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## BALANCING FREEDOM OF SPEECH*

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*The symbol for justice — a blindfolded goddess holding scales — is particularly appropriate in free speech cases, for when courts engage in balancing interests, they often do not know what they are weighing or even, sometimes, which way the scale tilts.*

The Supreme Court uses several criteria to determine whether a law violates the guarantee of freedom of speech contained in the first amendment. The test most frequently used, and most vociferously criticized, is the balancing of interests,[1] which requires the Court to weigh the importance of the interest advanced by the challenged governmental action against the degree to which it restricts expression. When the ideas were expressed through actions that have consequences additional to those stemming from the exposition of the ideas, even Justice Black, the most noted spokesman for the "absoluteness" of the first amendment, found himself "balancing."[2] When conduct that is not constitutionally protected is entangled with speech, regulation of the unprotected conduct may simultaneously suppress speech. In such cases it is the duty of courts, before upholding such regulations, "to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights" of speech and press.[3]

Critics of the balancing test have argued that it violates the language of the first amendment, which "absolutely" prohibits laws abridging free speech,[4] and that the test provides no guidance for determining whether the balance of interests favors sustaining a

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1. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 134 (1959) (Black, J., dissenting).

2. *See id.* at 141-45 (Black, J., dissenting).

3. NLRB v. Fruit & Veg. Packers Local 760, 377 U.S. 58, 78 (1964) (Black, J., concurring) (quoting Schneider v. State, 308 U.S. 147, 161 (1939)).

4. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, *passim* (1970).

law.[5] The first criticism is easily met. The words "freedom of speech and of the press" are not self-defining. They may well mean that the speaker has the right to express ideas without fear that the government will punish the speaker because it disagrees with his views. In this light, the command of the first amendment is an absolute prohibition on governmental suppression of ideas.[6] But relatively few laws restricting speech are justified on the grounds that the ideas expressed are noxious; instead, other reasons are offered. The balancing of interests, then, is a means to determine whether the challenged action served a legitimate end, that is, whether the speech was restricted because the ideas were objectionable or whether its restriction was only incidental to the advancement of a legitimate interest of government.

The second criticism of the balancing test — that it licenses judges to uphold or strike down laws on the basis of their personal values rather than those expressed in the Constitution — has some validity. This argument, however, is overstated because it ignores the function and limitations of the balancing test. When the stated governmental interest is a harm resulting from the idea expressed, the Court does not balance interests: if the harm is that persons hearing the speech will act upon it, the Court employs a variety of the clear and present danger test;[7] and if the harm is that the speech directly injures the listener, the Court uses tests of categorization, determining whether the speech may be classified as fighting words, obscenity, or libel.[8] It is only when the harm at which the law is purportedly directed is not caused by the content of the speech that the Court relies on a balancing analysis to discover whether antipathy for the content of the speech underlies the law.

The Court's use of the balancing technique to resolve these limited first amendment issues is intertwined with ancillary first amendment doctrines. These doctrines, which are designed to assure that the rule affecting speech is no broader than necessary to accomplish the desired legitimate purpose and that the appropriate rule-making body focused on the speech problem, include prior restraint, narrow construction, preemption, overbreadth, vagueness,

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5. *Cf.* A. MEIKLEJOHN, POLITICAL FREEDOM 56 (1960) (Meiklejohn goes so far as to argue that "the logic of the plan of self-government, as defined by the Constitution, decisively rejects the 'balancing' theory . . .")

6. *See* Bogen, *The Supreme Court's Interpretation of the Guarantee of Freedom of Speech*, 35 MD. L. REV. 555 (1976) [hereinafter cited as *Freedom of Speech*].

7. *See id.* at 563-73.

8. *See id.* at 575-615.

and equal protection.[9] If a governmental act is not invalidated under one of these doctrines, the Court is almost always willing to balance in favor of the government — the Court has already determined that the appropriate governmental body has considered the need for the action in light of its effect on speech and has acted only to the extent necessary to further its nonspeech interests. The balancing test may be viewed as a rare resort in case the protectable interest is slight or the magnitude of law's effect on expression suggests that the true purpose of the governmental action was to kill the idea. It is more commonly found in opinions upholding governmental acts or implied in the application of ancillary doctrines invalidating the challenged action.[10]

This Article sets forth the major categories of governmental interests invoked in cases to which balancing applies. It examines the manner in which the Court has approached these cases in order to demonstrate how the Court's decisions can be reconciled with the general theory of the first amendment stated above.

## I. SPEECH PLUS

*"It's not what she says, but the way that she says it."*

Until an idea is expressed, neither the government nor any individual other than the person having the idea knows of its existence. The expression of the idea, however, is not itself the idea, and the mode of expression may pose a threat to governmental interests quite apart from that posed by the idea. To use an extreme example, assassination of a public official may express opposition to government policies, but it is also an act of murder. The attempt to protect citizens from the consequences of the mode of expression

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9. *See* Bogen, *First Amendment Ancillary Doctrines*, 37 MD. L. REV. 769 (1978) [hereinafter cited as *Ancillary Doctrines*].

10. For example, Justice Harlan's concurrence in United States v. O'Brien, 391 U.S. 367 (1968), *see* text accompanying notes 70 to 79 *infra*, posited a law that was clear and precise, deliberately restricting all forms of speech to further a legitimate public interest. He then raised the possibility that the hypothetical law's effect on speech would be so great that the Court would declare it unconstitutional. *See* text accompanying note 78 *infra*.

In the preparation of opinions, members of the Court may consider balancing and ancillary doctrines simultaneously. The order of consideration in the opinion itself, however, is a product of the writer's desire to persuade. If the law is to be invalidated, the Court is likely to begin with an emphasis on its impact on speech and then show how ancillary doctrines forbid it. If the law is to be upheld, the Court will begin by analyzing the importance of the interest secured by the law and proceed to demonstrate how the law before it is tailored to secure the interest. The use of the balancing test apart from ancillary doctrines to strike down governmental acts is very unusual, however, and it is in that sense that the text refers to it as a "rare resort."

chosen is likely to be legitimate, but some scrutiny is necessary to be sure that such regulation is not simply a pretext for suppressing the idea. Litigation over regulation of the means of expression has involved five major areas: picketing and demonstrations, symbolic speech, expenditures of money to influence the political process, speech that is an integral part of a commercial transaction, and censorship of broadcast media.

### A. *Picketing and Demonstrations — The Public Forum*

The use of the streets and sidewalks of a community as a public forum is a cheap way to reach the public with ideas, and sometimes enables the speaker to reach the portion of the public with whom he is particularly concerned more effectively. In *Thornhill v. Alabama*,[11] the Supreme Court struck down a statute that prohibited picketing a business on the ground that the statute was overbroad.[12] The Court pointed out that picketing at the site of the business may be the only practicable means by which interested parties "may enlighten the public on the nature and causes of a labor dispute. The safeguarding of those means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern."[13] The Court then stated that the statute failed to identify any legitimate state interests to be protected:

> The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted . . . . Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern.[14]

This recognition of the connection between picketing and the dissemination of ideas was quickly followed by a recognition that picketing was more than simple communication. As Justice Douglas,

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11. 310 U.S. 88 (1940).
12. *See id.* at 99.
13. *Id.* at 104.
14. *Id.* at 105. Restrictions on the use of amplification have generated another line of cases involving regulation of means of expression. The Court has affirmed the legitimacy of limits clearly designed to protect the peace and privacy of the home, but struck down laws whose vague standards might permit administrative authorities to use a content-based licensing approach. Kovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York, 334 U.S. 558 (1948).

concurring in the reversal of another labor picketing conviction, stated:

> [p]icketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of the restrictive regulation.[15]

