

1-1-1987

# The "Political Propaganda" Label Under FARA: Abridgement of Free Speech or Legitimate Regulation?

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## Recommended Citation

Farrokh Jhabvala, *The "Political Propaganda" Label Under FARA: Abridgement of Free Speech or Legitimate Regulation?*, 41 U. Miami L. Rev. 591 (1987)

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# CASENOTES

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### I. INTRODUCTION

In 1938, Congress enacted the Foreign Agents Registration Act (FARA). The Act required all persons employed by foreign principals for the purpose of disseminating propaganda in the United States to register with the Secretary of State.<sup>1</sup> Concern within the country had been mounting over the activities of foreign propagandists, particularly Nazi, fascist, and communist, and the Act sought to unmask these agents and provide for official and public surveillance of their activities.<sup>2</sup>

Some four years later, after the United States had entered World War II, Congress amended and significantly extended the 1938 Act.<sup>3</sup>

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1. Foreign Agents Registration Act, ch. 327, 52 Stat. 631 (1938) (codified as amended at 22 U.S.C. §§ 611-21 (1982)). Section 611 defines “foreign principal” as the government or political party of a foreign country, a person domiciled abroad, or any foreign business, partnership, association, corporation, or political organization.

2. The House of Representatives’ report accompanying the original bill was on the “Investigation of Nazi and Other Propaganda.” H.R. REP. No. 153, 74th Cong., 1st Sess. 23 (1935). Some of the propaganda activities were disguised under otherwise legitimate business activities. See, e.g., *Viereck v. United States*, 318 U.S. 236 (1943) (registered author and journalist disseminated German war propaganda in the United States). For the legislative history and purpose of FARA, see *Attorney General of the United States v. Irish People, Inc.*, 684 F.2d 928, 937-43 (D.C. Cir. 1982).

3. Foreign Agents Registration Act, ch. 263, 56 Stat. 248 (1942) (codified as amended at 22 U.S.C. §§ 611-21 (1982)). All functions of the Secretary of State under the Act were

The amendment expressly declared the policy and purpose of the Act to be the protection of "the national defense, internal security, and foreign relations of the United States." It sought to force agents disseminating foreign propaganda into the open, "so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities."<sup>4</sup>

The revised Act contained an elaborate definition of the term "political propaganda," which has since remained unchanged.<sup>5</sup> The revised Act also empowered the Attorney General to label foreign communicative materials, including films, as "political propaganda."<sup>6</sup> Once the Attorney General makes such a determination, the material at issue must carry a label which identifies it as political propaganda.<sup>7</sup> The Act further empowers the Attorney General to make "such rules, regulations, and forms as he may deem necessary to carry out the provisions of this [Act]."<sup>8</sup> One such regulation requires the foreign agent to disclose the names of any station, organization, or theater showing films labeled as "political propaganda," the dates of their

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transferred to the Attorney General. Exec. Order No. 9176, 7 Fed. Reg. 4127 (1942), reprinted in 22 U.S.C. § 601, at 158 (1982).

4. FARA, 22 U.S.C. § 611, at 161 (1982).

5. "Political propaganda" is:

[A]ny oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence.

22 U.S.C. § 611(j).

6. "The Attorney General, having due regard for the national security and the public interest, may by regulation prescribe . . . the manner and form in which such statement shall be made and require the inclusion of . . . information . . . identifying such agent . . . and such political propaganda and its sources." *Id.* § 614(b).

7. In addition, the label must state that the person transmitting the political propaganda is registered with the Department of Justice as an agent of a foreign principal, that the registration statement is available for inspection along with copies of the propaganda at the Department of Justice, and that registration of the agent does not indicate that the United States government has approved the materials. *Id.*

8. *Id.* § 620.

showing, and the estimated attendance.<sup>9</sup>

In the fall of 1982, the Justice Department selected five Canadian films for review, and determined that three of them constituted political propaganda.<sup>10</sup> The first two films, *Acid From Heaven* and *Acid Rain: Requiem or Recovery*, deal with the phenomenon of acid deposition, while the third, *If You Love This Planet*, deals with the medical effects of nuclear war.<sup>11</sup> The Justice Department informed the National Film Board of Canada, the foreign agent that distributed the films in the United States, that the films would have to carry labels identifying them as "political propaganda."<sup>12</sup> Two separate federal lawsuits filed in March 1983, one in California and the other in the District of Columbia, challenged the constitutionality of the labeling and reporting requirements of FARA as applied to the three Canadian films.

#### A. *Keene v. Meese*

Barry Keene, majority leader of the California state senate and member of the California Bar, wished to exhibit the three films as a means of communicating his own ideas on the subjects concerned.<sup>13</sup> Alleging that the "political propaganda" label deterred him from showing the films and that the labeling constituted an abridgement of his first amendment right to freedom of speech, Keene brought suit to enjoin the Attorney General of the United States and the Chief of the Registration Unit in the Internal Security Section of the Criminal Division of the Justice Department from applying the label to the films. To show the films while they carried such a label, he claimed, would adversely affect his personal, political, and professional reputation, and would injure his legal practice and his ability to be reelected.<sup>14</sup>

On September 7, 1983, the United States District Court for the

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9. Brief for Appellants at 4, *Block v. Meese*, 793 F.2d 1303 (D.C. Cir.) (No. 84-5318), *cert. denied*, 106 S. Ct. 3335 (1986).

10. *Id.* at 7.

11. *Keene v. Smith*, 569 F. Supp. 1513, 1515 (E.D. Cal. 1983); Brief for Appellee at 5, *Meese v. Keene*, 106 S. Ct. 1632 (1986) (No. 85-1180). The term "acid deposition" encompasses the various ways in which sulphur and nitrogen oxides in the atmosphere descend to earth in the form of sulphur and nitrogen acids. These modes include rain, snow, sleet, and even solid deposition.

12. *Keene*, 569 F. Supp. at 1516.

13. *Id.* at 1517.

14. *Id.* at 1515. Keene claimed injury from adverse publicity which would harm his political career. A special survey, which a leading pollster designed and the Gallup Organization administered, showed that the public had an "overwhelmingly negative" reaction to a politician who showed foreign films that the Justice Department had classified as "political propaganda." Brief for Appellee at 30, *Meese v. Keene*, 106 S. Ct. 1632 (1986) (No. 85-1180).

Eastern District of California granted Keene's motion for a preliminary injunction,<sup>15</sup> and on September 12, 1985, it granted summary judgment on his request for a permanent injunction against the application of FARA to the three films.<sup>16</sup> Writing for the court, Judge Ramirez rejected the government's argument that the Act's definition of the term "political propaganda" was neutral and without any pejorative or denigrating connotation, and accepted the unchallenged expert testimony Keene presented to establish the meaning of the term.<sup>17</sup> As a factual matter, Judge Ramirez had little difficulty in finding that the phrase "political propaganda," as officials of the Justice Department applied it, abridged speech.<sup>18</sup>

From FARA's legislative history, the trial court found that Congress intended to denigrate the labeled materials by using the term "political propaganda," and that this term was not only "semantically slanted" but that it had already acquired its "unsavory connotation" when Congress enacted FARA.<sup>19</sup> Further, the court also concluded that Congress had enacted the portions of the Act at issue "in order to suppress or restrict that which it found abhorrent."<sup>20</sup> According to the California district court, Congress understood and intended the label "political propaganda" as a term of opprobrium by which it intended to discourage or suppress speech.<sup>21</sup>

Stating that an abridgement within the meaning of the first amendment occurs whenever there is a suppression of speech or a substantial interference therewith, the court held that the stigmatization of the three films at issue rendered them unavailable to Keene as vehicles for communicating his own views on the matter and thereby abridged his first amendment right to freedom of speech.<sup>22</sup> The district court declared sections 611(j) and 614(a), (b) and (c) of FARA unconstitutional and severable from the remainder of the Act, and enjoined the Attorney General from imposing the requirements of these sections on the three films.<sup>23</sup> The government took the case on

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Keene also claimed that as a lawyer he would risk violating professional codes of conduct if he were to show films that were viewed as containing false or misleading claims. *Id.* at 25 n.27.

15. 569 F. Supp. at 1523.

16. *Id.* at 1523; *Keene v. Meese*, 619 F. Supp. 1111, 1128 (E.D. Cal. 1985) (on motion to alter judgment), *prob. juris. noted*, 106 S. Ct. 1632 (1986).

17. *Keene*, 619 F. Supp. at 1124-25. For a description of the expert testimony, see *infra* note 156.

18. *Id.* at 1124.

19. *Id.* at 1121, 1125.

20. *Id.* at 1124.

21. *Id.*

22. *Id.* at 1123-24.

23. *Id.* at 1128.

direct appeal to the Supreme Court of the United States, which noted probable jurisdiction.<sup>24</sup>

Surprisingly, the government has interpreted FARA and the relevant Justice Department regulations as applying solely to the registrant, the foreign agent.<sup>25</sup> It therefore has no objection to Keene removing the labels from the films before showing them.<sup>26</sup> Thus, Keene's objection is not that he must show the films with the labels in place. His true objection is that the government's classification of the films as "political propaganda" emanating from a foreign source is in itself an abridgement of his first amendment rights, and that the labeling is a species of censorship.<sup>27</sup> Thus, the major constitutional issue in the case is whether the government, when it labels communicative materials produced abroad as "political propaganda" under FARA, abridges the first amendment right of freedom of speech of a person who wishes to use the materials as expressions of his personal views.<sup>28</sup>

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24. *Meese v. Keene*, 106 S. Ct. 1632 (1986). The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1252 (1982), which allows direct appeals from decisions invalidating acts of Congress.

25. *Keene v. Smith*, 569 F. Supp. 1513, 1516 (E.D. Cal. 1983).

26. *Id.* In addition, the label attached to the films did not include the phrase "political propaganda" as such. Brief for Appellants at 4, *Meese v. Keene*, 106 S. Ct. 1632 (1986) (No. 85-1180). The government's position is baffling because it defeats the purpose of informing the public of the films' foreign origin. Brief for Appellee at 11 & n.6, *Meese v. Keene*, 106 S. Ct. 1632 (1986) (No. 85-1180). Through press releases and letters to newspapers, however, the government "widely informed the public that the films had been officially designated as foreign political propaganda." Brief for Appellants at 6, *Block v. Meese*, 793 F.2d 1303 (D.C. Cir.) (No. 84-5318), *cert. denied*, 106 S. Ct. 3335 (1986).

27. *Keene*, 619 F. Supp. at 1118.

28. There is, of course, the question of the plaintiff's standing. Recent Court opinions on the subject have required a plaintiff to allege "a present or immediate injury in fact" so as to assure that concrete adverseness which sharpens the presentation of the issues; a causal connection between the asserted injury and the challenged action; and redressability, that is that the injury is of a type "likely to be redressed by a favorable decision" of the court. *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965, 2971 (1985). Further, for the purpose of ruling on a motion to dismiss for lack of standing, the trial court must accept as true all material allegations in the complaint. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). In *Keene*, the government failed to counter, by affidavit or otherwise, Keene's declarations on standing. Instead, the government argued that the plaintiff's declarations were insufficient to confer standing. 619 F. Supp. at 1117.

