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Only Words: An Examination of Catharine Mackinnon's Challenge to the Supreme Court's First Amendment Conceptual Framework

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ONLY WORDS: AN EXAMINATION OF CATHARINE MACKINNON'S CHALLENGE TO THE SUPREME COURT'S FIRST AMENDMENT CONCEPTUAL FRAMEWORK

by

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The [Indianapolis] law itself gave [women] *existence*: I am real; they believed me; I count; social policy at last will take my life into account, validate my worth -- me, the woman who was forced to fuck a dog; me, the woman he urinated on; me, the woman he tied up for his friends to use; me, the woman he masturbated in; me, the woman he branded or maimed; me, the woman he prostituted; me, the woman they gang-raped.

> Andrea Dworkin, Pornography: Men Possessing Women, New York: Penguin Publishing (1989). Introduction xxx.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

> Majority opinion in West Virginia State Board of Education v. Barnette (1943) as quoted by Judge Easterbrook in American Booksellers Association, Inc. v. Hudnut, 771 F.2d 323, (1985) at 327.

The rapidly increasing cry for forms of speech rationing is part of the "culture war" that currently splits the social and political life of the United States. The individual battles of this war can be defined along several lines. There is the struggle of minority groups against dominant whites, and also a bitter struggle between minority groups.[1] We also face a neo-Marxist economic battle between "the commons" and wealthy corporate America. There is a growing conflagration between traditional religious groups and the supporters of a secular view of morality and society. Finally, there is the complex struggle between men and women. These battles are bitter and brutal, and participants fully recognize the power of speech and press in determining the war's eventual victors. The stakes are higher than ever, and the intolerance for "unacceptable" speech is growing.

Minority rights theoreticians make inequality arguments with great vigor. Constitutional scholars have written copiously in recent years about the inability of African-Americans, Hispanics, gays, and lesbians to engage effectively in the so-called free market of ideas because of the imbalance of power inherent in a racist society.[2] Hundreds of colleges and universities have enacted speech codes that attempt to redress the imbalance by banning offensive racist, sexist, and homophobic speech.[3]

The new scholarship emphasizing the inequality of speech is strikingly similar to the old arguments about the need to balance economic equality against individual liberties. In the famous Rawls formulation: "All social values--liberty and opportunity, income and wealth, and the bases

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[1] Witness the animosity of many African-Americans against Koreans in the Los Angeles riots.

[2] See, e.g., Richard Delgado, Campus Antiracism Rules: Constitutional Narratives in Collision, 85 NW. U. L. REV. 343 (1991).

[3] See Nat Hentoff, "Speech Codes" on the Campus and Problems of Free Speech, in DEBATING P.C. 215 (Paul Berman ed., 1992).

of self-respect are to be distributed equally unless an unequal distribution of any, or all of these values is to everyone's advantage."[4] Libertarians argue that these types of egalitarian measures stifle individual effort and thus decrease prosperity for all.[5] The issue arises: do we limit the speech of the powerful and subsidize the speech of the disadvantaged in order to maximize the public good?

In the culture battle between men and women, a group of feminist scholars lead by Catharine MacKinnon and Andrea Dworkin have focused their attentions on restricting and chilling pornographic speech in the name of equality; speech, they argue, that perpetuates male dominance, sex abuse, and sexual discrimination. In this paper, I will examine the historical development of the Supreme Court's current free speech conceptual framework while tracing the challenges before the Court regarding the conflict between equality and First Amendment liberty leading up to Hudnut. This paper will also discuss the philosophical foundations of MacKinnon's unique challenge--found in the "model ordinance" and Only Words --to the status quo Constitutional conceptual framework, demonstrating its flaws, dangers, practical problems, and incompatibility with the Supreme Court's decisional framework.

I. Feminism, Catharine MacKinnon, and Pornography's Harms

Feminist legal theory consists of three fundamental strands, which for convenience may be called the "difference," "different voice," and "dominance" approaches. The "difference" strand, associated with the Equal Rights Amendment, is the least controversial and argues that women

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[4] JOHN RAWLS, A THEORY OF JUSTICE 75 (1975).