The focus of the Court in subsequent cases shifted to the aspects of picketing that are "more than speech" as it began to uphold state laws restricting picketing. In *Giboney v. Empire Storage Co.*,[16] the Court sustained an injunction against picketing for the purpose of forcing a merchant to refrain from selling to nonunion peddlers. The Court found that such a joint exercise of economic power was more than speech: "[the union members] were doing more than exercising a right of free speech;"[17] they "were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade."[18]

The crowning decision in the line of cases holding that picketing may be restricted was *International Brotherhood of Teamsters Local 695 v. Vogt, Inc.*,[19] in which the Court sustained an injunction against picketing that had caused several truck drivers to refuse to make pickups or deliveries at the plaintiff's plant. Justice Frankfurter's opinion for the Court reviewed the history of its labor picketing decisions — "[t]hese cases involved not so much questions of free speech as review of the balance struck by a State between picketing that involved more than 'publicity' and competing interests of state policy"[20] — and concluded that labor picketing was a form of economic pressure that could be forbidden when utilized to frustrate a valid state policy.[21]

It has not been entirely clear whether the vulnerability of picketing to regulation stems from its nature as a signal to others who have tacitly agreed to use their economic position to aid

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15. Bakery & Pastry Drivers Local 802 v. Wohl, 315 U.S. 769, 776-77 (1942) (Douglas, J., concurring).

16. 336 U.S. 490 (1949).

17. *Id.* at 503.

18. *Id.*

19. 354 U.S. 284 (1957).

20. *Id.* at 290.

21. *See id.* at 293-95.

picketers[22] or from the implied threat of force or other intimidation which physical presence presents.[23] When the general public is addressed *and* the physical presence of the pickets presents no threat, the Court has permitted the picketing. When the picketing is aimed at persuading the general public not to purchase the products of the struck company as opposed to forcing other employers to cease doing business with that company, the Court has permitted the picketing.[24]

When related problems were raised by demonstrations, particularly those of civil rights groups during the 1960's, the Court tended to apply the balancing tests derived from the labor cases, although the conduct on which it focused was inconvenience to others using the streets, rather than implied threats or an exertion of economic power. Before attempting to balance the interest ostensibly protected by the statute against the interests of speech, however, the Court first demanded that the law be narrowly drafted to focus on the particular legitimate interest. For example, in *Edwards v. South Carolina*,[25] the Court reviewed the convictions of persons who demonstrated on the statehouse grounds. The Court characterized the demonstrations as "an exercise of . . . basic constitutional rights in their most pristine and classic form,"[26] but nevertheless suggested that such a demonstration could be punished if it violated laws specifically directed to the physical presence of the demonstrators: "[i]f, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case."[27] The convictions were reversed because the breach of peace statute violated was too vague and could have been directed against the ideas being expressed.[28]

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22. *See id. See also* T. EMERSON, *supra* note 4; Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 591-602 (1951).

23. *See* NLRB v. Fruit & Veg. Packers Local 760, 377 U.S. 58, 82-83 (1964) (Harlan, J., dissenting). *See also* Honolulu Typographical Union No. 37 v. NLRB, 401 F.2d 952, 957 (D.C. Cir. 1968); Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896).

24. *See* NLRB v. Fruit & Veg. Packers Local 760, 377 U.S. 58 (1964) (construing statute to permit such picketing); *Ancillary Doctrines, supra* note 9, at 696-701.

25. 372 U.S. 229 (1963).

26. *Id.* at 235.

27. *Id.* at 236 (footnote omitted).

28. *See id.* at 237. More specifically, the Court explained that

> [t]he Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views . . . . [T]he courts of South Carolina have defined a criminal offense so as to permit conviction of the petitioners if their speech stirred people to anger, invited public dispute, or brought about a

Similarly, the Court struck down a breach of the peace conviction in *Cox v. Louisiana*,[29] because the statute was "unconstitutionally vague in its overly broad scope."[30] The Louisiana Supreme Court had defined the statutory term "breach of peace" as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet."[31] Referring to the statute struck down in *Edwards*, the *Cox* Court concluded that "[b]oth definitions would allow persons to be punished merely for peacefully expressing unpopular views," and ruled that the statute was "unconstitutional in that it swe[pt] within its broad scope activities that are constitutionally protected free speech and assembly."[32]

Two other statutes in *Cox* were directed more specifically to conduct. The first forbade obstructing public passages, and the Court indicated that a uniformly enforced policy designed to regulate traffic would be constitutional even though it might prevent certain demonstrations at certain times:

> The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection.[33]

Nevertheless, because the Louisiana authorities had not applied the obstruction statute uniformly and had allowed various parades to take place, the Court struck down a conviction. The statute contained no standards to guide the administrators in its application, and this discretion gave rise to the possibility, which may have been suspected in the case, that the statute would be enforced only against those who opposed local authorities.[34]

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> condition of unrest. A conviction resting on any of those grounds may not stand.

*Id.* at 237-38. *See also Ancillary Doctrines, supra* note 9, at 714-26 for a discussion of vagueness in the context of ancillary doctrines.

29. 379 U.S. 536 (1965).

30. *Id.* at 551. *See also Ancillary Doctrines, supra* note 9, at 705-14 for a discussion of overbreadth.

31. 379 U.S. at 551 (quoting LA. REV. STAT. ANN § 14:103.1 (West 1962) (repealed 1976)).

32. *Id.* at 551-52.

33. *Id.* at 554.

34. *See id.* at 557-58. *See generally Ancillary Doctrines, supra* note 9, at 682-85.

The defendants in *Cox* were also convicted of violating a statute which forbade picketing near a courthouse with the intent to influence persons there in the performance of their duties. The Court upheld this statute on its face. It identified the interest to be protected as the fair administration of justice and noted that picketing was conduct that implied physical pressure, and that, as conduct, it could be regulated.[35] Because the regulation was narrowly limited to picketing "near" the courthouse, it did not attempt to suppress the idea of judicial criticism. Thus, the Court held that the statute on its face was "a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection."[36] The Court reversed the convictions, however, because according to the on-the-spot interpretation of the police official the location of the picketing was not "near" the courthouse.[37]

Two more cases illustrate the manner in which the Court has carefully focused on the interests that the statutes prohibiting demonstrations were designed to serve, striking them down whenever the interest included the suppression of distasteful speech but upholding them when a clearly speech-neutral interest was perceived. In *Brown v. Louisiana*,[38] the Court reversed a conviction under the Louisiana breach of the peace statute of defendants who had stood quietly in a public library to demonstrate discontent with the library's segregation policies. The Court noted that the breach of the peace language was the same as that involved in *Cox*[39] but a different portion of the statute was involved because the conduct took place in a public building. The Court found that the demonstrators did not violate the statute because no disruption of the library had occurred, but concluded that even if the statute did apply to the defendants' conduct, it could not constitutionally be applied to punish the petitioners' actions[40] because they had a constitutional right "in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities."[41] Two notions are combined in this approval of the

35. 379 U.S. at 563 (1965).
36. *Id.* at 564.
37. *Id.* at 572–73.
38. 383 U.S. 131 (1966).
39. Both cases applied LA. REV. STAT. ANN. § 14:103.1 (West 1962) (repealed 1976). For the statute's definition of breach of the peace, see text accompanying note 31.
40. 383 U.S. at 142.
41. *Id.*

demonstrators' conduct. First, the location of the protest was open to the general public. Second, the demonstrators' conduct did not interfere with the primary use of the building:

> Fortunately, the circumstances here were such that no claim can be made that use of the library by others was disturbed by the demonstration. Perhaps the time and method were carefully chosen with this in mind. Were it otherwise, a factor not present in this case would have to be considered. Here, there was no disturbance of others, no disruption of library activities, and no violation of any library regulations.[42]