While Keene claimed that the government's labeling was "a species of censorship," the government chose instead to treat his claim as one of a "chilling effect," relying upon *Laird v. Tatum*, 408 U.S. 1 (1972) (Reluctance to engage in first amendment activities because of a fear of future governmental sanction is insufficient to confer standing because there is no "injury in fact."). The district court found that FARA's labeling of the films constituted a "present governmental interference with or suppression of expression." 619 F. Supp. at 1118; 569 F. Supp. at 1518. The trial court also found that Keene's injury stemmed directly from the government's action under FARA because it was the Act's "opprobrious characterization of plaintiff's chosen medium of expression" that placed the handicap upon him as a participant in the "marketplace of ideas." *Id.* at 1518. Finally, the court rejected the government's contention that the injunction Keene sought would not redress the injury because his

### B. *Block v. Meese*

The second case that the labeling of the three films spawned was initiated by several plaintiffs: Mr. Mitchell Block, president of a company that was the sole distributor in the United States of the film *If You Love This Planet*, and several potential exhibitors of the films, including the State of New York, the New York Library Association, a cinema house, and two environmental organizations. The plaintiffs claimed they had suffered actual economic injury in the form of lost profits on the sale and distribution of the films, that they were likely to suffer injury to their reputations because their names would be reported to the Justice Department as users of foreign "political propaganda," and that the Act burdened their first amendment right to communicate with their constituencies and to disseminate their ideas.<sup>29</sup>

In stark contrast with the *Keene* court, the trial court dismissed the complaint for lack of standing—"failure to state a case or controversy under the United States Constitution."<sup>30</sup> It held that the plaintiffs had not alleged any "injury in fact" because the reporting of their names to the Justice Department did not per se cause any injury, and any stigma that attached was "highly speculative."<sup>31</sup> The court also found that the label "political propaganda" was neutral and did not denigrate the material so labeled.<sup>32</sup> Finally, the court found that to establish causality it would have to assume that the public would

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constituents and audiences may nonetheless react negatively to the films. Characterizing this argument as "irrelevant and quite possibly disingenuous," the court distinguished between the plaintiff's willingness to risk disapproval based on the merits of the films and that based on the government's label of "political propaganda." *Id.* at 1518-19.

On appeal to the Supreme Court, the government has adhered to its argument that whatever "chilling effect" may arise from FARA, it is not sufficient to confer standing. Brief for Appellants at 12-14, *Meese v. Keene*, 106 S. Ct. 1632 (1986) (No. 85-1180). The government has also argued on appeal that causality in the case is too "indirect and convoluted . . . [a] chain of events" to meet the standing requirement because it requires that the public find out about the government's labeling, that they attach a pejorative connotation to the term "political propaganda" when that term does not appear on the label attached to the films, and that they finally transfer the negative value judgment to the plaintiff. *Id.* at 15-16. It is possible that the Court may find that *Keene's* alleged injuries are conjectural or that the causality is too attenuated to support standing, and thereby avoid the constitutional issue. *But see Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59 (1978) (holding allegations of environmental and aesthetic consequences stemming from operation of a nuclear power plant sufficient to confer standing).

29. Brief for Appellants at 22-30, *Block v. Meese*, 793 F.2d 1303 (D.C. Cir.) (No. 84-5318), *cert. denied*, 106 S. Ct. 3335 (1986).

30. *Block v. Smith*, 583 F. Supp. 1288, 1298 (D.D.C. 1984), *aff'd on other grounds sub nom. Block v. Meese*, 793 F.2d 1303 (D.C. Cir.), *cert. denied*, 106 S. Ct. 3335 (1986).

31. *Id.* at 1295.

32. *Id.* at 1297-98.

react negatively to the films despite the neutral definition of "political propaganda" in FARA, that this negative reaction would lead the audiences to discount the films' messages, and that the public would lose respect for the plaintiffs because they showed films which the government had labeled as "political propaganda."<sup>33</sup> The court was not willing to accept such a chain of assumptions.

The United States Court of Appeals for the District of Columbia Circuit reversed the trial court's decision on standing, but remanded to the trial court to enter judgment for the government.<sup>34</sup> Judge Scalia (now an Associate Justice on the Supreme Court) wrote the opinion for the three-judge panel which included Judges Bork and Wright. In the circuit court's view, the factual allegations of economic harm and injury to reputation from the reporting requirements of FARA were sufficient to confer standing upon the plaintiffs.<sup>35</sup> In addition, the court found that the necessary causality was established, rejecting the government's view that any causal connection between the labeling under FARA and the alleged injury in fact was only due to irrational interpretations of the label by the public for which the government was not responsible. The public's irrational interpretation of the label was immaterial so long as that reaction produced the injury in fact.<sup>36</sup>

Proceeding to the merits of the plaintiffs' claims, the court of appeals found, first, that there was no outright prohibition on the films under FARA.<sup>37</sup> It next determined that the term "political propaganda," as defined by the Act, was in accordance with the dictionary meaning and did not, as the plaintiffs alleged, identify the films as containing "mis-statements, half-truths and attempts to mislead."<sup>38</sup> Judge Scalia further argued that even if the label constituted an expression of governmental disapproval, it was a valid foray by the government into the marketplace of ideas and did not amount to an infringement of the first amendment right to freedom of speech.<sup>39</sup> Finally, the court held that any invasion of associational or privacy rights that may have attended the reporting requirement was only incidental and too insubstantial to rise to the level of a constitutional infringement.<sup>40</sup> The Supreme Court denied plaintiffs' petition for

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33. *Id.* at 1295.

34. *Block v. Meese*, 793 F.2d 1303, 1318 (D.C. Cir.), *cert. denied*, 106 S. Ct. 3335 (1986).

35. *Id.* at 1307-09.

36. *Id.* at 1309.

37. *Id.* at 1310-11.

38. *Id.* at 1311-12.

39. *Id.* at 1312-15.

40. *Id.* at 1315-18.



certiorari.<sup>41</sup>

Judge Scalia's opinion in *Block* is thus in direct contradiction with that of Judge Ramirez in *Keene* on the first amendment claims arising from the application of FARA to the three Canadian films. Barring a dismissal on standing, the Supreme Court—with Justice Scalia as a member—will have to resolve these differing interpretations of the first amendment right to freedom of speech.

## II. POLITICAL SPEECH: ITS PLACE AND MEANING

Congress shall make no law . . .  
abridging the freedom of speech . . . .

*First Amendment to the  
United States Constitution*

The construction of those seemingly simple and obvious words has been one of the most controversial areas of American constitutional law. Scholars and legal philosophers are deeply divided as to the proper interpretation of the first amendment, and over the years the Supreme Court itself has failed to develop a comprehensive and coherent first amendment theory.<sup>42</sup> This may appear to be a remarkable situation at first glance, because there appears to be widespread agreement that the first amendment is among the most important and central provisions of the Constitution.<sup>43</sup> It must be recognized, however, that the first amendment's freedom of speech clause covers an enormous and ever-expanding ground, that it covers a very high proportion of the outward manifestations through which individuals seek to promote their beliefs and interests in a society that is law-abiding, and that a significant amount of speech is "political speech."<sup>44</sup>

41. 106 S. Ct. 3335 (1986).

42. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 717 (1970).

43. For examples of the elevated language used to characterize the importance of the first amendment, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 576 (1978) (the Constitution's "most majestic guarantee"); Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 881 (1960) (The first amendment "is truly the heart of the Bill of Rights."); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) (The first amendment occupies "a central place in our society."); Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 1 (1980) ("freedom of conscience and expression enjoys primacy in our scale of rights").

44. For the purposes of this Note, the term "political speech" will be used to encompass all of "those activities of thought and communication by which we 'govern.'" See Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255. The first amendment also applies to other categories of speech, such as commercial speech, libel, obscenity, and pornography, albeit applying different standards of protection to them. Because only "political speech" is involved in the cases discussed here, no further reference will be made to other categories of speech. In addition, speech or expression may be part of a broader course of action. See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968) (statute punishing destruction of draft card upheld as justifiable and incidental limitation on the first

Generally, the central role of the first amendment is assumed to derive from at least four distinct interests: first, the role of freedom of expression in promoting individual self-fulfillment; second, its part in advancing knowledge and uncovering truth; third, its function in enabling participation in social decision making by all members of the society; and fourth, its role in providing a safety valve for dissent and for organizing the necessary consensus in society.<sup>45</sup> These interests are interdependent; not independent and distinct. Thus, self-government and political participation arguably contribute toward both self-fulfillment and personal growth.<sup>46</sup> Furthermore, the best, albeit imperfect, way that has yet been devised for the protection of the individual and his rights in large modern societies is that of governmental accountability to the members of the society. And no better method than a periodic referendum on the government has yet been divined to exact that accountability.<sup>47</sup> A free and fair vote is thus essential to a society which aspires to protect the interests mentioned above.

The ability of individuals to act intelligently, both in participat-

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amendment); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (first amendment protects peaceful picketing on matters of public concern); L. TRIBE, *supra* note 43, at 598-600 (“[e]xpression and conduct, message and medium, are . . . inextricably tied together in all communicative behavior”). *But see* Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 521, 539 (1979) (Freedom of expression is to be understood “primarily” in terms of the interests it seeks to protect and only secondarily in terms of the actions whose protection is necessary to safeguard those interests.).

45. T. EMERSON, *supra* note 42, at 6-7. This model has been called the “marketplace of ideas” model. For a discussion of this and other models, see Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978). For a different view of the interests that the right to freedom of speech protects, see Scanlon, *supra* note 44. Professor Scanlon divided the area into three categories: participant interests (the interest of being able to call something to the attention of a wide audience); audience interests (to have expression available in case one wishes to be exposed to it); and bystander interests (the restriction of expression insofar as it has an impact on those who are bystanders, that is, neither participants nor audiences).

In *Masses Publishing Co. v. Patten*, Judge Learned Hand enjoined the New York postmaster from refusing to accept in the mails a magazine that ridiculed the draft law and the United States effort in World War I. 244 F. 535 (S.D. N.Y. 1917). Holding that the provisions of the Espionage Act of June 15, 1917, did not give authority to the postmaster to refuse the mail in question, Judge Learned Hand argued that “the tolerance of all methods of political agitation . . . is a safeguard of free government” in “normal times.” *Id.* at 540.

46. L. TRIBE, *supra* note 43, at 578. Professor Emerson describes these values as “an integrated set.” Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 423 (1980).

