National Park Service for the Washington, D.C. Mall).

33. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

34. *See* Stromberg v. California, 283 U.S. 359, 361 (1931).

35. *See* United States v. Eichman, 496 U.S. 310, 317–18 (1990).

36. *See* Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972).

37. *See* Widmar v. Vincent, 454 U.S. 263 (1981); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993).

38. *See* Simon & Schuster, Inc. v. New York State Crime Victims Board, 502 U.S. 105 (1991).

39. *See* United States v. O'Brien, 391 U.S. 367 (1968).

40. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

41. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

loudspeakers to 80 decibels or loud conversations at 3 a.m.—so long as it does not regulate what is said.

In each of these cases of content-neutral regulation, the outcome, from the perspective of the speaker, is the same as if the speaker had been subject to a content-specific law: he or she has been deprived of a speaking opportunity, and the aggregate amount of speech in the community has been decreased. But crucially, current law says that this effect is not what matters; what matters is instead the purpose of the law. If a challenged regulation aims at something other than content, then the government nearly always wins.

True, some such regulations can be disproportionately rough on speakers with unpopular things to say. For example, a law against mutilating your draft card is tough on draft-card burners; as Dean John Hart Ely once noted, there just aren't that many fellows around who use their draft cards to light campfires instead.[42]

For another example, some years ago I worked with Professor Laurence Tribe in arguing that Hare Krishna should have a First Amendment right to proselytize in the open spaces of the Minnesota State Fair, rather than be confined, as the state required, to distribute pamphlets and seek donations from inside a rented booth. We lost; the Supreme Court held in *Heffron v. ISKCON*[43] that the booth rule was a permissible regulation of the place, not the content of speech. We had argued that the booth rule discriminated *de facto* against the unpopular and unorthodox. The Court had recognized as much, back in the 1930's and 40's, when it held that those venerable First Amendment pioneers, the Jehovah's Witnesses, were permitted to proselytize door to door. The unpopular must go to the mountain, we said, for the mountain will not come to them. Minnesotans will flock to the booths of the Methodists, Presbyterians or Episcopalians, but if Hare Krishna devotees sit in their booth waiting for listener-initiated contact, they will have a long and very quiet day. Justice White, writing for the Court, dismissed our argument in a footnote, saying it "is interesting but has little force."[44]

Thus, in free speech law, as in current equal protection doctrine, disparate impact does not matter; only invidious intent—that is, manifest hostility to ideas or messages—causes serious constitutional concern. This approach contrasts with the current state of religion law. There, the Court continues to treat disproportionately advantageous effects on religion as impermissible establishment. And there, despite the Court's own effort to bring free exercise into line with equal protection,[45] the Religious Freedom Restoration Act[46] requires relief from general laws whose impact on the religious is disproportionately adverse.

Why treat speech more like equal protection than religion, and focus more on purpose than on effect? It is tempting to answer that content-based

42. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1498 (1975).

43. 452 U.S. 640 (1981).

44. *Id.* at 649 n.12.

45. *See* Employment Division, Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) (employing deferential scrutiny in finding no free exercise violation in the denial of unemployment benefits to Native Americans claiming religious obligation to ingest peyote in violation of state narcotics laws).

46. Pub. L. No. 103–141, 107 Stat. 1489, codified at 42 U.S.C. § 2000bb–4 (1994).

laws wipe out more speech than content-neutral laws, but that is not necessarily the case. A flat ban on all billboards wipes out more speech, as a quantitative matter, than a ban only on billboards critical of current elected representatives. Yet the second is far more suspect than the first. Nor will it suffice to say that time, place and manner regulations merely divert speech rather than prohibit it, permitting the same ideas to be expressed another day or another way. For, as a practical matter, most content-based laws are similarly partial: a rule that says "no criticizing our elected officials on billboards" leaves unhappy citizens free to criticize them by many other means. Indeed it is difficult to imagine a total ban on a viewpoint; what one cannot say in public one may surely say in private, and even if those conversations were overheard and forbidden, government cannot under current technology erase the very thought from the dissident's brain.