The Court has, however, recognized a right to exclude all persons from certain areas even though they wish to express ideas there. In *Adderley v. Florida*,[43] the Court upheld convictions for trespass of demonstrators on jailhouse grounds protesting the arrest of their fellows. In *Brown* the Court intimated that the arrests for breach of peace were in fact based on dislike for the message of the protestors, but in *Adderley* there was no evidence to suggest that the trespass arrest was made "because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest."[44] When the interest that the state seeks to protect is the use of its facilities for a designated purpose without interference, and the nature of those facilities is not inherently open to the public as are streets and parks, the state can bar unauthorized persons. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[45]

In the past several years, the Court has been forced to decide whether particular municipal property is ordinarily open to the public and the consequences of allowing particular members of the public to use that property as a forum. In *Lehman v. City of Shaker Heights*,[46] the Court held that a city could bar political advertisements from its buses on the theory that public transportation, rather than constituting a normal public forum, was a commercial venture provided by the city, and that card space was incidental to the provision of transportation and merely part of the commercial

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42. *Id.*
43. 385 U.S. 39 (1966).
44. *Id.* at 47.
45. *Id.*
46. 418 U.S. 298 (1974).

venture.[47] Given this limited view of the public-forum aspects of public transportation, the Court looked to the equal protection clause to define the applicable rule of law, reasoning that the denial of access to advertising on public transit to all political speech did not appear designed to suppress such speech, but rather to "minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience."[48] The plurality opinion was written by Justice Blackmun and joined by Chief Justice Burger and Justices White and Rehnquist. Justice Douglas concurred on the basis that *all* messages on buses are addressed to a captive audience who are there for necessary transportation, and no speaker has a right to force his message on a captive audience.[49] Justice Brennan argued in dissent that although the city need not have transit advertising, the decision to lease the space for commercial and public service advertisements made it a public forum and that such space could not, therefore, be denied on the basis of content.[50]

An interesting contrast between content and place regulation was presented in the case of *Southeastern Promotions, Ltd. v. Conrad*.[51] The district court had refused to enjoin the implementation of a theatre director's order denying an application for the use of

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47. Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce . . . . The card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

*Id.* at 303.

48. *Id.* at 304. *See* discussion of equal protection in *Ancillary Doctrines, supra* note 9, at 726-36.

49. "In my view the right of commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience." 418 U.S. at 307 (Douglas, J., concurring). Justice Douglas had dissented many years earlier in Public Utils. Comm'n v. Pollak, 343 U.S. 451, 467 (1952), from a decision upholding the bus company's practice of broadcasting radio programs in buses and streetcars.

50. *See* 418 U.S. at 314-15 (Brennan, J., dissenting). Justice Brennan employed a balancing test to determine whether the card space was a public forum: "'The determination of whether a particular type of public property or facility constitutes a 'public forum' requires the Court to strike a balance between the competing interests of the government, on the one hand, and the speaker and his audience, on the other.'" *Id.* at 312 (footnote omitted). Because the transit system had opened the space for advertising, Justice Brennan found no significant government interest in restricting speech. Having found the card space to be a public forum under his balancing test, he argued that the content-oriented restriction of speech could not be sustained. *Id.* at 315.

51. 420 U.S. 546 (1975).

a municipal facility for the showing of the play "Hair" on the ground that conduct in the production was obscene and thus was not entitled to first amendment protection.[52] The Supreme Court found that because a municipal theatre is a public forum "designed for and dedicated to expressive activites,"[53] such rejection constituted an unlawful prior restraint in violation of the first amendment. As this was a public forum, the majority found that prior restraint would be justified only when the defendants' actions fell within one of the narrowly defined exceptions to first amendment protection, such as obscenity, and then only when certain procedural safeguards were followed.[54] The dissenters argued, *inter alia*, that the city could create a forum for limited speech purposes, and that given this limited nature, the content of the play need not be considered obscene in order to be excluded from the theatre.[55] Chief Justice Burger and Justice White argued that even if "Hair" were not obscene for adults, "Chattanooga may reserve its auditorium for productions suitable for exhibition to all the citizens of the city, adults and children alike."[56] Justice Rehnquist stated that "if it is the desire of the citizens of Chattanooga, who presumably have paid for and own the facility, that the attractions to be shown there should not be of the kind which would offend any substantial number of potential theatergoers, I do not think the policy can be described as arbitrary or unreasonable."[57]

In its public forum aspect, *Conrad* may be thought of as a *Lehman* twist. There was no captive audience in *Conrad*, and the *Lehman* dissenters were joined by Justices Douglas and Blackmun in finding the theatre to be a public forum in which the attempted municipal control of content was improper. But Justice Rehnquist's suggestion that the majority decision destroys managerial control is not necessarily accurate. If the management decision were based on the likely profit to be made by the play in a lease that provided for a percentage of the income as rent, or if the theatre were dedicated to plays and its use denied to lectures, such decisions might be upheld

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52. Southeastern Promotions, Inc. v. Conrad, 341 F. Supp. 465 (E.D. Tenn. 1972).
53. 420 U.S. at 555.
54. *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.

*Id.* at 560 (emphasis in original). *See also Ancillary Doctrines, supra* note 9, at 688.
55. *See, e.g.*, 420 U.S. at 571-72 (Rehnquist, J., dissenting).
56. *Id.* at 569 (White, J., dissenting).
57. *Id.* at 572 (Rehnquist, J., dissenting) (footnote omitted).

by the Court. They would, or might, be based on factors extraneous to the ideas expressed.

In *Food Employees Local 590 v. Logan Valley Plaza, Inc.*[58] Justice Marshall, in the course of setting forth the rules governing picketing on state-owned property, summarized the state's interest in such regulation as follows:

> Thus, where property is not ordinarily open to the public, this Court has held that access to it for the purpose of exercising First Amendment rights may be denied altogether. . . . Even where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the State. . . .
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> In addition, the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it.[59]

In general, these rules have governed as to public property; if it is open to the public, regulation must be based on interference with its normal use or with the rights of others having equal rights to access. Justice Marshall was overly sanguine, however, in attempting to apply the same rules to private property when the owners invited members of the general public, explaining the Court's decision to strike down an injunction against labor picketing in a suburban shopping center as follows:

> All we decide here is that because the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," . . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.[60]

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58. 391 U.S. 308 (1968).

59. *Id.* at 320–21.

60. *Id.* at 319–20. *Logan Valley* has its roots in Marsh v. Alabama, 326 U.S. 501 (1946), a case in which a company town had attempted to ban all handbilling. The majority there overturned the trespass convictions on the theory that when a privately owned area takes on *all* the attributes of a town, its rules may be deemed public for first amendment purposes.

The Court's ringing defense of shopping center speech in *Logan Valley* has subsequently been shelved — the Court first distinguished *Logan Valley* to a shadow of itself and then blew the shadow away. On the basis of the *Logan Valley* decision, anti-war demonstrators in Portland, Oregon obtained an injunction in district court to prevent the owners of a shopping complex from interfering with their handbilling. In *Lloyd Corp. Ltd. v. Tanner*,[61] the Supreme Court reversed, emphasizing the rights of private property owners. *Logan Valley* was distinguished on the grounds that, first, the message there was directly related to the property,[62] and, second, the location of the store with whom the labor dispute existed in *Logan Valley* was such "that no other reasonable opportunities for the pickets to convey their message to their intended audience were available."[63]

In *Hudgens v. NLRB*,[64] the plurality opinion of Justice Stewart conceded that "the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*,"[65] and the concurring opinion of Justice Powell agreed that *Logan Valley* should be overruled.[66] The *Hudgens* Court concluded that a large self-contained shopping center is not the equivalent of a municipality, and that the restrictions of the first amendment on governmental action therefore did not apply to the owner of the shopping center. In short, "the pickets . . . did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike . . . ."[67]

The Court's opinion in *Lloyd* was by no means as absolute as the *Hudgens* decision suggests. Indeed, the thrust of the *Lloyd* opinion was to create a balancing test — the rights of the private property owner to unilateral control of his property balanced against interests of free speech: "It would be an unwarranted infringement

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61. 407 U.S. 551 (1972).