47. A cursory glance at the condition of humanity around the world will indicate a correlation between the lack of meaningful accountability and governmental oppression. *See, e.g.,* AMNESTY INTERNATIONAL, ANNUAL REPORT, 1985 (1986); DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1985 (1986); *see also* Cox, *supra* note 43, at 3 (“Only by freedom of speech, of the press, and of association can people build and assert political power, including the power to change the men who govern them.”).

ing in social decision making and in holding their government accountable, is a function of their understanding of events and social situations and processes. Openness in government and free public discussion of issues give vitality to the vote. Public dialogue is, therefore, a fundamental premise of "political speech" as it is of free speech in general.<sup>48</sup> In the words of Justice Brennan, "speech concerning public affairs is more than self-expression; it is the essence of self-government."<sup>49</sup>

For all its attractive features, the above model does not avoid conflicts between the government's role in society and its relationship to individual interests and fulfillment. In our polity, such conflicts are largely resolved by reference to the Bill of Rights, and to the first amendment in particular when the individual interest at issue is free speech. *Keene* illustrates the conflict between the individual's interest in free speech and the government's role in society. On the one hand, the films represent Keene's personal views on acid rain and nuclear war, and ought to be protected by the right to freedom of speech. Furthermore, they fall into the subset, "political speech," because they concern "activities of thought and communication by which we

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48. Broadly, freedom of speech has a special value only in the context of a dialogue. See *L. TRIBE*, *supra* note 43, at 605; Scanlon, *supra* note 44, at 521. In *Cohen v. California*, Justice Harlan, writing for the Court, expressed his understanding of the first amendment thus:

It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

403 U.S. 15, 24 (1971). In a similar vein, Justice Brandeis, concurring in *Whitney v. California*, stated:

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

274 U.S. 357, 377 (1927). On the role of a free press in maintaining a free and open political system, see Brennan, *Address*, 32 *RUTGERS L. REV.* 173, 175 (1979) ("Broadly defined freedom of the press assures the maintenance of our political system and an open society.").

49. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); see also *New York Times Co. v. United States*, 403 U.S. 713, 714-20 (1971) (Black, J., concurring) ("[T]he press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints" because the free press serves an essential role in our democracy and "serves the governed, not the governors.").

'govern,'<sup>50</sup> and therefore also merit first amendment protection on this additional ground. On the other hand, Congress designed FARA to protect the defense, security and foreign relations interests of the United States, interests which represent some of the most vital and legitimate functions of government.<sup>51</sup>

The films at issue in *Keene* and *Block* clearly fall within the specially protected category of "political speech" because they deal with acid deposition and the consequences of nuclear war, two contemporary political issues of unparalleled importance. The issue of nuclear war and its consequences for individuals and society is not only one of survival in the long run, but is also a political issue of current and ongoing concern because of its impact upon the economy, the danger of accidents, and other serious problems. Acid rain also has long-term survival aspects because of its impact upon ecosystems and bio-support systems such as croplands, grasslands, and fisheries.<sup>52</sup> Moreover, acid deposition is also of immediate concern because of the economic impact it has on major industries.<sup>53</sup> Without any doubt, these issues are of great concern to the American people, and as there are no panaceas in these areas they are most likely to continue to be so for a long time. The United States government has adopted strong positions on both issues, domestically and internationally.<sup>54</sup> Finally, the government has labeled the films as *political* propaganda. Hence, there is no doubt that the case falls within the "political speech" rubric. An initial question to resolve, therefore, is what the first amendment says about "political speech." Interpretations of the first

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50. See *supra* note 44.

51. See *supra* notes 1-3 and accompanying text.

52. See generally L. BROWN, W. CHANDLER, C. FLAVIN, C. POLLOCK, S. POSTEL, L. STARKE & E. WOLF, *STATE OF THE WORLD 1985* (1985) (harmful effects of acid deposition on forests, fisheries, croplands, and grasslands).

53. The Canadian government has published the following information on acid rain in Canada: 1) more than four-fifths of Canadians live in areas of high acid deposition; 2) the fishery, tourism and forestry resources at risk due to acid rain provide about eight percent of Canada's gross national product; 3) about 90,000 jobs are at risk in eastern Canada; and 4) about half of Canada's productive forests (which produced \$14 billion worth of forest products in 1982) are in areas receiving high levels of acid rain. D. LEWIS & W. DAVIS, *JOINT REPORT OF THE SPECIAL ENVOYS ON ACID RAIN* 23 (1986). While the United States government has maintained that much is yet unknown about acid rain, it has acknowledged that "[a]cid rain is a serious environmental problem in both the United States and Canada," and that "[a]cid rain is a serious transboundary problem" which is causing both a diplomatic and an environmental problem. *Id.* at 6.

54. After some foot-dragging, the Reagan Administration agreed on March 17, 1985, that acid rain was a serious concern affecting U.S.-Canadian relations. *Id.* at 1. The same day President Reagan appointed Mr. Drew Lewis as the United States Special Envoy on Acid Rain. *Id.* at 5. On March 19, 1986, President Reagan and Prime Minister Mulroney endorsed the Lewis-Davis report. *Reagan, With Canadian, Backs Two-Nation Report on Acid Rain*, N.Y. Times, Mar. 20, 1986, at A1, col. 4.

amendment may be grouped into three schools of thought: the "absolutist," the "communitarian," and the "balancing" schools.

### A. *The Absolutist School*

Of all the writers on the first amendment, the absolutists give the greatest protection to "political speech," regarding it as absolutely protected from any governmental restriction. The absolutists interpret the first amendment literally to mean that Congress shall make *no law* abridging the right to freedom of speech.<sup>55</sup> They differ among themselves as to what constitutes "speech," with some—the "limited absolutists"—restricting the term to "political speech" and others—the "absolute absolutists" by analogy—expanding the term to all "speech."<sup>56</sup> Both groups are unanimous, however, in according absolute protection to "political speech."

The absolutists base their position on the text of the first amendment, its history, and on an uncompromising adherence to the "marketplace of ideas" model of free speech in society. They draw attention to the unqualified language of the first amendment and argue that the framers, being intelligent people, knew the meaning of the words they used, and meant what they said.<sup>57</sup> That such a limita-

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55. Thus, absolutists lay great stress on the fact that the first amendment contains no qualification whatsoever. See G. ANASTAPLO, *THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT* 35 (1971); W. DOUGLAS, *A LIVING BILL OF RIGHTS* 25 (1961); Black, *supra* note 43, at 874. Although there are no absolutists on the Supreme Court at present, the foremost absolutists on the Court were Justices Black and Douglas. For expositions of their views, see *New York Times Co. v. United States*, 403 U.S. 713, 715, 720 (1971) (Black & Douglas, JJ., concurring); *Garrison v. Louisiana*, 379 U.S. 64, 80 (1964) (Douglas, J., concurring). Justice Black wrote, "I read 'no law . . . abridging' to mean *no law abridging*." *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring).

56. The best known "limited" absolutist is Professor Alexander Meiklejohn. See A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Meiklejohn, *supra* note 44.

57. *New York Times Co. v. United States*, 403 U.S. at 716-17, 719 (Black, J., concurring); *Smith v. California*, 361 U.S. at 157-58 n.2 (Black, J., concurring); Black, *supra* note 43, at 874-75. Absolutists remind us that the framers of the Constitution set up a government of limited and delegated powers, and that Alexander Hamilton best expressed the popular view at the time: There was no need for a Bill of Rights in the Constitution because the people had retained all their rights. *THE FEDERALIST* No. 84, at 513 (A. Hamilton) (C. Rossiter ed. 1961). See also 3 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 713-16 (1970) (1833) (Among responses given for the lack of a Bill of Rights was that a formal Bill of Rights "was wholly unnecessary, and might even be dangerous."). James Madison expressed similar views in Congress. 1 *ANNALS OF CONG.* 436-37 (J. Gales ed. 1834). The views Mr. Benson expressed in reporting the proposed amendments to the House encapsulated the notion prevailing at least among the proponents of the Bill of Rights. The first amendment rights, he said, "belonged to the people; the [committee] conceived them to be inherent; and all that they meant to provide against was their being infringed by the Government." *Id.* at 733. At one point, Madison stated that the liberty of the press "was expressly declared to be beyond

tion on government may appear to be rather inconvenient from some points of view, or that the passions of the moment may lead the majority and its legislative representatives to want to stifle certain opinions or voices of dissent, is entirely beside the point for the absolutists.<sup>58</sup> The Constitution is above such considerations and is not so malleable.

Justice Black has pointed out that there are several amendments that are both categorically phrased and categorically construed: The seventh amendment categorically preserves the right of trial by jury in certain cases; the sixth amendment mandates a speedy and public trial in criminal cases; and the third amendment provides that no soldier shall be quartered in any house in times of peace without the consent of the owner.<sup>59</sup> Clearly, if these provisions are not mere admonitions to Congress but are prohibitions on the government, then why should the first amendment, which is also categorically worded, be construed differently?<sup>60</sup> At heart, the absolutist position stems from a distrust of government and the view that fundamental rights cannot be secured unless they are regarded as absolutes. To accept anything less is to place these rights at the whim and caprice of Congress and its ephemeral majorities, that is, on the slippery slopes of progressive abrogation of the rights.<sup>61</sup> In addition, the fact that the Constitution is written, reigns supreme over the legislature, sets up a separation of powers and internal checks and balances, and creates an independent judiciary, all reflect the underlying purpose of establishing a new kind of limited government.<sup>62</sup> The ninth and tenth amend-

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the reach" of the government. *Id.* at 738. The freedom of speech could have no inferior a status.

These statements may be tempered by the observation of Professor Levy that the framers of the Constitution and the Bill of Rights were not particularly concerned with the protection of those aspects of free speech which are of major concern today. L. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION* 221-38 (1963). Doubts have also been cast upon the accuracy of the *Annals of Congress*, as well as exactly when Madison actually jotted down his recollections of the framing of the Bill of Rights. *But see* Brant, *The Madison Heritage*, 35 N.Y.U. L. REV. 882 (1960) (authenticity of *Annals of Congress* borne out by Madison's notes made during a brief illness soon after the first Congress met).

58. G. ANASTAPLO, *supra* note 55, at 39.

59. Black, *supra* note 43, at 871-73. Professor Anastaplo points out that there are categorical provisions within the body of the Constitution itself: "No Bill of Attainder or ex post facto Law shall be passed" (art. I, § 9, cl. 3); "No Tax or Duty shall be laid on Articles exported from any State" (art. I, § 9, cl. 5); "No Title of Nobility shall be granted by the United States . . ." (art. I, § 9, cl. 8). G. ANASTAPLO, *supra* note 55, at 39-45.

60. Black, *supra* note 43, at 866, 876.

61. *Id.*; *see also infra* note 187.