[5] A good example of an economic egalitarian piece of legislation is the progressive income tax.

should be permitted to compete on equal terms with men in the public world. The "different voice" strand of feminist theory, associated with the work of Carol Gilligan,[6] asserts that there is a distinctly female way of approaching moral and legal dilemmas that has been ignored in legal doctrine. The third strand of feminist legal theory is the "dominance" approach which describes gender inequality not in terms of arbitrary differentiation but in terms of the social subordination of women. The "dominance" strand argues that rape, prostitution, and pornography are not isolated social deviations, but extreme examples of the subordination of women that occurs in many areas.

Catharine MacKinnon is the most prominent advocate for the dominance strand of feminist theory. She is also the most significant force in rethinking rape, prostitution, and pornography:

> MacKinnon has been perhaps the most important force behind the burgeoning theoretical literature in law on sex discrimination and feminist theory. With Andrea Dworkin, MacKinnon has developed what is probably her most controversial thesis: the idea that pornography is a form of sex discrimination .... MacKinnon's work has generated a dramatic shift in legal thinking and reoriented the terms of debate.[7]

MacKinnon's contributions to feminist legal theory and the ongoing debate surrounding free speech and pornography are unparalleled.

MacKinnon makes three basic claims. First, she suggests that severe harms are done to women in the production of pornography, and that regulation of the material is necessary to prevent these harms. Second, MacKinnon argues that pornography has a causal connection to acts of sexual violence against women. Third, MacKinnon contends that pornography influences

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[6] See C. GILLIGAN, IN A DIFFERENT VOICE (1982)

[7] Cass R. Sunstein, Book Review of FEMINISM UNMODIFIED, 101 HARVARD LAW REVIEW 829 (1988).

the attitudes of men and women in gender relations which produce discrimination and inequality.

MacKinnon's diagnosis of pornography as a form of sex discrimination has been criticized from two perspectives. Some critics deny that pornography is harmful. Others claim that there is no gender specific harms from pornography because women also enjoy pornography. These arguments are weak at best. There is mounting evidence of the indirect causal link between pornography and sexual violence.[8] Although there is no conclusive proof that antisocial behavior is caused by obscene material, I will agree with Judge Easterbrook's opinion in Hudnut that: "depictions of subordination tend to perpetuate subordination."[9] As MacKinnon wrote:

> It is not the ideas in pornography that assault women: men do, men who are made, changed, and impelled by it. Pornography does not leap off the shelf and assault women. Women could, in theory, walk safely past whole warehouses full of it, quietly resting in its jackets. It is what it takes to make it and what happens through its use that are the problem.[10]

II. The Development of the Supreme Court's First Amendment Conceptual Framework

Since the Supreme Court's summary affirmation of the Seventh Circuit Court of Appeal's decision in American Booksellers Association, Inc. v. Hudnut[11] which struck down MacKinnon's anti-pornography ordinance enacted in Indianapolis, legal scholars and commentators have written extensively about the MacKinnon-Dworkin model statute: comparing the feminist approach to pornography with the Supreme Court's obscenity doctrine,[12] discussing the theoretical

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[8] See, e.g., ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT (1986); PORNOGRAPHY AND SEXUAL AGGRESSION (N. Malamuth & E. Donnerstein eds. 1984).

[9] 771 F.2d. 323 at 329.

[10] CATHARINE MACKINNON, ONLY WORDS 15 (1993)

[11] 475 U.S. 1001 (1986).

[12] See, e.g., JOAN HOFF, LAW, GENDER, AND INJUSTICE 331-49 (1991).

implications and challenges that the feminist-inspired ordinances have on obscenity doctrine,[13] and dissected the lower courts' opinions in Hudnut in light of these issues.