62. The significance of the first distinction is questionable in view of the fact that on the day that it decided *Lloyd* the Court held in Central Hardware Co. v. NLRB, 407 U.S. 539 (1972), that the first amendment did not protect a labor organization's use of handbilling in the customer parking lot of a downtown store in order to organize that store.

63. *Id.* at 563. In *Lloyd,* on the other hand, the anti-war message clearly had no relation to any purpose for which the shopping center was being used, and thus was plainly directed at the general public as opposed to the operators of the enterprise. Moreover, the Court viewed the public streets surrounding the enclosed shopping mall as providing an alternative site for communication. *Id.* at 564.

64. 424 U.S. 507 (1976).

65. *Id.* at 518.

66. *See id.* at 523 (Powell, J., concurring).

67. *Id.* at 521.

of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accomodation would diminish property rights without significantly enhancing the asserted right of free speech."[68] In this balance, it appears inevitable that the property owner will win unless the effect of law supporting him will totally suppress discussion of some matter.

The *Hudgens* case was remanded to the National Labor Relations Board, which, under section 7 of the National Labor Relations Act, was required to weigh employees' rights to organize and take concerted action for mutual aid and protection against the property rights of the shopping center owner. On remand, the Board upheld the right of the union to picket on the ground that there were no other reasonable means of communication for employees seeking to publicize the facts of their dispute.[69] Thus, despite the language of its opinion, the *Hudgens* Court did not really consider what result would have been required under the first amendment if all other means of communication had been unavailable.

Governmental respect for individual property and the owner's right to control use of it does not normally evidence an attempt to stifle speech. When there is only one location at which certain ideas might have a significant audience, however, allowing the owner to prevent such speech suggests a possible intention to stifle all speech other than that emanating from the government. Virtually every community has some locations open to the public. When all such places are privately owned, so that there is no possibility of public discussion without the consent of owners of private property, the Court may yet find that they are the equivalent of a municipality for the purposes of that community. Such an approach would enable the Court to distinguish *Hudgens* and assure that trespass laws are not used as a mechanism to suppress speech. At present, a majority of the Court believes that trespass laws serve legitimate social interests if other means of communication remain open and perhaps even if they do not, but a minority of its members has expressed concern that the diminution in public discussion may be more significant than the injury to a property owner who has opened his property to the general public.

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68. 407 U.S. at 567.
69. Scott Hudgens, 230 N.L.R.B. 414 (1977).

### B. *Symbolic Speech — The Banner Still Waving*

Picketing and marching are not the only forms of expression that present "speech plus" difficulties. Forms of symbolic speech may also raise the issue whether prohibitory legislation is directed at the expressive act or against the idea expressed. In *United States v. O'Brien*,[70] the Supreme Court considered the constitutionality of a statute prohibiting the knowing destruction or mutilation of a draft card.[71] The Court of Appeals for the First Circuit had held that because the conduct punishable under the statute at issue was also punishable under the existing nonpossession statute,[72] the destruction or mutilation statute served no permissible interest and ran afoul of the first amendment by singling out persons engaged in public protest.[73] In reversing this determination, the Supreme Court held that the government's interest in preventing the destruction of draft cards was separate from, and unrelated to, any desire to curtail the expression of opposition to the nation's military policy,[74] and articulated the following general test for resolving "speech plus" questions:

> we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[75]

This is as clear a statement as can be found on the methodology of the Court in "speech plus" cases. The first clause requires a court to find that the challenged regulation comes within the affirmative powers granted to the government, for example, that it is a regulation of commerce, or that it is "necessary and proper" for raising an army. Next, the regulation must further an "important or substantial" government interest. The *O'Brien* opinion does not

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70. 391 U.S. 367 (1968).

71. 50 U.S.C. app. § 462(b)(3) (1976).

72. 32 C.F.R. 1617.1 (revoked 1972).

73. O'Brien v. United States, 376 F.2d 538, 541 (1st Cir. 1967).

74. The Court found that the statute promoted verification of the registration and classification of suspected delinquents, communication between registrants and local draft boards, observance of other statutory requirements and the prevention of fraudulent use of the draft cards. 391 U.S. at 378-80.

75. *Id.* at 377.

speak of balancing because it is assumed that if the interest is important the incidental impact on speech will not prevent the regulation, but balancing occurs nonetheless, for the government interest must be important or substantial before it justifies restricting free speech. This criterion suggests that the Court was attempting to ensure that the interest asserted was real and not just a pretext for censoring thought. The third clause identifies the core of the Court's reading of the first amendment: that the governmental interest pursued cannot be the suppression of ideas.[76] Finally, the requirement that the restriction be no greater than is essential to the furtherance of the interest is a variation of the ancillary first amendment doctrines of vagueness, overbreadth, and improper delegation; if the law prohibits more speech than is necessary to vindicate the governmental interest, it may also be directed at ideas rather than simple vindication of the interest.

The general principles stated in *O'Brien* continue to command great support on the Court.[77] There is, however, a caveat expressed in Justice Harlan's concurring opinion that a regulation may be invalid if it results in total suppression of an idea:

> [T]his passage [the test from *O'Brien* quoted above] does not foreclose consideration of First Amendment claims in those rare instances when an "incidental" restriction upon expression, imposed by a regulation which furthers an "important or substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a "speaker" from reaching a significant audience with whom he could not otherwise lawfully communicate.[78]

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

> The reference of *O'Brien's* second [third as used in text above] criterion is . . . not to the ultimate interest to which the state is able to point, for that will always be unrelated to expression, but rather to the causal connection the state asserts. If, for example, the state asserts an interest in discouraging riots, the Court will ask why that interest is implicated in the case at bar. If the answer is (as in such cases it will likely have to be) that the danger was created by what the defendant was saying, the state's interest is not unrelated to the suppression of free expression within the meaning of *O'Brien's* criterion . . . .

*Id.* at 1497.

77. *See, e.g.*, Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 93-94 (1977); Buckley v. Valeo, 424 U.S. 1, 16-17 (1976); Procunier v. Martinez, 416 U.S. 396, 413 (1974).

78. 391 U.S. at 388-89 (Harlan, J., concurring).

This caveat is consistent with the majority's analysis in that it also suggests a focus on whether the government may in fact have been using legislation neutral on its face to suppress thought.

*O'Brien* has been criticized by commentators who argue that the legislation in question was adopted for the purpose of suppressing dissent to the war in Vietnam.[79] The legislative history suggests that the penalty was higher for destruction of such cards than for wilful nonpossession in order to deter protestors who expressed their disapproval of governmental policies by burning their draft cards. Yet, if the rationale was to adjust the penalty to the level necessary to deter the specific harm to the selective service system (the mass destruction of draft cards), it was directed to a legitimate state interest. Thus, the Court supported the law.

Another form of symbolic speech that has received increasing attention is flag desecration. The communicative connotation of the flag has long been recognized by the Court, and this may be the reason that a majority of the Court has never upheld a conviction for flag desecration.[80] In *Street v. New York*,[81] the Court overturned a conviction because it may have been based on the defendant's casting of contemptuous words upon the flag rather than his act of burning it.[82] A Massachusetts flag desecration statute, which made it a criminal offense to treat "contemptuously" the flag of the United States, was struck down for vagueness in *Smith v. Goguen*.[83] Goguen had worn a small flag sewn to the seat of his trousers. The Court found the line between casual and contemptuous treatment of the flag too uncertain to give the defendant notice that his conduct was proscribed.