62. Black, *supra* note 43, at 869-70. Justice Black has argued that to allow Congress the authority to abridge free speech is to give it a far higher place than allotted to it by the Constitution, effectively converting our polity from one of internal structural balance between

ments reemphasize the idea of a limited government and stress that all reserved powers remain with the states and the people.<sup>63</sup>

All absolutists protect "political speech" absolutely, on the ground that self-government can tolerate nothing less. For example, Professor Meiklejohn, a "limited" absolutist, concedes that the first amendment does not protect "unregulated talkativeness."<sup>64</sup> What it does protect is the right of each citizen to participate on a basis of total equality with all others in discussing and deciding all issues of public concern.<sup>65</sup> In Professor Meiklejohn's theory, the right to vote is absolute, and so are all the "forms of thought and expression" through which the voter derives the knowledge upon which he bases his role in the self-governance of his society.<sup>66</sup> These protected areas include education, the achievements of philosophy and the sciences, all literature and the arts, and free public discussion of public issues together with the dissemination of information and opinion bearing on these issues.<sup>67</sup>

The absolutist position has drawn the fire of many critics who find it inconceivable that the Constitution would lend absolute protection to the right to freedom of speech. Professor (now Judge) Bork has posed the rhetorical question as to whether Congress is forbidden from prohibiting an incitement to mutiny aboard a naval vessel engaged in action against an enemy.<sup>68</sup> He has concluded that, if Congress is so authorized, then the "absolutist" theory totally collapses because Congress may make some laws abridging free speech.<sup>69</sup>

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co-ordinate branches of government to one of legislative supremacy, a la the British model, precisely the system the framers sought to avoid. *Id.* at 866-67, 878-79.

63. *Id.*

64. A. MEIKLEJOHN, *supra* note 56, at 25.

65. *Id.*

66. Meiklejohn, *supra* note 44, at 256.

67. *Id.* at 256-57.

68. Bork, *supra* note 43, at 21.

69. *Id.* The absolutist response to this criticism is that the framers had precisely the necessities of war and national peril in mind when they drafted the first amendment. Professor Anastaplo points out that the framers were fully conscious of these necessities because they expressly provided for such perils in appropriate places. The third amendment provides that "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." In addition, the Constitution declares, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. Had the framers intended to limit freedom of speech during war or national emergencies they would have said so, just as they did in the above provisions. That they did not do so, Professor Anastaplo argued, only strengthens the claim for absolute protection of the freedom of speech. G. ANASTAPLO, *supra* note 55, at 44-45. Justice Black has argued that the framers knew that free speech could be dangerous, and consciously chose to protect it absolutely because they also knew that it was the "deadliest enemy of tyranny." Black, *supra* note 43, at 881.

Absolutists have also been criticized for the distinction they have sought to draw between "speech" and "conduct." In drawing a line between what is protected absolutely and what is not—and draw a line they must—absolutists have attempted to distinguish between "speech" on the one hand and "conduct" on the other.<sup>70</sup> The difficulty, of course, is that many forms of expression can be looked upon as being "conduct" and not "speech" only by a strained and contrived categorization.<sup>71</sup> As Justice Harlan so felicitously pointed out in *Cohen v. California*,<sup>72</sup> much linguistic expression conveys not only ideas which may be expressible solely in speech, but "inexpressible emotions" as well. He added that, because words are often chosen as much for their emotive as for their cognitive force, both forms of expression deserve first amendment protection.<sup>73</sup> And, it is an inherent deficiency of the absolutist position that it is unable to provide constitutional protection for forms of expression that are not "speech," even in the core area of "political speech." Thus, although the absolutist position has several attractive features, it is not a theory that can be applied consistently and fairly in complex fact situations which involve "conduct" in addition to "speech."

Applying absolutist thought to the three films in *Keene* is not difficult. The case involves only "political speech" and no conduct. Keene simply wants to be able to use the three Canadian films to express his own views on acid rain and nuclear war without having the government label that expression as foreign "political propaganda." There can be no doubt that the films constitute "political speech."<sup>74</sup> All absolutists would therefore conclude that the films are absolutely protected "speech." For absolutists the only question then is whether the government's labeling of the films under FARA constitutes any limitation whatsoever. If it does, then it constitutes an unconstitutional abridgement of free speech.<sup>75</sup>

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70. In his concurring opinion in *Garrison v. Louisiana*, Justice Douglas wrote that it was time "to face the fact that the only line drawn by the Constitution is between 'speech' on the one side and conduct or overt acts on the other." 379 U.S. 64, 220 (1964) (Douglas, J., concurring).

71. Thus, in *Cox v. Louisiana*, Justice Black took the position that a demonstration to protest segregation and the incarceration of other demonstrators was "conduct," and not "speech" and therefore not protected by the first amendment. 379 U.S. 536, 581 (1965).

72. 403 U.S. 15 (1971).

73. *Id.* at 26. Justice Black joined Justice Blackmun's dissent, which found that Cohen's antic (wearing a jacket with the words "Fuck The Draft" in a courthouse corridor) was "mainly conduct and little speech." *Id.* at 27. See also L. TRIBE, *supra* note 43, at 599-600.

74. See *supra* notes 41-54 and accompanying text.

75. See *infra* notes 137-71 and accompanying text.



### B. *The Communitarian School*

The communitarian school is best described by looking at the views of Judge Bork. The major concern of this school is with judicial activism and the consequent construction of "new rights" by activist judges who, communitarians say, act without "legitimacy."<sup>76</sup> "Legitimacy" derives from the people and the Constitution. According to communitarians, our constitutional system is not a pure democracy because, among other things, the courts do not function on a democratic (majoritarian) basis and there is judicial supremacy.<sup>77</sup> This contradiction between democratic principle and nondemocratic courts is resolved by the Constitution, through which the people have consented to limited government and to a designated role for the Supreme Court.<sup>78</sup> In the communitarian view, the only proper ambit for the Supreme Court's operation—and, correspondingly, of lower federal courts, too—is within this constitutionally designated area. The Supreme Court acts with legitimacy only when it applies "neutral principles," that is, when it bases its decisions on value choices embodied in the Constitution.<sup>79</sup>

When the Court decides a case, especially one in which the wishes of the majority as expressed through legislation clash with the rights claimed by the minority, the legal principle on which it bases its decision will not be truly "neutral" in the sense that it will make no value choice. The principle will embody a choice of one value rather than another.<sup>80</sup> But so long as that value has been chosen by the framers of the Constitution, the judicial decision is "legitimate." "Value choices are attributed to the Founding Fathers, not to the Court."<sup>81</sup> The relevant moral value system is that of the framers (and

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76. Bork, *supra* note 43, at 8.

77. *Id.* at 2.

78. *Id.*

79. *Id.* It is important to underscore the point that when the Court acts without legitimacy, it does not only act imprudently or erroneously; it acts *unconstitutionally*. See generally Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism With the Views of Five Conservative Academic Judges*, 40 U. MIAMI L. REV. 913, 943-50 (1986). The basic work on the concept of "neutral principles" is H. WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3 (1961).

80. Bork, *supra* note 43, at 2.

81. *Id.* at 4. If, therefore, the Court has a case in which a solution based on one value choice favors the majority and another solution based on a different value choice favors the minority, the Court can choose between these values only as the Constitution directs. The Court's power and legitimacy extend only so far as it can demonstrate in reasoned opinions that it has a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. *Id.* at 3. When the Court does not have such a theory, but rather imposes its own value choices, it violates the basis of its power and acts illegitimately. The Court then becomes a "perpetrator of limited coups d'etat." *Id.* at 6.

the legislature, as will be seen), and not that of the Supreme Court.

Where the Constitution does not clearly specify the value choices that a judge must make, he must "stick close to the text and the history, and their fair implications, and not construct new rights."<sup>82</sup> But, of course, it may happen that none of this is possible. A fair-minded judge who studies the text of the Constitution, its history and their fair implications, may nonetheless be unable to discover the preferred value choice in a given case. The communitarian solution in such cases is to have the judge implement the "community judgment embodied in the statute."<sup>83</sup> In such cases, the judge has no role other than to apply the statutes in a fair and impartial way regardless of the pain caused by such a decision.<sup>84</sup> In other words, where the Constitution and its history are silent, any choice the legislature makes as representative of the majority of the community is fine and the Court must accept it.<sup>85</sup>

In the area of the first amendment, Judge Bork's view is superficially similar to that of the "limited absolutists": Constitutional protection should be accorded only to speech that is explicitly political. Professor Bork would have no judicial intervention to protect any other form of expression.<sup>86</sup> He does not indicate, however, the consti-

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82. *Id.* at 8.

83. *Id.* at 10.

84. *Id.*

85. *Id.* at 10-11. As one commentator has pointed out, Professor Bork's theory "conflicts with the historical practice of the Supreme Court." Wilson, *supra* note 79, at 945. Professor Bork's response is Olympian: "It follows, of course, that broad areas of constitutional law ought to be reformulated." Bork, *supra* note 43, at 11. It is a matter of some wonder that Judge Bork appears to place so much emphasis upon the text of the Constitution and its history, and is yet so disregarding of the available historical evidence, such as the several passages in *The Federalist Papers* that decry blatant majoritarianism and the consequent threat to the rights of minorities. See, e.g., THE FEDERALIST No. 10, at 77 (J. Madison) (C. Rossiter ed. 1961) (arguing that the proposed federal union would end the then-prevailing conditions in which "measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority"); *id.* No. 51, at 323 (J. Madison) ("It is of great importance in a republic not only to guard society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . If a majority be united by a common interest, the rights of the minority will be insecure."); *id.* No. 78, at 469 (A. Hamilton) ("This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community."). For differences between Madison and Hamilton, see Mason, *The Federalist—A Split Personality*, 57 AM. HIST. REV. 625, 634-39 (1952).

86. Bork, *supra* note 43, at 20. Within the area of "political speech" Professor Bork departs from the "limited absolutists" because he would make criminal any speech that advocates the forcible overthrow of the government or the violation of any law. *Id.*

tutional provisions from which these value choices emerge. In fact, Professor Bork states that the framers probably had no coherent theory on freedom of speech and were probably only mildly interested in the subject.<sup>87</sup> We are, therefore, "forced to construct our own theory of the constitutional protection of speech."<sup>88</sup> But we are not entirely free to construct any theory we please, for the Constitution creates a representative democracy, which can be given meaning only if there is freedom to discuss government and its policies. Judge Bork thus appears to fall back upon the structure of the Constitution to support his notion of the right to freedom of speech. Freedom for "political speech" "could and should be inferred even if there were no first amendment."<sup>89</sup> However, we are not told why no reliance is placed upon the text of the first amendment itself!<sup>90</sup>

Were Judge Bork to stop at this point, his views would be mildly interesting but hardly exceptionable, except for his unorthodox approach to constitutional interpretation. But he does not. For Judge Bork, "political speech" is the "discovery and spread of political truth," and "political truth" is "what the majority thinks it is at any given moment."<sup>91</sup> It is entirely changeable from day to day and is the temporary outcome of democratic (i.e., majoritarian) processes.<sup>92</sup>

So, in Professor Bork's view, there really is no constitutionally protected freedom of speech. The argument he makes by drawing upon the constitutional structure of representative democracy is only to assist him in concluding that freedom of speech is no more than what the majority (i.e., the legislature) deems it to be. He has dematerialized the first amendment's clause that "Congress shall make no law . . . abridging the freedom of speech." A truly remarkable feat for a jurist reputed to be a strict constitutionalist. At bottom, Professor Bork's "communitarian" approach to the first amendment is nothing less than an abrogation of the first amendment and an enthronement

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87. Judge Bork relies on Professor Levy's analysis for this conclusion. See L. LEVY, *supra* note 57.