In all of these discussions of MacKinnon's unique challenge to the Supreme Court, however, little attention has been paid to the fact that the philosophy behind MacKinnon's anti-discrimination legislation at issue in Hudnut and found in her controversial book, Only Words,[14] not only challenges the Supreme Court's obscenity doctrine, but also challenges the conceptual framework on which the Court has based much of its First Amendment jurisprudence. Moreover, legal scholars and commentators have ignored the fact that Hudnut is only one in a series of cases in which legislation barring sex discrimination gave rise to claims that questioned the Court's conceptual framework. The uniqueness of Hudnut is that the Supreme Court was not able to adhere to its First Amendment doctrines and still uphold the anti-sex discrimination legislation at issue.

Accordingly, it is important to take a fresh look at Hudnut and all of the cases that challenged anti-sex-discrimination legislation as violative of the First Amendment. A close analysis will reveal not only that Hudnut does not conform to the Supreme Court's decisional pattern, but also much about the Court's understanding of gender equality.

The Supreme Court's modern approach to the protection of free expression rights can, in large measure, be traced back to opinions authored by Justice Holmes and Brandeis. Holmes and Brandeis articulated their philosophical visions for the constitutional protection of free speech in

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[13] See, e.g., Eric Hoffman, Note, Feminism, Pornography, and Law, 133 U. PA. L. REV. 497 (1985).

[14] CATHARINE MACKINNON, ONLY WORDS, Harvard University Press: Cambridge (1993).

early political speech cases.[15] Both Justices argued that the constitutional foundation for free speech lies in the free marketplace theory. Holmes asserted that the suppression of speech interferes with society's best mechanism for discovering the truth,[16] the marketplace of ideas.[17] In Holmes' view, government should remain a bystander in the free speech arena. Brandeis later extended the free marketplace theory of the First Amendment by specifically tying it to the search for political truth. Free speech, Brandeis suggested, enhances democratic decision making and is essential to self government.[18]

Implicit in Brandeis' argument was the idea that by allowing a political minority the opportunity to attain majority status through persuasion and debate, free speech would ensure the prospects for peaceful social and political change. Consequently, both Holmes and Brandeis expressed dissatisfaction with the Court's initial First Amendment test, the bad tendency test.[19] In their view it gave the government too much power in suppressing minority political viewpoints that the government deemed harmful. According to Holmes and Brandeis, the proper test would only allow the government to suppress speech if the danger stemming from the speech was "so imminent that it would befall before there was an opportunity for discussion."[20]

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[15] These cases include: Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); and Abrams v. United States, 250 U.S. 616 (1919).

[16] The belief that open discussion and debate will result in "truth" or consensus can be traced, at the very least, as far back as the post-feudal humanist rhetoric of the Renaissance.

[17] Abrams v. United States, 250 U.S. 616, 630 (1919)

[18] Whitney v. California, 274 U.S. at 375

[19] See Gitlow v. New York, 268 U.S. 652 (1925), specifically Justice Sanford's majority opinion, for a classic formulation of the bad tendency test. Under the bad tendency test, speech may be suppressed by the government if the speech has a tendency to produce bad effects, even distant ones.

[20] Whitney, 274 U.S. at 376-7.

Holmes' and Brandeis' approach to the First Amendment was both reflective of and responsive to a common disputing arrangement present in the cases they heard. In all of these cases, the disputes centered around the same basic scenario: political minorities, members of the radical left (communists), had asserted free speech rights against efforts by the government to restrict their political views. Out of this disputing arrangement, free speech rights became associated with minority interests and calls for political change. In addition, free speech became counterpoised to government regulation and defense of the status quo in society. This perspective on the relationship between free speech rights, minority interests, and democracy was the basis for the two ideas found in Holmes' and Brandeis' approach to the First Amendment: (1) that the protection of free speech rights would result in the protection of minority interests and thus would preserve democracy[21] and (2) that free speech rights were negative liberties to be protected from governmental interference.[22]

The liberal approach to free speech of Holmes and Brandeis has generally prevailed as a core component of the Supreme Court's First Amendment theory. The trend in the Court has been to strengthen this approach and to broaden it to encompass expression traditionally thought to be nonprotected, such as nude dancing, libel, and commercial advertisement.[23]

The social maelstrom of the 1960's set the stage for such an expansion of the Court's liberal free speech doctrine. Vietnam protests, consumer activism, and the sexual revolution

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[21] Id. at 375-6.