When presented with an analogous statute that prohibited "improper use" of, and specifically forbade attaching any mark upon, the flag, the Court held in *Spence v. Washington*[84] that the

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79. *See* T. EMERSON, *supra* note 4, at 84-85.

80. *Cf.* note 101 and accompanying text *infra* (flag desecration may be a form of "symbolic speech").

81. 394 U.S. 576 (1969).

82. *Id.* at 594. *But see* Radich v. New York, 401 U.S. 531 (1971) (per curiam), in which an equally divided Court upheld the conviction of an artist who had used the flag in his work, wrapped in the shape of a penis.

83. 415 U.S. 566 (1974). *See also* discussion of vagueness aspects of *Goguen* in *Ancillary Doctrines, supra* note 9, at 721-22.

84. 418 U.S. 405 (1974) (per curiam). It should be pointed out that, in addition to the removability of the tape and the private ownership and display of the flag, the Court relied on the fact that the defendant's message was direct and likely to be understood, that he was charged under an improper use statute rather than a desecration statute, and that the flag was displayed in a manner commonly used to communicate ideas.

statute could not constitutionally be applied to a person who attached a peace symbol to the flag with removable tape. After pointing out that the defendant's flag was privately owned and had been displayed on private property, the *Spence* majority ruled that the defendant's action was a form of protected expression.[85] They then catalogued the reasons that the state might offer for its "improper use" statute other than suppressing speech. There was nothing in the record to suggest that the display had threatened to cause a breach of the peace, and, as the Court noted, offense to the sensibilities of passers-by cannot be sufficient to stop speech.[86] Moreover, there was no suggestion that Spence's use had created any risk that people would erroneously assume he was a government official or endorsed by the government. The only interest that the Court suggested might justify the legislation was the need to preserve the physical integrity of the flag so that it could be used in the future as a patriotic symbol. Because the tape that Spence used was removable, the Court held that such an interest did not apply to him, and that he could not properly be convicted. The majority thus left open the question of the validity of narrowly drawn flag desecration statutes.[87]

Justice Rehnquist, joined by Chief Justice Burger and Justice White, argued that the true interest of the state is in "preserving the flag as 'an important symbol of nationhood and unity,' "[88] and that this is a legitimate state interest: "the flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it."[89] They found no attempt to suppress speech because the statute still permitted verbal criticism of the flag; only defacing the flag was prohibited.[90] Finally, the dissenters found

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85. *Id.* at 408–09. The Court characterized the defendant's conduct as "a pointed expression of anguish by appellant about the then current domestic and foreign affairs of his government." *Id.* at 410.

86. *Id.* at 412.

87. *Id.* at 415. The majority in *Goguen* carefully avoided direct commitment on the fundamental free speech issues involved in flag desecration statutes, passing only on the vagueness and overbreadth of the statute. *Spence* involved an improper use statute, so there is still no direct ruling on a narrowly drawn flag desecration statute such as the federal one.

88. 418 U.S. at 421 (Rehnquist, J., dissenting).

89. *Id.* at 422 (Rehnquist, J., dissenting) (quoting Smith v. Goguen, 415 U.S. 566, 587 (1974)).

90. 418 U.S. at 422–23. *Accord,* Smith v. Goguen, 415 U.S. at 599 (Rehnquist, J., dissenting) ("Since the statute by this reading punished a variety of uses of the flag which would impair its physical integrity, without regard to presence or character of expressive conduct in connection with those uses, I think the governmental interest is unrelated to the suppression of free expression.").

untenable the majority's distinction of flag desecration statutes from the improper use statute which the majority held could not be applied to Spence:

> The suggestion that the State's interest somehow diminishes when the flag is decorated with *removable* tape trivializes something which is not trivial. The State of Washington is hardly seeking to protect the flag's resale value, and yet the Court's emphasis on the lack of actual damage to the flag suggests that this is a significant aspect of the State's interest. Surely the Court does not mean to imply that appellant *could* be prosecuted if he subsequently tore the flag in the process of trying to take the tape off.[91]

The state's interest in preserving the flag as a symbol of national ideals is frustrated by any criticism of the state, so of course such an interest is not a valid one.[92] The interest in preserving a particular flag owned by a private person so that others may use it, if the present owner so allows, for their own patriotic purposes is incredibly trivial in view of the ease with which another flag can be made and the speculative nature of future use of that particular one. Thus, it is likely that Justices Brennan, Marshall, Powell, and Stewart, who participated in the *per curiam* opinion in *Spence*, and Douglas, who concurred in it,[93] would overturn all flag desecration statutes despite the studious avoidance of the issue in *Goguen*.[94]

The property interest of the nation in the flag postulated by the dissenters in the flag desecration cases is unique. Justice White

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91. 418 U.S. at 420 (Rehnquist, J., dissenting) (emphasis in original).

92. The assumption of the Court in *Street* was that verbal expressions of contempt for the flag were clearly protected by the first amendment. Yet, if the flag represents a set of ideas, verbal criticism of the country or its ideals can distort the message of the flag as greatly as physical abuse. Professor Ely has suggested that the state could argue that defacing a flag interferes with the message of the state like a heckler interfering with a speaker. Ely, *supra* note 76, at 1504. The defiling of a flag should not have any such impact.

93. 418 U.S. at 415 (Douglas, J., concurring). Justice Douglas' opinion indicated no support for the theory of the flag as "national property."

94. Smith v. Goguen, 415 U.S. 566, 583 n.32 (1974). Justice Blackmun's concurrence in the result in *Spence* must be viewed in light of his dissent in *Goguen*. In *Goguen*, he stated that punishment of the defendant was permissible "for harming the physical integrity of the flag by wearing it affixed to the seat of his pants." 415 U.S. at 591. His concurrence in the *per curiam* opinion in *Spence* is thus surprising. It may be illuminated somewhat by the emphasis of the dissenters in *Spence* that the state interest is not merely the "physical integrity of the flag," (citing Justice Blackmun's dissent in *Goguen*), but also preserving the flag as a symbol. This suggests that Justice Blackmun saw the interest only in terms of preserving the physical character of the flag.

argued in *Goguen* that because the United States has made the flag its national symbol by law, the United States is the owner of the design and thus may restrict its use however it wishes. Ownership of a design, however, is very different from ownership of a specific material object. Its closest analogy is to proprietary interests protected by copyright law.[95] This analogy would support laws to prevent the use of the flag in a fraudulent fashion to suggest that a product is produced or supported by the government. It does not, however, support flag desecration statutes. Copyright laws encourage expression by granting limited monopolies for commercial exploitation;[96] the government does not need any such monopoly protection to encourage the expression of its views or ideals. Further, copyright laws do not prohibit a critic from disparaging a copyrighted title or language within the work, nor do they prevent a purchaser from burning a copy of the work to show his displeasure with it.[97] The only governmental interest apparent in preserving the physical integrity of the flag is the promotion of respect for it, and this interest should not suffice.[98] The government may properly issue guidelines for the display or use of the flag by those who wish to show respect, but condemnation for failure to show respect is difficult to square with any other case in this area. The attempt to justify such condemnation by pointing to the nonexpressive features of the conduct reflects more love than logic,[99] more realism than

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95. Justice Rehnquist even made this analogy in *Goguen*, 415 U.S. at 602–03 (Rehnquist, J., dissenting).

96. *See generally* 1 M. NIMMER ON COPYRIGHTS §§ 1.01–.11 (1978).