88. Bork, *supra* note 43, at 22.

89. *Id.* at 23.

90. Professor Wilson, too, has remarked on Judge Bork's "surprisingly little use of history, the text, or the framers' intentions" in interpreting the first amendment. Wilson, *supra* note 79, at 947.

91. Bork, *supra* note 43, at 26.

92. *Id.* at 30-31. To leave no doubt as to his meaning, Professor Bork emphasizes that the views he espouses were epitomized in the opinions of Justice Sanford in *Gitlow v. New York*, 268 U.S. 652 (1925), and *Whitney v. California*, 274 U.S. 357 (1927). Bork, *supra* note 43, at 31-35. Justice Sanford's opinions in those cases essentially held that in freedom of speech cases the Court had only the limited function of determining whether the legislature had defined a category of forbidden speech which might be suppressed. The Court then merely had to apply the statute as the legislature had adopted it.

of unalloyed majoritarianism.<sup>93</sup>

The first amendment issues in *Block v. Meese*<sup>94</sup> and *Keene v. Meese*<sup>95</sup> are the same. Thus, Judge (now Justice) Scalia's opinion in *Block*, with Judge Bork on the court, is an excellent case study of the communitarian approach to the novel question of whether governmental labeling that denigrates communicative materials infringes upon constitutionally protected speech. The *Block* court started with the obvious: that the government did not expressly prohibit the films.<sup>96</sup> It further rejected the plaintiffs' claim that the "political propaganda" label itself deters use of the films and therefore is an unconstitutional infringement of free speech, because it found that the statutory definition of the term "political propaganda" is neutral and does not import the pejorative and denigrating connotations the plaintiffs alleged.<sup>97</sup> Further, the government's application of the label to the three films in question is only an "accurate and lawful identification of an objective phenomenon that is suspect [and] does not constitute the government's expression of its own official suspicion."<sup>98</sup> In other words, the government's labeling of the Canadian films as "political propaganda" is not regulation of the content of the films, which the communitarians acknowledge may be unconstitutional in certain circumstances;<sup>99</sup> it is only an objective and neutral statement of the foreign origin of the films.

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93. Professor Wilson comes to a similar conclusion at a more general level, finding that "Bork's abstract theory of preference neutrality virtually eliminates individual rights." Wilson, *supra* note 79, at 947.

94. 793 F.2d 1303 (D.C. Cir.), *cert. denied*, 106 S. Ct. 3335 (1986).

95. 619 F. Supp. 1111 (E.D. Cal. 1985), *prob. juris. noted*, 106 S. Ct. 1632 (1986).

96. *Block*, 793 F.2d at 1310-11. Communitarians may strike down prior restraints in certain cases where the government is unable to show some specific interest that the restraint protects. In *Lebron v. Washington Metropolitan Area Transit Authority*, Judge Bork, joined by Judge Scalia, struck down the transit authority's refusal to display a poster critical of President Reagan. 749 F.2d 893, 896 (D.C. Cir. 1984). The authority's action was invalidated because it was a "prior restraint" and was not justified under any of the exceptions that permit the state to restrict political speech in a public forum. Judges Bork and Scalia disagreed, however, in the case of *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (activist plaintiff must show more than actual malice to prevail on a libel claim against political columnists). Judge Bork departed from his previously enunciated doctrine of constitutional legitimacy and argued that judges must discern how the framers' values apply to modern conditions. *Id.* at 995. Judge Scalia could not accept such an evolutionary view and adhered to the pure communitarian view that any evolution of constitutional doctrine was a legislative task and not one for the judiciary. *Id.* at 1038 (Scalia, J., dissenting in part). For an interesting analysis of this debate between the two communitarian judges, see Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter*, 40 U. MIAMI L. REV. 1171, 1186-88 (1986).

97. *Block*, 793 F.2d at 1311.

98. *Id.* at 1312.

99. See *supra* note 96.

Moreover, even if the plaintiffs' claim that the label denigrates the films were accepted for purposes of argument, the *Block* court held that it does not amount to an infringement of first amendment rights. It based its decision on the following reasons: first, the government cannot be excluded from the marketplace of ideas; second, the government is not required to remain ideologically neutral in any debate on political issues; and third, the government may actively affirm national values.<sup>100</sup> Judge Scalia went even further and suggested that "political speech" by the government is as protected under the first amendment as is "political speech" by any individual.<sup>101</sup> Thus, the communitarian approach finds that the labeling of the Canadian films under FARA does not infringe the freedom of speech of persons, such as Keene, who wish to show these films as expressions of their own views on the matters concerned.

It should be emphasized, however, that far from treating the government on the same footing as any ordinary individual, the first amendment expressly *limits* governmental action. Thus, Judge Scalia's view that the government has the same right of unfettered "political speech" that individuals have is not based upon the text of the first amendment.<sup>102</sup> As with Professor Bork's theoretical elaboration of the communitarian approach to the first amendment, so with Judge Scalia's practical application of that approach, the text of the provision does not always survive communitarian exegesis.

Judge Scalia's argument that the first amendment does not require the government to remain "neutral" in any public debate also merits examination.<sup>103</sup> It bears emphasis that neither *Block* nor

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100. 793 F.2d at 1313-14. See also *infra* notes 102-06 and accompanying text.

101. Judge Scalia wrote: "The short of the matter is that control of government expression (which would *always* seem to fall in the category of political expression, the most protected form of speech) is no more practicable, and no more appealing, than control of political expression by anyone else." 793 F.2d at 1314.

102. Professor Wilson concludes from an analysis of Judge Scalia's opinion in *Block v. Meese* that the opinion infers "goals beyond the Framers' intentions," an exercise that conservative judges such as Judge Scalia have condemned as "illegitimate" judicial activity when undertaken by liberal judges. Wilson, *supra* note 96, at 1194. As to Judge Scalia's general approach, Professor Wilson comments: "When pressured, Scalia leaves text and history behind, and engages in basic policy arguments about 'common sense,' 'remedy,' and 'proper functioning.'" *Id.* at 1193.

103. 793 F.2d at 1314. Judge Scalia cites Professor Tribe in support of his position. However, there is a fallacy in this claim as Professor Tribe makes a different point than that for which Judge Scalia claims support. Judge Scalia claims that government may attach pejorative labels to other voices in a debate, while Professor Tribe only concedes that the government may participate in any political debate by *adding* its voice to those in the debate. L. TRIBE, *supra* note 43, at 588, 590. Government may "*add* its own voice to the many that it must tolerate, provided it does not drown out private communications." *Id.* at 590 (emphasis added). To get from Professor Tribe's position to his own, Judge Scalia has to demonstrate not

Keene have claimed that the government must stay out of the debate on the issues the three films raised. There is no evidence in the record that they have claimed that the government may not present its views on acid rain or nuclear war to the public. The only question is whether the government may denigrate, and thereby place a restraint on, the views of others in a public debate on matters of public concern. Thus, Judge Scalia misstates the issue in *Block*, and his conclusion is therefore suspect.

Further, if the purpose of the first amendment is the "discovery and spread of political truth,"<sup>104</sup> then it is essential to allow the unimpeded flow of ideas and to have a public dialogue on matters of public concern without stacking the debate for or against particular views, at least until the public has made up its mind on the issues in question. The government may participate in the debate; it may add its voice to those of the other participants in the debate; but it may neither drown out the other voices in the debate, nor may it seek to lend legitimacy to its own views by stigmatizing opposing views. For the government to do so before public opinion on a given issue has gelled is to flout that very democratic and majoritarian basis upon which communarians base their approach. By labeling other points of view as "political propaganda," the government stacks the debate against these views, and thereby restrains their full and unimpeded expression.<sup>105</sup>

It is axiomatic that the government's expression has a special impact upon the polity and the public.<sup>106</sup> Therefore, when the government pejoratively labels a point of view, its expression can hardly be said to have the same impact upon our system as expression by a private person. The government knowingly resorts to the enormous

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only that the government may add its voice to the debate, but that it may actually stack the debate in its favor by attaching pejorative or denigrating labels to views different from its own. Professor Tribe adds in the section following the one Judge Scalia relied on that "[i]f the first amendment requires an extraordinary justification of government action which is aimed at ideas or information that government does not like, the constitutional guarantee should not be avoidable by government action which seeks to attain that unconstitutional objective under some other guise." *Id.* at 591.

104. See *supra* note 91 and accompanying text.

105. Interestingly, while Judge Scalia recognizes that his neutral meaning of the term "political propaganda" would render that label also applicable to the government's communications, he prefers not to so apply it. 793 F.2d at 1312 n.3. This reluctance suggests that Judge Scalia himself is not entirely comfortable with his exegesis of the term "political propaganda."

106. See T. EMERSON, *supra* note 42, at 699-700; M. YUDOF, *WHEN GOVERNMENT SPEAKS* 201-02 (1983). Professor Emerson stated that government "poses greater and more subtle threats to individual rights" and that it has become "an overpowering antagonist in any clash between state and individual." T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 38 (1966).

weight public opinion places upon its pronouncements to prevent a fair consideration of the ideas and views these films express, and *pari passu* those of Keene. By labeling the films as "political propaganda," the government interferes with the development of that "informed and educated public opinion" which is essential for national and social decision making.<sup>107</sup>

### C. *The Balancing Approach*

In contrast with both of the above theories, which seek to give complete, or "absolute," effect to the fundamental principles that the respective proponents hold valuable, the balancing approach seeks to accommodate the contending and conflicting interests in any given situation. Thus, while conceding the primacy of the right to freedom of speech, balancers argue that it "can never be absolute."<sup>108</sup> To make the freedom of expression an absolute, is to subordinate to it all other values in society, individual and collective. The balancers have other values, such as the survival of the polity through times of crisis, which are clearly superior to free speech and expression. In addition, the balancers argue that the quintessential role of government, and more particularly that of the Court, is to give as much satisfaction as possible to the legitimate contending interests in any conflict. Therefore, "[s]ome balancing is inescapable."<sup>109</sup>

While the notion of balancing legitimate interests in conflict may be acceptable to most persons, the major difficulty is that of striking the appropriate balance.<sup>110</sup> Balancing is inherently an *ad hoc* process that can enunciate only a few, broad standards. The particular balance struck in any given configuration of facts depends critically on those facts and not on any automatically applicable doctrinal directive. Professor Emerson has concluded that in "nearly every case, the [Supreme Court] Justices could have struck the balance in favor of either side, and in most cases there was disagreement with the balance that prevailed."<sup>111</sup> He laments that the uninhibited use of the balancing test has led the Court to adopt positions that are in conflict with traditional first amendment theory.<sup>112</sup>

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107. *Thornhill v. Alabama*, 310 U.S. 88, 104-05 (1940).