[22] Id. at 374.

[23] See, e.g., Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (nude dancing can fall within the rubric of First Amendment protection); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (First Amendment protection extends to truthful, legal commercial speech); New York Times v. Sullivan, 376 U.S. 254 (1964) (seditious libel receives First Amendment protection unless the remarks are made with "actual malice").

presented the Court with opportunities to broaden its interpretation of the First Amendment. Most importantly, the civil rights struggle spawned a series of cases which linked the expansion of free expression to the revolution underway in constitutional theory regarding the principle of equality. The court began to recognize the free speech claims of civil rights activists by refining its public forum and group association doctrines.[24] In this way, First Amendment free expression rights became even more interwoven with minority interests and the democratization of American society.

III. Reconciling Free Speech Rights with Anti-Sex-Discrimination Legislation: The Dilemma

A series of sex discrimination cases starting in the 1970's posed a fundamental philosophical challenge to the Court's view of the First Amendment as an instrument of political and social change. In these cases, the opponents, rather than the supporters of various governmental anti-discrimination measures, attempted to invoke the First Amendment to support their positions and constrain legislative attempts to equalize women's status. For the first time since Holmes' and Brandeis' formulation of the Court's First Amendment doctrine, free expression rights were asserted by the status quo against minority interests. These cases presented a jurisprudential dilemma for the Court as they contradicted the Court's conceptual framework. The Court was faced with the prospect of choosing between protecting minority interests or protecting free expression rights. Moreover, such a choice posed a philosophical dilemma for the Court, which perceived its role in American politics as the guardian of both free

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[24] See, e.g., Edwards v. South Carolina, 372 U.S. 229 (1963) (civil rights demonstration on state capital grounds is constitutionally-protected expression in a public forum); Bates v. Little Rock, 361 U.S. 516 (1960) (NAACP's membership list protected from compulsory disclosure under the First Amendment derivative right of association).

expression and equal rights.

The first case to pit free expression rights against minority interests was the 1973 case of Pittsburgh Press Co. V. Pittsburgh Commission on Human Relations.[25] In that case the commission's enforcement of Pittsburgh's "human relations" ordinance prohibited the Pittsburgh Press from running sex-designated help-wanted ads. The Pittsburgh Press argued that such a ban was a prior restraint on First Amendment freedoms of expression, specifically freedom of the press. In an effort to preserve minority interests without destroying its First Amendment conceptual framework, the Court avoided the conflict between the values of liberty and equality by employing a system of speech categorization. In its majority opinion, the Court argued that the case did not involve viewpoint expression, but only commercial speech which proposed illegal activity. Hence, the Pittsburgh Press Court's vision of commercial speech as expression far removed from the core First Amendment concerns of democratic self-government, coupled with the Court's liberal approach to gender equality allowed the Court to advance the pace of social reform without reassessing its First Amendment framework and theory.

Following the Pittsburgh Press decision, the next series of cases offering possible challenges to the Court's First Amendment framework involved the derivative right of freedom of association. In the first of these cases, Hishon v. King & Spalding,[26] the conflict between free expression and equality did not materialize. The Supreme Court, in a unanimous decision, interpreted Title VII of the Civil Rights Act of 1964 as forbidding sex discrimination in law firm partnership decisions. In so holding, the Court rejected King & Spalding's contention that such

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[25] 413 U.S. 376 (1973).

[26] 467 U.S. 69 (1984).

an interpretation would violate the firms freedom of expression and association. The association in Hishon, like the advertisements in Pittsburgh Press, was found to be unworthy of constitutional protection. Again, the Court resolved the dispute through simple judicial categorization.