97. "Mr. Wolfe is in the middle of a fit. It's complicated. There's a fireplace in the front room, but it's never lit because he hates open fires. He says they stultify mental processes. But it's lit now because he's using it. He's seated in front of it, on a chair too small for him, tearing sheets out of a book and burning them. The book is the new edition, the third edition, of Webster's New International Dictionary, Unabridged, published by the G. & C. Merriam Company of Springfield, Massachusetts. He considers it subversive because it threatens the integrity of the English language." R. STOUT, GAMBIT 2 (Bantam ed. 1964) (Nero Wolfe burning third edition of *Webster's New International Dictionary* page by page).

98. "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, . . . or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). In that case, the Court held that school authorities could not require Jehovah's Witnesses to salute the flag.

99. Justice Rehnquist's opinion in *Goguen* collects many eloquent examples of the use of the flag to symbolize the glorious hopes and ideals of our nation. Smith v. Goguen, 415 U.S. 566, 601–02 (Rehnquist, J., dissenting). Yet its status as the symbol *par excellence* for what this country means to itself and to mankind makes its defilement a particularly expressive gesture. If defacing the flag is a punishable taboo, it is so only because we cannot bear to have our history and ideas rejected. Yet

reason,[100] and, unfortunately, more speciousness than concern for speech. Nevertheless, at least in rhetoric, even the justices who would uphold flag desecration statutes cling to the principle that the government may not punish for the purpose of suppressing the idea of opposition to the government. Symbolic acts have been recognized as speech[101] and the divisions on the Court are over the legitimacy of the nonspeech interest that the government asserts in condemning the act.

### C. *Expenditures for Political Purposes — "Money Talks"*

Despite the insistent repetition of the phrase "free speech," it remains true that most speech costs money. If ideas are to be translated into changes in society, they need a larger audience than will be available to the sidewalk speaker. If a government wishes to suppress an idea in our society, it need not forbid expression; it will be almost as effective if it merely forbids the expenditure of money to promote the idea. On the other hand, money may be used for far more than the purchase of a temporary means of communication. It can buy votes, and the prevention of bribery and corruption in the political process is a proper end of legislation. Moreover, there are no first amendment problems with most governmental attempts to reduce disparities of wealth or the severity of inequalities of power stemming from disproportionate wealth. Thus we have a progressive tax system, programs of social welfare, recognition of fundamental rights which must be afforded persons unable to pay, etc. But when Congress attempted to redress the imbalance in ability to communicate that stems from inequalities in wealth, the Court ruled that the first amendment forbade it.

In *Buckley v. Valeo*,[102] the Supreme Court struck down federal laws limiting the amount of money an individual could spend in

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in making the flag a sacred object, we ourselves defile it; for its central meaning is that all people must be free to criticize every aspect of government.

100. The reference to state flag desecration statutes in the Court's opinion in *Goguen, id.* at 581–82, indicates the depth of feeling involved in this issue. Allowing flag desecration might hurl the Court into bitter attacks reminiscent of those which greeted its decisions on school prayer. *E.g.*, Engel v. Vitale, 370 U.S. 421 (1962). Attacks on objects of reverence are always hated and feared. Nonetheless, Justice Jackson's words in *Barnette* hold true here: "The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own." 319 U.S. at 641.

101. *See, e.g.*, Spence v. Washington, 418 U.S. 405 (1974) (per curiam); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969). In *Tinker*,the wearing of black armbands was recognized as speech "closely akin to 'pure speech. . . .'" *Id.* at 505.

102. 424 U.S. 1 (1976) (per curiam).

promoting his own candidacy or political views, basing its holding upon the premise that political expression is one of the most fundamental first amendment activities, and the dependence of such communication on expenditure of money had never itself been deemed to introduce a nonspeech element into such expression.[103] The Court reasoned that if the government's interest is the prevention of an idea from being accepted because it has greater circulation than competing ideas, the interest is inextricably tied to the forbidden end of suppressing ideas.[104] The Court did not need to resort to any form of a balancing test in order to reach this conclusion.[105]

Other aspects of the federal legislation gave the Court more problems. Money may be spent in aid of a candidate in order to make him act favorably towards the spender. This is a subtle form of bribery. When money is given to the candidate directly and the candidate then chooses to spend it in the campaign, the initial gift is subject to regulation, which raises no significant problem of free speech, to prevent the possibility of corruption. If the money is given directly to the campaign at the candidate's behest, the essence of the problem remains; it still may be an exchange agreement of money for candidate favor. The Court therefore upheld that portion of the federal legislation that limited contributions to the candidate's campaign committee.[106]

Rather than contributing to the campaign, independent groups or persons may make direct expenditures to support a candidate or his position. Such expenditures may also be attempts to influence the candidate to do favors for the spender, but the absence of any coordination between the candidate and the person expending money in support of his candidacy substantially weakens the ability of that person to obtain favors from the candidate. As the Court stated, "[t]he absence of pre-arrangement and coordination of an expenditure with the candidate or his agent not only undermines the

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103. *See id.* at 39.

104. *See id.* at 48-49, 54.

105. The Court explained that

> [t]he interests served by the Act include restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns. . . . Unlike *O'Brien*, where the Selective Service System's administrative interest in the preservation of draft cards was wholly unrelated to their use as a means of communication, it is beyond dispute that the interest in regulating the alleged "conduct" of giving or spending money "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful."

*Id.* at 17.

106. *Id.* at 29.

value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[107] Thus, the Court found that portion of the legislation that limited direct expenditure to support a candidate or his position unconstitutional because it burdened expression without serving any substantial governmental interest.

Recently, the Court once more considered legislation against expending money for political purposes. In *First National Bank of Boston v. Bellotti*,[108] it struck down a Massachusetts statute that prohibited corporations from making expenditures for the purpose of influencing the vote on referendum proposals not materially affecting the property, business, or assets of the corporation. The statute further specified that no question concerning the taxation of income, property, or transactions of individuals shall be deemed to have such a material effect on any corporation.

Justice Powell's opinion for the majority is interesting on two counts. First, he explicitly stated that the issue was not whether the party suing had first amendment rights — a concern that focuses on the speaker — but rather that "the question must be whether § 8 abridges expression that the first amendment was meant to protect."[109] Although the *O'Brien* criteria[110] led naturally to a focus on the expression rather than the identity of the speaker, *Bellotti* provided the first occasion for the Court to make this explicit. This shift in focus from speaker to speech in turn led to the conclusion that speech on political issues before the electorate is subject to the protections of the first amendement.

Having concluded that the applicable speech was clearly entitled to first amendment protection, Justice Powell then inquired into, and quickly rejected, the notion that the speech might be deprived of its protection by virtue of the corporate identity of the speaker.[111] Only Justice Rehnquist's dissent argued the validity of the Massachusetts law based on the proposition that corporations have no first amendment rights.[112]

The other dissenters agreed that corporations are protected by the first amendment but argued that the prohibition at issue was justified by the potential for using advantages conferred by the state

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107. *Id.* at 47.
108. 435 U.S. 765 (1978).
109. *Id.* at 776.
110. *See* notes 70 to 78 and accompanying text *supra*.
111. 435 U.S. at 784.
112. *Id.* at 822-28 (Rehnquist, J., dissenting).

for business purposes to acquire an unfair advantage in the political process. This justification, which bears a close relationship to the concern rejected in *Buckley*,[113] was rejected by the *Bellotti* Court on the theory that "[t]he fact that advocacy may persuade the electorate is hardly a reason to suppress it . . . ."[114] Justice Powell found no need to pursue further discussion on any argued distortion of the political system because he found "no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts or that there has been any threat to the confidence of the citizenry in government."[115]

It is Justice Powell's treatment of the second justification proffered that is striking. Massachusetts had argued, and the dissenters agreed, that the legislation was needed to ensure that corporate shareholders would not be compelled to support ideas with which they disagreed. The majority responded that the limit to referenda, and particularly referenda on taxation of individuals, was underinclusive because corporate speech on many other issues could be equally offensive to shareholders. Justice Powell's opinion further argued that the statute did not permit expenditures even if the shareholders unanimously approved them and disapproving shareholders had the opportunity to bring a derivative suit for corporate waste to protect their interests, and concluded that the overbreadth and underinclusiveness of the statute "undermine[d] the plausibility of the State's purported concern for the persons who happen to be shareholders in the banks and corporations covered by § 8."[116]

In sum, the *Bellotti* Court saw that the real purpose of the Massachusetts statute was to secure passage of taxation proposals by limiting the speech of its opponents. When the interests proffered by the state were slight or were tied to suppressing the expression of ideas, the balance in *Buckley* and *Bellotti* was struck in favor of expression.