108. *Cox*, *supra* note 43, at 3. Besides, as Professor Tribe has pointed out, if the argument for absolute protection of "political speech" is a strategic maneuver to give up protection for all other areas in the hope that the valued core will become sacred, such a strategy is unlikely to succeed. "[T]he claims for suppression will persist, and the defense will be no stronger for having withdrawn to arbitrarily constricted territory." L. TRIBE, *supra* note 43, at 579.

109. *Cox*, *supra* note 43, at 4.

110. *Id.*

111. Emerson, *supra* note 46, at 451.

112. *Id.*

Precisely because of its ad hoc character, the balancing approach gives little guidance for future conduct. It has neither produced a comprehensive and coherent theory nor has it given clear standards that may be easily understood and followed by the community.<sup>113</sup> In addition, some critics of the balancing approach have warned that constitutional rights are not really protected when they are left to the uncertain, even capricious, balances that legislatures and courts may strike.<sup>114</sup>

Despite the fact that balancers reject an absolute right to freedom of speech, they give it a very high status among the protected rights.<sup>115</sup> And like the absolutists, the balancers derive the importance of the first amendment from its function in preserving the special self-governing characteristics of our polity.<sup>116</sup> Thus, the protection of "political speech" is among the most important interests the balancers seek to protect, although many balancers would probably extend the same level of protection to any expression that the government sought to regulate on the basis of its content.<sup>117</sup> The Supreme Court has applied some version of the balancing approach in all important first amendment cases, and further discussion of the balancing approach and its application to *Meese v. Keene* is therefore combined with the following discussion of the practice of the Court.

### III. THE LIMITS TO "POLITICAL SPEECH"

Although the Court has not developed a comprehensive theory of the first amendment, or of freedom of speech, it has frequently recognized that a heightened respect is due "political speech." In *Meese v. Keene*,<sup>118</sup> the Court must decide whether the labeling of the three films as "political propaganda," without more, rises to the level of an unconstitutional abridgement of the freedom of speech. The plaintiff's claim is not that the "political propaganda" label produces a "chilling

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113. In fact, the Court's balancing approach has led to the enunciation of a variety of standards in different cases, which in turn has led to some confusion among scholars as to the applicability of the various standards. Some scholars see the succeeding standards essentially as coexisting simultaneously; others see recent standards as supplanting earlier ones. See, e.g., G. GUNTHER, *CONSTITUTIONAL LAW* 972-1001 (11th ed. 1985); L. TRIBE, *supra* note 43, at 580-736; Cox, *supra* note 43, at 5-12; Emerson, *supra* note 46, at 430-51.

114. See, e.g., Black, *supra* note 43, at 876-77.

115. See, e.g., L. TRIBE, *supra* note 43, at 576-79; Brennan, *supra* note 48, at 176-77.

116. See L. TRIBE, *supra* note 43, at 579; Brennan, *supra* note 48, at 175; Cox, *supra* note 43, at 2-3; see also *Cohen v. California*, 403 U.S. 15, 24 (1970) (constitutional right of free expression designed to remove governmental restraints from public discussion and to produce a more capable citizenry and a more perfect polity).

117. L. TRIBE, *supra* note 43, at 580-81; Brennan, *supra* note 48, at 176-77; Cox, *supra* note 43, at 5.

118. 619 F. Supp. 1111 (E.D. Cal. 1985), *prob. juris. noted*, 106 S. Ct. 1632 (1986).



effect" on his first amendment rights, but rather that the labeling itself is a "species of censorship."<sup>119</sup> This question is one of first impression.

The Court has repeatedly stated that communicative, or "pure speech," that is, speech unaccompanied by any conduct, has almost absolute constitutional protection and the government must show a very high level of governmental interest to sustain any limitation on such speech. Similarly, while the Court has never declared that the right to "political speech" is absolute and subject to no abridgement under any circumstances,<sup>120</sup> it has often stated that this right is to be accorded the highest degree of protection.<sup>121</sup> In contrasting the right to "political speech" with other forms of speech protected by the first amendment, the Court has stated that "not all speech is of equal First Amendment importance," and that speech on "matters of public concern" is at the "heart of the First Amendment's protection."<sup>122</sup>

#### A. *The Court's Protection of "Political Speech"*

The reasons for the Court's heightened protection for "political speech" appear in several opinions. In *Roth v. United States*,<sup>123</sup> Justice Brennan, writing for the majority, explained that the protection given to speech and the press was to assure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>124</sup> Justice Brennan added that the freedoms of speech and the press had contributed greatly to the development and well-being of our society, and that these freedoms were

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119. 619 F. Supp. at 1118. Other issues raised in the case, such as those of overbreadth and vagueness, are not discussed here.

120. Thus, in *Cohen v. California*, Justice Harlan, writing for the majority, stated that the first amendment (as applied to the states through the fourteenth) "[has] never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses." 403 U.S. 15, 19 (1970); see also *Roth v. United States*, 354 U.S. 476, 483 (1957) (first amendment was not intended to protect every utterance).

121. In *Dun & Bradstreet v. Greenmoss Builders*, the Court reiterated a statement previously made in other cases that "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." 105 S. Ct. 2939, 2946 (1985). Professor Blasi has suggested that in adjudicating first amendment disputes, the overriding objective of courts should be to strengthen first amendment doctrine in a way that will enable it to withstand the intolerance of the worst of times. Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

122. *Dun & Bradstreet*, 105 S. Ct. at 2945; see also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (Speech on matters of public concern is at the heart of the first amendment's protection.).

123. 354 U.S. 476 (1957).

124. *Id.* at 484.

“indispensable” to its continued growth.<sup>125</sup> Debate on public issues must, therefore, be “uninhibited, robust, and wide-open.”<sup>126</sup>

Thus, the Court’s theory of the right to freedom of “political speech” is that this right is inextricably wound up with, and affords vitality to, our political system of representative democracy. The Court’s theory is clearly within the mainstream of thought in the country on the subject, as expressed by the absolutists and the balancers.<sup>127</sup> While the absolutists and the balancers disagree about the limitations that may be placed upon the first amendment right to freedom of speech, and in particular on “political speech,” they agree the right serves the political and personal goals of society and individuals. The communitarians, on the other hand, appear to start from similar assumptions about the political role of “political speech,” but reach a totally different end by upholding raw majoritarianism and denying, effectively, any constitutional guarantee of the right to freedom of speech.<sup>128</sup> The Court’s acceptance of the former, as opposed to the latter, of these competing theories is a vital ingredient in analyzing first amendment cases, and is a key factor in the case at hand.

The Court has ensured that “political speech” receives the highest degree of protection by allowing abridgement of content only in the most extreme cases. In *City of Mobile v. Bolden*,<sup>129</sup> Justice Stewart stated the axiom that “a law that impinges upon a fundamental right . . . secured by the Constitution is presumptively unconstitutional.”<sup>130</sup> The government has the burden in such a case to show that the restrictions it places on content are warranted.<sup>131</sup> And, a reg-

125. *Id.* at 488.

126. *Dun & Bradstreet*, 105 S. Ct. at 2943. In *First National Bank*, Justice Powell, writing for the Court, declared that the government is prohibited from “limiting the stock of information from which members of the public may draw.” 435 U.S. at 783; see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764 (1976) (society has a strong interest in the free flow of commercial information, and the state cannot suppress information about drug prices). Unlike “political speech,” commercial speech is not at the heart of the first amendment right to freedom of speech. Thus, if the government may not impede the free flow of commercial information, it may not, *a fortiori*, limit the stock of information on political issues of public concern or impede the free flow of information on these issues.

127. See *supra* notes 55-75, 108-17 and accompanying text.

128. See *supra* notes 76-93 and accompanying text.

129. 446 U.S. 55 (1980).

130. *Id.* at 76. Justice Brennan expressed the same idea: “The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.” *Roth v. United States*, 354 U.S. 476, 488 (1957).

131. *Young v. American Mini Theatres*, 427 U.S. 50, 76 (1975) (“substantial burden rests upon the State when it would limit in any way First Amendment rights”); L. TRIBE, *supra* note 43, at 580-82.

ulation of content will be unconstitutional unless the government can show a "compelling state interest."<sup>132</sup>

In *Dun & Bradstreet v. Greenmoss Builders*,<sup>133</sup> Justice Powell, joined by Justices Rehnquist and O'Connor, found that the credit reports at issue there did not concern any public issue, at least in part because they were issued solely in the individual interest of the speaker and its specific business audience. The speech in *Dun & Bradstreet* was "solely motivated by the desire for profit."<sup>134</sup> Such speech was "hardy" and unlikely to be deterred by incidental state regulation.<sup>135</sup> In stark contrast, Keene does not desire to show the films in question for profit, but rather to express his personal views. In addition, the films address matters of public concern.<sup>136</sup> Such speech, therefore, merits greater protection than speech solely motivated by the profit motive.

In *Whitney v. California*,<sup>137</sup> Justice Brandeis declared that first amendment rights could be subject to restrictions only if the restrictions were "required in order to protect the State from destruction or from serious injury, political, economic or moral."<sup>138</sup> Almost fifty years later, Justice Harlan's opinion for the Court in *Cohen v. California*,<sup>139</sup> elaborated upon this view and ruled that situations in which the state had a justifiable interest in regulating speech fell within one or more of the following exceptions that the Court had previously established: offensive conduct, intent to incite disobedience to laws (the draft, in *Cohen*), obscenity, "fighting words," and intentional provocation of others to hostile reaction.<sup>140</sup> The films in *Keene* do not fall within any of these categories. The government does not claim that these films endanger national security, or that they present a "clear and present danger" to society, or that they constitute "fighting

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132. L. TRIBE, *supra* note 43, at 582. See also *Cohen v. California*, 403 U.S. 15, 24 (1971). A similar test applies to government efforts to restrict the content of a message. The standard is lower if the government seeks instead, only to regulate the "time, place and manner" of the exercise of free speech. In *American Mini Theatres*, Justice Powell reiterated that the first amendment prohibited the government from restricting expression "because of its message, its ideas, its subject matter, or its content." 427 U.S. at 64.

133. 105 S. Ct. 2939 (1985).

134. *Id.* at 2947.

135. *Id.* Regulation was less likely to deter the profit motive than other motives.

136. See *supra* notes 50-54 and accompanying text. The Court has said that speech is on a matter of public concern if its "content, form, and context . . . as revealed by the whole record" shows it to be so. *Dun & Bradstreet*, 105 S. Ct. at 2947; *Connick v. Myers*, 461 U.S. 138, 149 (1983). See also *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-03 (1952) (first amendment protects films).

137. 274 U.S. 357 (1926).

138. *Id.* at 373.

139. 403 U.S. 15 (1970).