The next series of cases involving freedom of association claims and women's equality claims involved the exclusion of women from men's clubs or service organizations.[27] The Court ruled in favor of minority interests in all of these cases. Although these decisions were not based solely on judicial categorization, the Courts did rely on a constrained approach. Fortunately for the Supreme Court, which was committed to its First Amendment framework and to the protection of minority interests, adoption of a more interventionist, positive liberties approach to freedom of expression rights by the Court was not necessary to uphold the equality demands of women in these cases.

IV. MacKinnon's Unique Challenge to the Court's First Amendment Framework.

Unlike any of the cases that preceded it, American Booksellers Association, Inc. v. Hudnut offered a positive liberties challenge to the Court's First Amendment framework which could not be ignored. The dispute in Hudnut centered on an anti-pornography ordinance inspired by Catharine MacKinnon that was passed by the City of Indianapolis which would have tightened governmental control over pornography.[28]

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[27] See Roberts v. United States Jaycess, 468 U.S. 609 (1984); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987); New York State Club Association, Inc. v. City of New York, 487 U.S. 1 (1988).

[28] The Indianapolis Ordinance is similar to other ordinances proposed across the country about the same time that were also supported by feminists and social conservatives. Los Angeles, Minneapolis, Cambridge, and Bellingham considered similar ordinances. The Bellingham ordinance was adopted and subsequently declared unconstitutional. The Minneapolis ordinance was passed by the City Council and then vetoed by the Mayor.

In Only Words and the Indianapolis ordinance, MacKinnon defines pornography:

> Pornography is the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (1) Women are presented as sexual objects who enjoy pain or humiliation; or (2) women are presented as sexual objects who experience sexual pleasure in being raped; or (3) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or (4) women are presented as being penetrated by objects or animals; or (5) women are presented in scenarios of degradation, injury abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or (6) women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.[29]

Catharine MacKinnon intentionally avoids any use of the term "obscenity" to describe the material she seeks to prohibit because of her dissatisfaction with the Supreme Court's definition of obscenity and the premises behind its regulation. To be "obscene" under Miller v. California "a publication must, taken as a whole, appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value."[30]

This legal definition of obscenity emphasizes the lewdness and provocativeness of the work and whether it offends community sensibilities. In contrast, MacKinnon's conception of pornography:

> . . .focuses on the woman depicted and on whether the depiction encourages men to believe that the woman experiences sexual pleasury through brutalization or degradation. Extremely graphic depictions of sexual intercourse might well qualify as obscenity, but they would not constitute pornography unless they portrayed women as creatures craving subordination. On the other hand, although a billboard depiction of a semi-nude, bound, and battered woman proclaiming that she loves being black and blue might not be sexually shocking enough in a particular community to merit the label "obscene," feminists would see such a billboard as endorsing the physical subordination of women and thus as

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[29] Indianapolis Code @ 16-3(q).

[30] Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973).

pornographic.[31]

It is irrelevant to MacKinnon whether a work has literary, artistic, political or scientific value. As she asserts, "if a woman is subjected, why should it matter that the work has other value?"[32] It does not take an in depth analysis of MacKinnon's model ordinance to discover that it would lead to widespread censorship. Much radical feminist literature, including Only Words, is explicit and depicts women in ways forbidden by the ordinance. The ordinance would ban works from James Joyce's Ulysses to Homer's Iliad; both depict women as submissive objects for conquest and domination. MacKinnon's definition of pornography would include a story of a woman given by her husband to his attackers in his stead. After a lengthy gang rape, the woman if found lying dead at the door of the house. The husband cuts her corpse up into twelve pieces and sends them to the family branches with whom he had nurtured close relations. That story, and therefore the book containing it, was in violation of the letter and spirit of MacKinnon's ordinance. A plaintiff would have a difficult time taking the writer to court because the story is from Chapter 19 of the Book of Judges in the Old Testament. As we can see, "the law is so broad and vague that God could be in the dock for passages in the Old Testament."[33]

MacKinnon makes two basic contentions about pornography and its relationship to First Amendment protection. First, she argues that pornography is not just speech.[34] Rather, pornography is also a form of conduct (the practice of sex discrimination) and thus does not fall under the umbrella of First Amendment protection. MacKinnon's strategy is clever. She argues

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[31] Anti-Pornography Laws and First Amendment Values, 98 HARVARD L. REV. 466 (1984).