A better answer thus would seem to be that government hostility to a speaker's ideas is an illegitimate reason for a law.[47] Just as racism is a forbidden purpose for laws under equal protection, so the enforcement of ideological orthodoxy is a forbidden purpose for laws as a matter of free speech. Of course, government can pass laws that themselves take sides in an ideological debate. For example, the civil rights laws embody an anti-racist "viewpoint." But that is a different matter from saying that criticism of the civil rights laws is forbidden, or that one may not hold in private racist views.

The purpose/effect distinction is defensible on classic democratic process-perfecting grounds,[48] whatever the normative theory underlying freedom of speech. Forbidding government to ban speech for its content might promote autonomy, whereby citizens make up their own minds about their views. Or it might check the self-interest of those in power, by preventing them from skewing debates in their own favor, or tying their opponents' ideological hands behind their backs. Either way, laws that aim at content will tend to undermine the procedural prerequisites for freedom of speech. Apparently content-neutral laws may sometimes conceal bad purposes too, and when they do, those bad purposes should be smoked out. But as a rule of thumb, content-neutral laws are far less likely to have been driven by censorial purposes. The fact that a law applies generally to speakers of all viewpoints, or to speakers and non-speakers alike, creates political safeguards against censorship. When you round up a whole herd, it is difficult to say that anyone's ox in particular is being gored.

Some thoughtful critics of free speech law, in contrast, take a substantive rather than a procedural view. The First Amendment should be read, they say, not only to free speakers from government discrimination, or protect them from the sin of thought control. It is not government's guilty motives that matter, but rather the effect that government has on public debate. Bad effects should be invalidated and good effects upheld, regardless of whether government's purpose in enacting them was evil or benign. How do we tell what effects are good or bad? This requires a substantive theory. There must be some end-state which the First Amendment is supposed to advance.

To some, this end-state might be maximizing speech; to some, maximizing the diversity of what is said. For others, the criteria might be even more stringent. Professor Sunstein, for example, has argued that the First

47. *See* Stone, *supra* note 33.
48. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

Amendment should be read to promote deliberative democracy.[49] Thus, in his view, the free speech end-state "must reflect broad and deep attention to public issues"[50] and "there must be public exposure to an appropriate diversity of view."[51] In other words, not just discrimination but distribution matters: in his words, "It is important to ensure that government does not suppress dissident views. It is also important to ensure not merely that diversity is available, but also that a significant part of the citizenry is actually exposed to diverse views about public issues."[52]

It follows from such an approach that courts should relax the purpose/effect distinction in both directions. First, they should invalidate more content-neutral laws that impede some desirable mix of speech. For example, if shopping malls or cable stations are where the audience is, then their owners should have to give up some of their conventional property rights to exclude speakers, so that guaranteed access can be allowed.[53] Second, on this view courts should uphold even explicitly content-based laws if good distributive effects would follow. For example, the explicit regulation of hate speech and pornography, some critics suggest, would in effect tax racist and sexist speech and transfer speaking power to the previously silenced or excluded, increasing both the quantity and diversity of speech over the long run. To take an analogy from competition policy, they would jettison per se rules for a running rule of reason, in which courts would assess case-by-case whether a law on balance would have more pro-competitive or anti-competitive effects.

I find myself quite wary of these approaches to free speech. For one thing I am skeptical of the definition of the end-state: how can one tell that one has maximized the quantity or diversity of speech? Even Sunstein concedes, "What counts as appropriate diversity is of course controversial."[54] There is no equivalent in this view to the competitive equilibrium that guides the antitrust judge in seeking to promote allocative efficiency. And when Professors Sunstein and Fiss talk of appropriately deliberative public discourse, they adopt a partisan and controversial substantive conception of speech. On this view, there must be articulate discussion of worthy issues, not a gong show of candidates trying in sound bites to outdo one another in ad hominem attacks. Moreover, for them the worth of speech resides in its political content; Robert Mapplethorpe's photographs become, for Fiss—who would protect them—not ambiguously suggestive art works or formal studies but rather two-dimensional political poster art—propaganda for gay rights.[55] Autonomy is a subordinate value here; the discourse people choose to have may be insufficiently deliberative and when it is, government should re-engineer it to be better. This view thus turns critically on filling in the content of the highly ambiguous term "deliberative."