140. *Id.* at 18-20, 24.

words," or indeed that there is any compelling government interest in placing any burden on the showing of the films.<sup>141</sup> In fact, the government allows the films may be shown.<sup>142</sup>

Thus, the films are clearly within the area of "political speech," and merit the special protection the Constitution gives to such speech. The crucial question in this case then is whether the label "political propaganda," as applied to the films, constitutes an abridgement of this specially protected right to freedom of "political speech."

### B. *Is the Label "Political Propaganda" an Abridgement of Speech?*

The government's basic argument is that the label "political propaganda" does not impose any impediment to the "political speech" claimed in this case, or, at least, that whatever impediment is placed does not rise to a level which offends the first amendment.<sup>143</sup> On the other hand, Keene claims that the government's label constitutes a species of censorship.<sup>144</sup> Previous cases that the Supreme Court has decided concerned statutes that directly obstructed and prohibited the expression at issue.<sup>145</sup> Here, the impediment is not a direct restriction on free speech, but is a burden that is tantamount to a direct restriction.

In the government's view, the Act defines the term "political propaganda" in a content-neutral manner and its labeling of the films constitutes neither approval nor disapproval of the films.<sup>146</sup> The government claims that the labeling "simply reflects the congressional judgment that, in view of the wide range of motives that may inspire . . . [the foreign] material, it is best viewed and evaluated with an awareness as to its source."<sup>147</sup> It is clear, however, that there are ways to identify the foreign source of communicative material other than labeling them as "political propaganda." Quite simply, they could be labeled, "Made in —." Of course, if the Court adopts the government's view that the label "political propaganda" is itself con-

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141. *See generally* Brief for Appellants, *Meese v. Keene*, 106 S. Ct. 1632 (1986) (No. 85-1180).

142. *Id.* at 36-37.

143. *Id.* at 18-37.

144. *Keene v. Meese*, 619 F. Supp. 1111, 1118 (E.D. Cal. 1985) (on motion to alter judgment), *prob. juris. noted*, 106 S. Ct. 1632 (1986).

145. *See, e.g.*, *Young v. American Mini Theatres*, 427 U.S. 50 (1975) (regulation distinguishing between cinemas that showed explicit "adult" films and those that did not); *Cohen v. California*, 403 U.S. 15 (1970) (state statute imposing criminal penalties on offensive expression that has a tendency to provoke others to violence); *Roth v. United States*, 354 U.S. 476 (1957) (statute making it a crime to use the mails to distribute obscene materials).

146. Brief for Appellants at 20, *Meese v. Keene*, 106 S. Ct. 1632 (1986) (No. 85-1180).

147. *Id.* at 19.

tent-neutral, then that label would do just as well as any other. The question, therefore, turns on whether the term "political propaganda" is content-neutral.

The government claims that the statutory definition of the term "political propaganda" is neutral and nonjudgmental and therefore, its application to the films cannot impede the free flow of political debate.<sup>148</sup> It also argues that the label has been applied to material disseminated "by close friends and allies" and even to materials that reflect policy positions that the government has adopted, thereby indicating that no denigration of the labeled material is intended.<sup>149</sup> The government further argues that the pejorative connotations attached to the label "political propaganda" are the subjective misunderstandings of third parties (the public at large) for which it is in no way responsible.<sup>150</sup> Finally, the government contends that the Act is a reasonable exercise of Congress's legislative power, and that even if the label "political propaganda" places a burden on the first amendment right to free speech it is slight and not unconstitutional.<sup>151</sup>

In *Block v. Meese*,<sup>152</sup> Judge Scalia accepted these arguments.<sup>153</sup> The court embraced the government's argument that the statute's definition of the term "propaganda" was in accordance with the dictionary meaning, and that no element of the definition supported the plaintiffs' claim that "propaganda" means untruth.<sup>154</sup> The District Court for the Eastern District of California thought otherwise, and held that the term "political propaganda" denigrated the content of the films because the term was generally taken to apply to communication that contains "half-truths, distortions and omissions."<sup>155</sup>

The real issue is the factual one of how the average person on the street will understand the term "political propaganda"; will Keene's audience take the term "political propaganda" in the neutral statutory sense? The inhibition to free speech occurs, if it does, because the average person considers the government's labeling to be predisposing in the matter. That is, free speech is burdened when the label stigmatizes the content of the films and thereby impedes free debate on the public issues concerned. Well-known experts submitted affidavits that support Keene's view that ordinary persons understand the term

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148. *Id.* at 20-31.

149. *Id.* at 27-28.

150. *Id.* at 31-33.

151. *Id.* at 34-38.

152. 793 F.2d 1303 (D.C. Cir. 1986).

153. *Id.* at 1311.

154. *Id.*

155. *Keene v. Smith*, 569 F. Supp. 1513, 1520 (E.D. Cal. 1983).

“political propaganda” to have a pejorative, denigrating connotation.<sup>156</sup> The government submitted no affidavits of its own and chose instead to rely upon the statutory-and-dictionary-meaning argument stated above.

The government’s argument on this point, and Judge Scalia’s, must, however, be wrong because the chief purpose of FARA is to inform the public about the foreign origin of the films at issue.<sup>157</sup> The public’s understanding of the term “political propaganda” is, therefore, not only an important matter, it is at the heart of the issue. If the public’s understanding of the term is significantly different from that of the government, as the government argues, then the use of the term misleads the public and fails to achieve the goals of FARA. It makes no sense in such a case to argue that the public’s understanding of the term is not important, and that if the statute’s definition is neutral that’s all there is to it.<sup>158</sup>

Similarly, the government’s argument that it uses the FARA label in a content-neutral manner, applying it to friend and foe alike and even to views that reflect its own policies founders upon the same rock of public perception. Indeed, if the public views the label as

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156. Professor Leonard Doob, Sterling Professor Emeritus of Psychology at Yale University, stated that the government’s designation of the films as “political propaganda” was pejorative and denigrating to the material, and that it stigmatized the person disseminating the films. He added that the attaching of the label suggested the communication was deceitful, that unfair or insidious methods were being employed, and that some manipulation of the audience was involved. Mr. Edwin Newman, head of the Usage Panel of the American Heritage Dictionary, declared that calling something propaganda was tantamount to saying it was not worth considering, and that the general understanding was that the communication was put forward in an attempt to mislead. Brief for Appellants at 12-13, *Block v. Meese*, 793 F.2d 1303 (D.C. Cir. 1986) (No. 84-5318); see also Brief for Appellee at 23 n.24, 24 n.26, *Meese v. Keene*, 106 S. Ct. 1632 (1986) (No. 85-1180).

157. See *supra* note 4 and accompanying text. Section 614(b) of FARA permits the government to label foreign materials as “political propaganda” to protect the national security and public interest. 22 U.S.C. § 614(b) (1982). This power is reviewable by the courts, unless there is a “textually demonstrable constitutional commitment of the issue to a coordinate political department” of the government, or if there is a lack of judicially discoverable and manageable standards for resolving the question. *Baker v. Carr*, 369 U.S. 186, 217 (1962). The government has not shown that any national security matter or public interest meriting protection is at stake here.

158. *Block v. Meese*, 793 F.2d at 1311-13; Brief for Appellants at 20-31, *Meese v. Keene*, 106 S. Ct. 1632 (1986) (No. 85-1180). In discussing the standing issue, however, Judge Scalia dismissed as “irrelevant” the government’s argument that any injury Sen. Keene suffered was due to the public’s mistaken interpretation of the label. 793 F.2d at 1309. Judge Ramirez of the Eastern District of California had the better approach as he not only looked at the formal elements in interpreting the term “political propaganda,” but he also examined the ordinary usage of the term. *Keene v. Meese*, 619 F. Supp. 1111, 1121-22 (E.D. Cal. 1985) (on motion to alter judgment), *prob. juris. noted*, 106 S. Ct. 1632 (1986). In *Bantam Books, Inc. v. Sullivan*, Justice Brennan examined the practical effects of the state law at issue and refused to base the judgment on the formalities of the statute. 372 U.S. 58, 67 (1962).

being pejorative and the government applies it to views of friendly states, even some that reflect its own policies, then the government misleads the public and the public's confusion on such issues must be total! Moreover, while the peculiar and non-popular use that the government makes of the term "political propaganda" has some bearing upon the constitutional question of whether the term abridges a first amendment right, it is not the sole consideration. More important is the question whether the label offends the first amendment despite the government's present neutral use of it.

Finally, the government argues that even if the label "political propaganda" denigrates the materials at issue, the act is nonetheless valid as a reasonable exercise of Congress's legislative power.<sup>159</sup> The Supreme Court's approach on such issues has been that the interests in question must be balanced: the abridgement of free speech must be balanced against the governmental interests at stake. Here, because the governmental interest is that of exposing the foreign source of communicative materials, it can easily achieve this goal by using means that do not have as great an impact on free speech as those in fact adopted. And, where the government's goals may be achieved through a lesser impact upon constitutional rights it cannot resort to means that have a greater impact on those rights.<sup>160</sup>

Numerous opinions of the Court have emphasized that protected "political speech" is vital to self-government, and must be available without any governmental hindrance. There should be "no potential interference" with a meaningful dialogue of ideas concerning self-government, and there should be no threat that causes "self-censorship."<sup>161</sup> Such speech not only encapsulates the rights of the speaker, but also those of the listener.<sup>162</sup> In *Young v. American Mini Theatres*,<sup>163</sup> Justice Powell wrote that the first amendment requires that there be "full opportunity for expression in all of its varied forms to convey a desired message";<sup>164</sup> that "there be a free flow from creator to audience of whatever message a film or book might convey";<sup>165</sup> and that the central concern of the first amendment was "the need to

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159. Brief for Appellants at 34, *Meese v. Keene*, 106 S. Ct. 1632 (1986) (No. 85-1180).

160. See *supra* notes 131-32 and accompanying text. The present Court has no absolutists, one "communitarian" (Justice Scalia) and eight balancers. The Court is therefore most likely to adopt a "balancing" approach in *Meese v. Keene*.

161. *Dun & Bradstreet v. Greenmoss Builders*, 105 S. Ct. 2939, 2946 (1986).

162. There must be a "full opportunity for everyone to receive the message." *Young v. American Mini Theatres*, 427 U.S. 50, 76 (1975).

163. 427 U.S. 50 (1975).

164. *Id.* at 76.

165. *Id.* at 77.

maintain free access of the public to the expression.”<sup>166</sup> Thus, if the application of the label “political propaganda” impedes the free flow of the dialogue on the matters of public concern raised by the films in *Keene*, then that label must be unconstitutional.

The Court has struck down laws that required a license to be purchased prior to the exercise of first amendment rights, and has declared such laws to be an unconstitutional abridgement of these rights.<sup>167</sup> In *Murdock v. Pennsylvania*,<sup>168</sup> the Court held that “[t]he power to tax . . . is the power to control or suppress” the enjoyment of the first amendment right.<sup>169</sup> In *Lovell v. City of Griffin*,<sup>170</sup> Chief Justice Hughes argued that such laws would “restore . . . censorship.”<sup>171</sup> *Keene* does not involve any tax on the exercise of the freedom of speech; but, like *Lovell* and *Murdock*, it impedes the uninhibited flow of ideas and obstructs a free debate within society by prejudicing the audience against the films. In *Lovell* and *Murdock*, the Court did not consider whether the tax was low and whether the affected persons could afford the license fees. The impediment itself, without more, was unconstitutional. Similarly, in *Keene* the impediment itself is unconstitutional.