[32] Catharine MacKinnon, Pornography, Civil Rights, and Speech, 20 HARVARD CIV. RTS.--CIV. LIB. L. REV. 1,21 (1985).

[33] NAT HENTOFF, FREE SPEECH FOR ME--BUT NOT FOR THEE 340 (1992).

[34] CATHARINE A. MACKINNON, Not a Moral Issue, in FEMINISM UNMODIFIED 146, 154 (1987).

that pornography is a type of performative speech act like a minister's pronouncing a couple man and wife or a jury's finding a defendant guilty:

> Along with other mere words like "not guilty" and "I do," such words are uniformly treated as the institutions and practices they constitute, rather than as expressions of the ideas they embody or further. They are not seen as saying anything (although they do) but as doing something.[35]

Although it is easily understood that "not guilty" and "I do" are both speech and acts, pornography pushes the bounds of the paradigm. For example, the only utterances in pornography are usually written down or taped on film or videocassette. Thus, the performer of the alleged speech act is rarely in the presence of his or her audience. Can "speech" in such circumstances be a speech act? That is, are speech acts iterable? If I want to marry Jennifer, can I play a recording of a minister proclaiming us to be married, or would I need the minister's presence?[36]

The effects of pornography involves mental intermediation. Pornography affects how people see the world. If pornography is what pornography does, so is other speech. Hitler's orations affected how some Germans saw Jews. Communism is a world view, not simply a Manifesto by Marx or a set of speeches. Religions affect socialization in the most pervasive way.

MacKinnon also argues that the First Amendment debate over pornography should properly concern the values of liberty and equality, not liberty and morality. Pornography's subject matter is not sex, but power. Therefore, pornography should be regulated, not because it offends the dominant community standards of sexual morality and lacks communicative content, but for precisely the opposite reasons; because it validates dominant community standards of male

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[35] CATHARINE MACKINNON, ONLY WORDS 12-13 (1993).

[36] David C. Dinielli, Law and Equality: Only Words, 92 MICHIGAN LAW REVIEW 1945 (1994).

power and advocates harmful political ideas. MacKinnon argues that if the Court recognized the Fourteenth Amendment's competition with the First Amendment, the equality guarantee limits or even trumps the speech under question. Our Constitution, MacKinnon notes, is "a document that accepts balancing among constitutional interests as method."[37] In suggesting that the Fourteenth Amendment might limit speech rights, she performs her classic move. She recasts pornography as an instance of sex inequality.

MacKinnon argues that the Court's notion of the free marketplace of ideas is based upon the same naive and archaic laissez-faire confidence that inspired the concept of the economic free marketplace,[38] a theory based on the presupposition that economic bargaining occurs between relative equals. Under such a system, the government should not intervene. However, after portions of the economy fell to monopolistic control, congressional regulations were needed to restore economic balance. Accordingly, MacKinnon contends that the free marketplace of ideas also suffers from monopolistic control. According to MacKinnon, men's voices dominate the marketplace of ideas, and pornography is political propaganda that support's men's control.[39] Pornography, MacKinnon argues, silences women by terrorizing them.[40] Ironically, the hearings regarding the Minneapolis ordinance appear to have been constructed to exclude meaningful

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[37] CATHARINE MACKINNON, ONLY WORDS 84 (1993).

[38] Id. at 155.

[39] Id. at 518.

[40] MacKinnon takes this notion to its disturbing extreme by seeming to claim that a woman's consent and enjoyment of sex is actually coercion because the unequal relationship between men and women taints the way women perceive the sexual experience. For a more in depth examination of this issue see, e.g., Susan Etta Keller, Viewing and Doing: Complicating Pornography's Meaning, 81 GEORGETOWN LAW JOURNAL (1993).

dissent, attempting to silence her opponents.[41] In short, to MacKinnon the free marketplace of ideas framework is inadequate. The preconditions necessary for the model to function in the case of women are not present. Truth cannot be discovered when a powerful group--men--through pornography make the voices of women inaudible. This inequity in the balance of power justifies governmental intervention into the marketplace of ideas.