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49. *See* SUNSTEIN, *supra* note 23.
50. *Id.* at 20.
51. *Id.* at 21.
52. *Id.* at 22.
53. *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).
54. *See* SUNSTEIN, *supra* note 23, at 21.
55. *See* Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2091 (1991).

In addition to these concerns with the substantive conception of speech in proposals of the free speech critics, I have doubts about the institutional wisdom of trading in a bright-line rule for ad hoc balancing of speech-affecting regulations across the board. I cannot revisit here in detail this venerable debate.[56] In a nutshell, though, rules have the jurisprudential virtue of limiting discretion, and there is good reason in our free speech history to suspect that discretion (both legislative and judicial) will most frequently be exercised with a bias toward the governing status quo.

Finally, the potential reach of the new regulators' model is quite breathtaking. There is no political anti-establishment clause, so that virtually everything government does might be seen as the embodiment of some contestable point of view. On the other hand, virtually any behavior might in some contexts be expressive, from dirty dancing to assassination to driving in fast, red, convertible cars. Moreover, government shapes discourse through subsidy and education as well as prohibition, as well as through a variety of structural rules.[57] Effects analysis taking account of all these factors would be unruly or unmanageable without our limiting conventions distinguishing between speech and conduct, public and private, and purpose and effect.

Does this mean that I would banish distributive concerns from First Amendment analysis altogether? Most definitely not. The Supreme Court itself has never gone so far. It has sometimes held distribution more important than discrimination in identifying fatal First Amendment flaws. For example, in striking down even flat bans on whole mediums of expression, the Court has said that government may not ban too much speech. From leafleting and door-to-door solicitation in the 1930's and 40's to hand-lettered signs in one's own window last Term, the Court has held that cheap and convenient modes of communication may not be eliminated wholesale.[58] Rather we all must contribute to their subsidy, whether directly through the costs we pay as taxpayers to clean up the litter they cause, or indirectly as bystanders by our having to bear the negative externality of some extra visual blight. But it is a big leap from such guarantees of minimal access to the new critics' maximizing views.

Moreover, while I object to cultural trust-busting—that is, laws that seek to reduce the power of speakers by reference to content— government clearly retains the power to apply ordinary antitrust laws and their equivalents to those whose products happen to be speech. For example, I recently worked with counsel to broadcasters seeking to uphold the provisions of the Cable Act that required cable operators to carry their signals, over the cable industry's objection that such provisions violated its First Amendment rights.[59] Crucial to our argument was the premise that Congress had aimed at the economic structure of the industry, and not what anyone within it had to say. The must-carry provisions reflected no judgment that Tom Brokaw spun the news in a more favorable direction than Bernard Shaw. They reflected simply the judgment that cable had a chokehold on the broadcast market. The remedy,

56. *See* Kathleen M. Sullivan, *The Supreme Court: 1991 Term – Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).
57. *See* Baker, *supra* note 24.
58. *See* City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994).
59. *See* Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994).

consistent with free speech proceduralism, was diversity of competitors, not enforced diversity of substantive views.

Finally, liberty itself has a redistributive aspect, at least when observed in practice rather than considered in the abstract. Justice Jackson once suggested that equality serves as a backstop to liberty: "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."[60] But liberty can also be a backstop to equality. Liberties of speech, after all, need only be asserted by the dissident or unpopular minorities whom the majority would suppress. And sometimes it may be easier to end subordination by appealing to abstract rights with which the powerful can identify, rather than by emphasizing what is special and victimized about one's group. Thus, for this and all the other reasons sketched above, I think progressives jettison First Amendment conventions at their peril.

60. Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).