The Supreme Court has also struck down statutes which have placed impediments other than a tax upon free speech. In *Lamont v. Postmaster General of the United States*,<sup>172</sup> the Court held it unconstitutional to require persons who received mail from communist countries to return a reply card to the postal service in order to have such mail delivered.<sup>173</sup> The federal statute permitting interference with the mail in the above fashion was held to be an unconstitutional abridgement of the addressee’s first amendment rights because it required the addressee to undertake an affirmative obligation which would almost certainly have “a deterrent effect, especially as respects those who

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166. *Id.*

167. *See, e.g.*, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (holding city ordinance, requiring Jehovah’s Witnesses distributing literature and soliciting donations door-to-door to have a license, to be unconstitutional under the first amendment); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (city ordinance requiring license to distribute literature declared unconstitutional on its face). In other cases, the Court has held taxes placed on newspapers to be a violation of the first amendment right to freedom of the press. *See Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

168. 319 U.S. 105 (1943).

169. *Id.* at 112.

170. 303 U.S. 444 (1938).

171. *Id.* at 452.

172. 381 U.S. 301 (1965).

173. *Id.* at 305.



have sensitive positions."<sup>174</sup> The Court stated that public officials, for example, might be deterred from receiving the withheld mail because the government had labeled it as "communist political propaganda," which, by implication contained "the seeds of treason."<sup>175</sup> Others, not in such sensitive positions, would be likely to feel some inhibition in sending for literature which federal officials had condemned as "communist political propaganda."<sup>176</sup> The government had argued that the statute only involved "inconvenience and not an abridgement."<sup>177</sup> But, "inhibition as well as prohibition" is a power denied to the government.<sup>178</sup> These considerations are perfectly apposite to the films in *Keene*. The "political propaganda" label of FARA does not prohibit the showing or the viewing of the films. But like the statute in *Lamont*, the government's label inhibits and deters both speakers and listeners from disseminating and receiving the messages of the films.<sup>179</sup> The "inconvenience" in *Lamont* of requesting information the government has denigrated was no greater than that entailed in *Keene*, and the latter is, therefore, as offensive to the first amendment as the former.

Finally, in *Thomas v. Collins*<sup>180</sup> the Court refused to countenance the minimal inhibition of first amendment rights that the requirement of obtaining a state union organizer's card prior to addressing a union rally imposed. Although the Texas law in *Collins* provided for the automatic granting of the card upon application, (the state had contended that the law was not inconsistent with the first amendment because it conferred only "ministerial, not discretionary" authority), Justice Rutledge's opinion for the Court held the law to be unconstitutional. The mere requirement of prior registration for making a public speech was incompatible with the first amendment.<sup>181</sup> So long as there was no imminent danger to the public interest, the exercise of free speech is immune to any restriction whatsoever, because "it is from petty tyrannies that large ones take root and grow."<sup>182</sup> If in

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174. *Id.* at 307.

175. *Id.*

176. *Id.* Justice Douglas's opinion for the Court found the Act to be "at war with the 'uninhibited, robust, and wide-open' debate and discussion . . . contemplated by the First Amendment." *Id.* at 307.

177. *Id.* at 309.

178. *Id.*

179. *See supra* note 14.

180. 323 U.S. 516 (1945).

181. *Id.* at 540.

182. *Id.* at 543. In *Bantam Books, Inc. v. Sullivan*, the Court struck down a Rhode Island law under which a state commission urged a distributor of books to remove certain books from sale. 372 U.S. 58, 64-68 (1963). Although the commission claimed that it had only exhortory

*Collins* it was unconstitutional to require a card, which the state would automatically issue, because it would inhibit the free exchange the first amendment envisioned, then it must be unconstitutional in *Keene* to label the films in question as "political propaganda." The inhibition on freedom of speech is at least as great in *Keene* as in *Collins*.

#### IV. CONCLUSION

A review of the first amendment theories and of leading cases leaves no doubt that "political speech"—activities of thought and communication by which we govern—is given the greatest degree of protection, both by theorists and by the Supreme Court, and that the government must demonstrate a very high degree of state interest before it may be permitted to abridge such speech. In the case of *Meese v. Keene*, the government has made no such demonstration. The films dealing with acid rain and the medical effects of nuclear war hardly amount to any threat to the state, let alone a serious threat. The government has not even challenged the veracity or the objectivity of the films.<sup>183</sup> Incredible as it may sound, the government has even recommended that the term "political propaganda" be dropped from FARA and replaced with a more "neutral term," such as "political 'advocacy' or 'information.'"<sup>184</sup>

It should be added that the government's and FARA's stated interests in identifying the films as being of foreign origin can easily be achieved by the simple label, "Made in Canada."<sup>185</sup> Why then the

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powers and no specific enforcement powers, the Court found that the scheme amounted to "governmental censorship."

183. In *Block*, several scientists submitted affidavits stating that the films on acid rain were factual and fair. Brief for Appellants at 14, *Block v. Meese*, 793 F.2d 1303 (D.C. Cir.), cert. denied, 106 S. Ct. 3335 (1986). The government did not controvert these submissions. *Id.* at 14 n.8.

184. Letter from Deputy Attorney General Edward Schmults to Rep. Robert Kastenmeier, quoted in Brief for Appellants at 14-15, *Block v. Meese*, 793 F.2d 1303 (D.C. Cir.) (No. 84-5318), cert. denied, 106 S. Ct. 3335 (1986).

185. It is worth noting that about the same time that the government was seeking to attach the label of "political propaganda" to the three Canadian films at issue here, thereby impeding the free flow of information domestically, it was seeking to defend the "right" to the free flow of information internationally. On June 2, 1981, Assistant Secretary of State Elliott Abrams denounced the "massive assault on the free flow of information" attempted in UNESCO. UNITED STATES DEPARTMENT OF STATE, AMERICAN FOREIGN POLICY DOCUMENTS 306 (1984). Undersecretary of State James Buckley affirmed the government's commitment to the free flow of information and news. *Id.* at 405. Even President Reagan participated in this effort to stave off international attempts to impede the free flow of information. In writing to House Speaker Thomas P. O'Neill, Mr. Reagan characterized the principle of the free flow of information as the cornerstone of democratic order. He cited article 19 of the Universal Declaration of Human Rights, which states that everyone has the right to freedom of opinion

fuss? On Sen. Keene's side it is clear that he would face much opposition to his views, as expressed in the films, were they to be labeled as "political propaganda."<sup>186</sup> The government's label would thus impede his free expression of views on matters of public concern.

The government's interests are not as clear, but probably are a combination of the following. First, the executive branch's general interest in exercising powers granted to it by Congress without any review by the courts. Second, its particular interest in denigrating the specific views the films expressed, for an unusual degree of skepticism, if not hostility, toward environmental concerns and fears of nuclear holocaust characterized the Reagan Administration's early years. Third, its general interest in preserving the power of denigration for future occasions. Finally, its interest in preserving its right under FARA to structure the national debate on the issues covered by the films and all other foreign policy questions by ostracizing, through pejorative labeling, opposing points of view.<sup>187</sup>

In any case, the government has argued that the "political propaganda" label is innocuous and only follows the neutral definition of

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and expression, and to seek, receive, and impart information and ideas through any media and regardless of national frontiers. Mr. Reagan lamented that these principles were so often observed only in the breach nowadays. *Id.* at 410. On March 4, 1982, Undersecretary of State Buckley declared that the government had been fighting the "good fight" against the efforts to establish the New World Information Order, and that they had "stoutly" defended such fundamental principles of a free press as the right to a "work environment free of governmental interference." U.S. DEPARTMENT OF STATE, AMERICAN FOREIGN POLICY CURRENT DOCUMENTS 416 (1985). The Senate, too, could not sit by while other countries launched assaults on free speech and free press. *See, e.g.*, 127 CONG. REC. S12,733 (1981) (statement of Sen. Dan Quayle); *id.* at S12,735 (statement of Sen. Daniel Patrick Moynihan). The Senate approved by a vote of 99 to 0 a resolution opposing efforts within UNESCO to regulate the press and free flow of information. S. Res. 1636, 97th Cong., 1st Sess., 127 CONG. REC. 12,733, 12,737 (1981). Subsequently, the United States withdrew from UNESCO, among other reasons, because of the efforts to impede the free flow of information. Letter from Secretary of State Schultz to the Director-General of UNESCO (December 28, 1983), *reprinted in* U.S. DEPARTMENT OF STATE, AMERICAN FOREIGN POLICY CURRENT DOCUMENTS 282-83 (1985); *see also*, Dept. of State Authorization Act, Fiscal Years 1982 and 1983, H.R. CONF. REP. NO. 693, 97th Cong., 2d Sess. 35, *reprinted in* 2 U.S. CODE CONG. & ADMIN. NEWS 697 (1982).

186. *See supra* note 14.

187. The government has also attempted to constrain and structure national debates on political issues by denying entry visas to foreign visitors whose views and opinions the government disfavors. *See* A. MEIKLEJOHN, *supra* note 56, at xiii-xiv (denial of entry visas to foreigners whose views are deemed "subversive"). For recent efforts of this kind, see Shipler, *Seeing Visa Denials as Attempt to Manipulate Debate*, N.Y. Times, Nov. 12, 1986, at 10, col. 3 (nat'l ed.); *Writers Protest U.S. Order to Deport Author Over Political Works*, N.Y. Times, Nov. 16, 1986, at 15, col. 3 (nat'l ed.). For a case striking down the United States Information Agency's regulations setting out when films may be deemed "educational," and therefore exempt from customs duties and licensing requirements, see *Bullfrog Films, Inc. v. Wick*, 646 F. Supp. 492 (C.D. Cal. 1986).

the term included within the statute. The true impact of the label on the plaintiff's first amendment right, however, must be assessed by its practical impact and not by the formalistic test the government proposes. The first amendment's role in the governance of our society, as acknowledged by theory and case law alike, cannot be undermined by formalistic interpretations that leave its shell, but gut its substance. In situations analogous to the instant case, the Court has struck down other impediments to the exercise of the freedom of speech. And, while the case of *Meese v. Keene* involves a different factual base from the previous cases in that there is governmental denigration of the communicative material concerned rather than a licensing or other requirement, the Court's first amendment doctrine and case law leave it no choice but to strike down the impediment to the freedom of speech in this case because the government has shown no state interest whatsoever in the imposition of the impediment.

FARROKH JHABVALA\*

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\* This casenote is for my wife, Margarita. I also wish to thank Mr. Kevin Dorse and Mr. Adalberto Jordan for their guidance in writing the casenote.