It should be noted that many women today do not perceive the world in MacKinnon's terms. Indeed, many are hostile to her depiction. These women argue that "sex discrimination has neither the nature nor the magnitude that MacKinnon suggests, and the world she describes -- one of widespread and objectionable gender hierarchy -- is not the world in which they live."[42] MacKinnon's response to women who defend the pornographers is that they are protecting the power given to them by the male hierarchy. She blasts them, saying: "I want you to stop claiming that your liberalism, with its elitism, and your Freudianism, with its sexualized misogyny, has anything in common with feminism."[43]

V. The Decision of the Court: Easterbrook Defends the Status Quo Conceptual Framework

Hudnut not only presented a direct challenge to the Supreme Court's obscenity doctrine but also openly challenged the Court's First Amendment conceptual framework and its underlying premises. MacKinnon pits women's free expression rights and equality demands against the free expression rights of those who opposed the ordinance. In short, the Indianapolis ordinance was

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[41] Rowena Yeung, Book Note: THE NEW POLITICS OF PORNOGRAPHY by Donald Downs, 91 COLUMBIA LAW REVIEW 1271 (1991).

[42] Cass R. Sunstein, Book Review: Feminism and Legal Theory, 101 HARVARD LAW REVIEW 836 (1988).

[43] CATHARINE MACKINNON, FEMINISM UNMODIFIED 205 (1987).

grounded in the notion that not one, but two sets of free expression rights were at stake. Allowing men unrestrained speech silences women. Moreover, MacKinnon takes a positive liberties approach--one which views free expression as requiring state intervention, not state neutrality. MacKinnon demands that a new framework incorporating a positive liberties approach to free expression rights is necessary in order to guarantee free expression rights to all groups. MacKinnon's philosophical framework is clearly at odds with the Court's traditional framework.

Judge Easterbrook wrote the Seventh Circuit's response to the challenge contained in the Indianapolis ordinance.[44] In support of the court's holding that the ordinance constituted discrimination on the basis of viewpoint, a form of thought control, Easterbrook relied on the Supreme Court's traditional First Amendment framework.[45] Easterbrook asserted, as the Supreme Court had in the past, that freedoms of expression are negative liberties:

> The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way in -- sexual encounters "premised on equality" -- is lawful no matter how sexually explicit. Speech treating women the disapproved way -- as submissive in matters sexual or as enjoying humiliation -- is unlawful no matter how significant the literary, artistic or political qualities of the word taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.[46]

One of the things that separates our society from totalitarianism around the world is that we allow the propagation of opinions that the government finds wrong or even hateful. The ideas of the Klan may be propagated.[47] Communists may speak freely and run for office.[48] The Nazi Party

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[44] Hudnut, 771 F.2d at 324.

[45] Id. at 328.

[46] Id. at 325.

[47] Brandenburg v. Ohio, 395 U.S. 444, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969).

[48] DeJonge v. Oregon, 299 U.S. 353, 81 L. Ed. 278, 57 S. Ct. 255 (1937).

may march through a city with a large Jewish population.[49]

Although Judge Easterbrook accepted the legislation's premise that pornography is part of a socialization process that leads to women's secondary status, he nevertheless contended that this premise simply demonstrated that pornography is powerful and effective speech and is perhaps best answered by more speech.[50] He also refused to abandon the Court's free marketplace of ideas model. He argued that although the free marketplace theory rests upon the assumption that truth is more likely to emerge from discussion unrestrained by government, the viability of the theory does not depend upon the actual emergence of truth.[51] Easterbrook rejected the feminist argument for regulation by writing:

> A power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth .... If the government may declare the truth, why wait for the failure of speech? Under the First Amendment, however, there is no such thing as a false idea, so the government may not restrict speech on the ground that in a free exchange truth is not yet dominant .... The Supreme Court has rejected the position that speech must be "effectively answerable" to be protected by the Constitution.[52]

Many scholars, including Ronald Dworkin, worry that MacKinnon's attempt to "equalize" speech will result in government censorship of any material that might reasonably offend disadvantaged groups. Since the Special Commission on Pornography and Prostitution adopted a system similar to MacKinnon's in 1985, the Canadian Supreme Court has upheld laws restricting

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[49] Collin v. Smith, 578 F. 2d 1197 (7th Cir.), cert. denied; 439 U.S. 916, 99 S. Ct. 291, 58 L. Ed. 2d 264 (1978).