### D. *Commercial Speech — The Marketplace of Ideas?*

Commercial speech has had an interesting history in the Court. It is treated here, in the discussion of "speech plus," because it is by definition inextricably linked to an act — the exchange of money for goods or services. Speech colors such transactions, but it is the

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113. *See* notes 102 to 105 and accompanying text *supra*.
114. 435 U.S. at 790.
115. *Id.* at 789–90 (footnote omitted).
116. *Id.* at 793.

transaction itself that concerns the government. The purpose of most regulations of commercial speech is to prevent purchasers from being deceived or harmed, not to prevent them from having ideas about certain goods. The Court has been careful to distinguish between speech that is merely paid for by the speaker or by the listener, and speech by a person engaged in commerce and directed at influencing a commercial transaction. Only the latter is covered by the term "commercial speech."[117]

The commercial speech cases began with *Valentine v. Chrestensen*,[118] which upheld a time, place, and manner ordinance that prohibited distribution of commercial handbills or advertising matter upon any public street or in any public place. The defendant had attempted to attract customers to an exhibition of a submarine by distributing handbills that advertised the submarine on one side and protested the refusal of the city to allow him to use certain wharf facilities on the other. The Court viewed this protest as a ruse calculated to insulate the advertisement from regulation. If the handbill had contained only the protest against the denial of facilities, it might have been protected, but the ordinance was not directed at such protest. It applied only to commercial advertising on handbills, and the Court sustained this limited application, explaining:

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.[119]

Thus the Court regarded advertising merely as a component of a commercial transaction and determined that, as such, it could be regulated in the public interest.[120]

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117. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels., 413 U.S. 376, 385 (1973). *See* text accompanying note 129 *infra*.

118. 316 U.S. 52 (1942).

119. *Id.* at 54.

120. The state can regulate such transactions by forbidding tampering with the goods, by forbidding false or misleading statements to induce their purchase, or by

Another case decided on similar grounds was *Breard v. Alexandria.*[121] There a municipal ordinance of Alexandria, Louisiana which forbade uninvited door-to-door solicitation of orders for the sale of goods had been applied to the sale of magazine subscriptions. A similar ordinance had previously been held unconstitutional as applied to Jehovah's Witnesses promoting their religious beliefs,[122] but the Court distinguished the Alexandria ordinance on the basis that its object was commercial activity. Justice Douglas dissented on the ground that magazine subscriptions were a form of expression entitled to the protections of the first amendment. The Court, however, focused on the act of sale, pointing out that the ordinance applied to all such commercial activities and was not directed at stopping the spread of information, despite its incidental effect on magazine sales. The salesman was not promoting particular views; he was trying to make a profit.

In *Valentine* and *Breard* the Court was faced with regulations of the time, place, and manner of engaging in commercial speech. Although the Court has been more receptive to regulations of the time, place, and manner of engaging in speech than to content regulation, it had previously struck down regulations similar to those in *Valentine* and *Breard* when they were applied to political speech.[123] The laws invalidated could have amounted to an effective foreclosure of forums for political speech, raising at least the possibility that the regulations were adopted for the purpose of suppressing ideas. But the *Valentine* and *Breard* Courts may have perceived that such a purpose was quite unlikely when the speech affected was commercial in nature. Forbidden to solicit door-to-door or to handbill in the streets, businesses will turn to advertising in the media or through the mail and add the costs of such advertising to the price of the goods. In other words, increasing the costs of communication for noncommercial speech may totally silence it, but increasing the cost of commercial speech is likely simply to increase

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forbidding intrusive advertising. *See generally* Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising,* 90 HARV. L. REV. 661 (1977).

121. 341 U.S. 622 (1951).

122. Martin v. City of Struthers, 319 U.S. 141 (1943). Even in *Martin* the Court was closely divided. The dissenters saw the local ordinance as directed at the act of intruding on an individual's privacy at his residence, but the majority argued that because the individual could protect his or her privacy by a "no solicitors" sign, the ordinance swept too broadly in preventing persons from spreading their ideas in places where the resident might actually be willing to listen to them.

123. An anti-littering law prohibiting the distribution of handbills on public streets was invalidated in Lovell v. City of Griffin, 303 U.S. 444 (1938), when applied to noncommercial speech, and a door-to-door solicitation ban was struck down when applied to the Jehovah's Witnesses in Martin v. City of Struthers, 319 U.S. 141 (1943).

the cost of the product or service.[124] This suggests that time, place, and manner limitations on commercial speech are responsive to legitimate state concerns of aesthetics and personal privacy rather than illegitimate attempts to suppress the ideas and information communicated.

The Court in *Valentine* and *Breard* reacted to its perception that time, place, and manner restrictions which were impermissible for noncommercial speech had a different quality as applied to commercial speech, by announcing that commercial speech was not protected by the first amendment. In other words, the Court applied a categorization test when faced with such speech.[125] Time, place, and manner restrictions did not totally stifle commercial speech, and the Court did not feel obliged to examine the intent underlying such regulation. When faced with subsequent laws directed at the content of, rather than the manner of engaging in, commercial speech, the Court was forced to scrutinize the justifications proffered for such laws and to change its doctrines.[126]

The treatment of commercial speech began to change in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.[127] There, a city ordinance proscribed discrimination in employment on the basis of sex and made it unlawful for "any person . . . to aid . . . in the doing of any act declared to be an unlawful employment practice by this ordinance."[128] Pursuant to

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124. *But cf.* Bates v. State Bar of Ariz., 433 U.S. 350, 376 (1977) (rejecting the argument that attorney advertising would result in higher attorneys' fees and concluding that the effect of allowing attorney advertising would likely be the opposite). For a discussion of the impact of commercial speech on the overbreadth doctrine, see *Ancillary Doctrines, supra* note 9, at 712-13.

125. *See* note 8 and accompanying text *supra*.

126. The labels affixed to the categories of unprotected speech — fighting words, obscenity, libel — appear to refer to the content of the speech. The definitions used by the Court, however, require distinctions to be made on the basis of the context of the speech — whether the words were uttered face-to-face, whether the speaker was negligent in gathering facts, or whether the purpose of the speaker was to arouse lust. This definitional process has enabled the Court to ensure that the legislature focused on an interest unrelated to the suppression of expression. Commercial speech, however, is always uttered in the context of an exchange transaction. Thus, a statute's focus on the context of the speech does not assure the Court of a legitimate interest motivating the legislation.

127. 413 U.S. 376 (1973). It is interesting to note that although the dissent in Lehman v. City of Shaker Heights, 418 U.S. 298, 308 (1974) (Brennan, J., dissenting) had expressed doubt as to the special position of commercial speech, it went on to say that it was "sufficient for the purpose of public forum analysis merely to recognize that commercial speech enjoys at least *some* degree of protection under the First Amendment, without reaching the more difficult question concerning the *amount* of protection afforded." *Id.* at 314-15 n.6 (emphasis in original).