[50] Id. at 329.

[51] Id. at 330.

[52] Id. at 330-1.

hate propaganda[53] and obscenity,[54] relying on equality principles. The repercussions of these decisions are not what MacKinnon would have hoped. One opinion piece in the New York Times has noted that MacKinnon has become the target of widespread anger among Canadian artists, writers, and activists. Apparently, Canadian authorities have used the terms "degrading and dehumanizing" -- terms lifted directly from MacKinnon's model ordinance-- to justify seizing lesbian, gay, and feminist material and fining a bookstore owner for selling a lesbian magazine.[55]

Easterbrook forcefully defended the Supreme Court's framework, arguing that it correctly dealt with the complexity of the relationship between the constitutional values of liberty and equality. Easterbrook opined:

> Free speech has been on balance an ally of those seeking change. Governments that want stasis start by restricting speech. Culture is a powerful force of continuity; Indianapolis paints pornography as part of the culture of power. Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is.[56]

Judge Easterbrook correctly argued that the Indianapolis ordinance sought to redefine pornography as political expression.[57] In so doing, the ordinance not only attacked the Court's obscenity doctrine, but also its traditional free speech categories.

VI. Conclusion

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[53] See Regina v. Keegstra, 1990 3 S.C.R. 697 (Can.).

[54] See Butler v. Regina, 1992 1 S.C.R. 452 (Can.).

[55] Leanne Katz, Censor's Helpers, N.Y. Times, Dec. 4, 1993 at 15.

[56] Id. at 332.

[57] Id. at 329.

The disparity in outcomes between other anti-sex-discrimination cases and Hudnut stemmed from the difference in the array of challenges that Hudnut brought before the Court. Only Hudnut offered direct challenges to the Court's First Amendment framework, its vision of gender equality, and its institutional role. Given these additional challenges, the Supreme Court, could not easily use the constrained and categorizational methods. It could not adhere to its First Amendment doctrines and framework and still find in favor of the Indianapolis ordinance. To uphold the ordinance, given its philosophical assumptions, the Court would have had to alter its use of traditional free speech categories, adopt a new First Amendment conceptual framework based on positive liberties, and reorient its approach to gender equality. From both a philosophical and institutional level, MacKinnon asked too much from the Court.[58]

The equalizing theory in speech turns out, on some mild deconstruction, to have a not-so-hidden agenda to create a revolutionary new society that is egalitarian toward gender, among other things.. Ironically, subjugated speech cannot be rescued by individuals or associations without political clout. Egalitarian speech results will probably be obtained by groups with superior organizational powers. Naturally, rival interest groups would lobby for government "subsidies" of speech. This will be done in the name of equality, but the results will be otherwise. Everyone would be equal, but in dramatic Orwellian terms more powerful groups would become more equal.

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[58] When read together, the Court's decisions seem to indicate that there is a link between the modern relationship between freedom of expression as a civil liberty and legislative attempts to equalize women's status. The decisions appear to be shaped by the Court's avowal of liberal theory. In all of the cases other than Hudnut, the Court was willing to uphold anti-sex-discrimination when the equality demand involved activity in the public sphere and when the legislation either regulated unprotected expression or was viewpoint neutral. However, the Court in Hudnut was unwilling to uphold anti-sex-discrimination when the equality demand involved the private sphere, when the assumptions in the dispute involved women's sexual roles, and where the legislation arguably regulated protected political expression and was viewpoint discriminatory.