128. 413 U.S. at 378.

this law, the Pittsburgh Press was ordered to cease and desist from making any reference to sex in employment advertising column headings, except for jobs exempt from the ordinance. The newspaper argued that the law infringed freedom of the press, but, in a five-to-four decision, the Court upheld the order.

Justice Powell, writing for the majority, began by pointing out that "no suggestion is made in this case that the Ordinance was passed with any purpose of muzzling or curbing the press. Nor does Pittsburgh Press argue that the Ordinance threatens its financial viability or impairs in any significant way its ability to publish and distribute its newspaper."[129] He concluded that the want-ad headings were commercial speech under *Valentine* rather than protected speech under *New York Times Co. v. Sullivan*:[130]

> The critical feature of the advertisement in *Valentine v. Chrestensen* was that, in the Court's view, it did no more than propose a commercial transaction, the sale of admission to a submarine. . . . In the crucial respects, the advertisements in the present record resemble the *Chrestensen* rather than the *Sullivan* advertisement. None expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize the Ordinance or the Commission's enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.[131]

The newspaper argued that even if the want ads were commercial speech, the column headings were separate statements by the paper. Justice Powell replied that "[t]he combination [of want ad and sex-

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129. *Id.* at 383 (footnote omitted). When laws have singled out the communications media for restriction, the Court has struck them down. *See, e.g.*, Grosjean v. American Press Co., 297 U.S. 233 (1936), invalidating a tax on gross receipts derived from advertising by publications having a weekly circulation in excess of 20,000. "[I]n the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." *Id.* at 250. When the laws have been part of a broader scheme of control not discriminating against the media, regulations which affected the media have been upheld. *See* Breard v. Alexandria, 341 U.S. 622 (1951) (statute prohibiting door-to-door sales applied to peddlers of magazine subscriptions). *See also* Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (application of the Sherman Antitrust Act to newspapers); Associated Press v. NLRB, 301 U.S. 103 (1937) (application of the National Labor Relations Act to a news service).

130. 376 U.S. 254 (1964).

131. 413 U.S. at 385.

differentiated column headings], which conveys essentially the same message as an overtly discriminatory want ad, is in practical effect an integrated commercial statement."[132] His majority opinion also

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132. *Id.* at 388. Chief Justice Burger in dissent saw the newspaper's action as disassociated from the employer's discrimination. He stated that "[a]ssuming, *arguendo,* that the First Amendment permits the States to place restrictions on the content of commercial advertisements, I would not enlarge that power to reach the layout and organizational decisions of a newspaper." *Id.* at 393. Surely individuals are permitted to hold the opinion that certain jobs are more suitable for, or appealing to, one sex than another and to express that opinion. Moreover, the paper ran the following notice underneath its column headings:

> Jobs are arranged under Male and Female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances — local, state and federal, prohibit discrimination in employment because of sex unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination.

*Id.* at 394. Chief Justice Burger concluded: "Especially in light of the newspaper's 'Notice to Job Seekers,' it is unrealistic for the Court to say, as it does, that the sex-designated column headings are not 'sufficiently disassociate[d]' from the 'want ads placed beneath [them] to make the placement severable for First Amendment purposes from the want ads themselves.'" *Id.* (footnote omitted).

Justice Stewart, dissenting, also assumed that "the city may prohibit employers from indicating any such discrimination [as to sex] when they make known the availability of employment opportunities." *Id.* at 400. But the order in question was directed at the newspaper, not the employer. The newspaper did not itself discriminate in employment of its employees and its decision to place the want ads in sex-segregated columns was arguably an exercise of journalistic discretion. As Justice Stewart saw it, the question was "whether any government agency — local, state, or federal — can tell a newspaper in advance what it can print and what it cannot." *Id.* "Under the First and Fourteenth Amendments," he concluded, "no government agency in this nation has any such power." *Id.* (footnote omitted).

The essence of the division on the Court was whether the newspaper was acting independently in making its sex-segregated columns or was enmeshing itself in an act of sex discrimination by the advertiser. The dissenters pointed out that the existence of column headings and the decision as to what ads were placed in which column were made by the newspaper, so that, in effect, the column headings were tantamount to an expression of opinion by the newspaper as to the job preferences of men and women. As a disinterested comment, such action would surely be protected speech, but the majority concluded that the headings were tied to illegal discrimination. If an employer advertises for men only, it engages in a discriminatory hiring practice even though no female applicant is rejected, because the ad assures the company of no or few female applicants. Because such speech is illegal, a newspaper may be prohibited from acting as the employer's agent in publishing it. By establishing sex-segregated column headings, the newspaper encourages employers who wish to discriminate to use its paper as a means of accomplishing that end. This practice is profitable to the paper, and thus may be characterized as a deliberate attempt to make a profit out of a sex-discriminatory transaction. The same remedial result might be obtained by prohibiting employers from advertising in a newspaper which used sex-segregated columns. (This approach would prevent the awkward situation of an order running against the newspaper and would achieve the same

hinted at a willingness to use a balancing test for commercial speech, but found that the illegality of the transaction advertised made reconsideration of the appropriate test for commercial speech unnecessary, stating that "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."[133]

Justice Douglas' dissent in *Pittsburgh Press*[134] suggested that the time had come for a reevaluation of the commercial speech rules. This suggestion bore fruit in *Bigelow v. Virginia.*[135] Jeffrey Bigelow, the editor of the Virginia Weekly, published an advertisement in his newspaper for a New York abortion referral agency and was convicted under a provision of the Virginia criminal code which provided: "If any person by publication, lecture, advertisement, or by the sale or circulation of any publication or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor."[136] After his conviction was upheld in the Supreme Court of Virginia, the United States Supreme Court remanded the case for consideration in light of its decisions in *Roe v. Wade*[137] and *Doe v. Bolton,*[138] which had held unconstitutional state laws forbidding abortion. After the Virginia Court reaffirmed Bigelow's conviction on the ground that *Roe* and *Doe* did not deal with abortion advertising, the case was again appealed to the Supreme Court.

The Court began its consideration by recognizing that commercial advertisements may involve the communication of ideas, emphasizing that the ideas and information in advertisements may be of interest to the general public and not just to persons considering buying the advertiser's product or service:

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result of forcing editorial changes in column headings, but at a substantial administrative cost.) Thus, the majority felt that the Pittsburgh ordinance was focused on a transaction rather than the suppression of ideas about the propriety of that transaction.

133. *Id.* at 389.

134. *Id.* at 397-99. Justice Douglas' dissent was noted in Lehman v. City of Shaker Heights, 418 U.S. 298, 314-15 n.6 (1974) (Brennan, J., dissenting), which also raised the question of the appropriate approach to commercial speech.

135. 421 U.S. 809 (1975).

136. VA. CODE § 18.1-63 (1960) (repealed 1975).

137. 410 U.S. 113 (1973).

138. 410 U.S. 179 (1973).

> The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear "public interest." Portions of its message, most prominently the lines, "Abortions are now legal in New York. There are no residency requirements," involve the exercise of the freedom of communicating information and disseminating opinion.[139]

The opinion's apparent stress on material of public interest in advertisements is probably misleading in that it suggests that the contents of commercial speech can be regulated unless they are of "clear public interest," and the Court is unlikely to follow that suggestion. Most advertisements communicate information — the claims that the Vega hatchback gets thirty-seven miles per gallon on highways according to tests by the Environmental Protection Agency and that the Pinto is the lowest priced American-made car, for example, are certainly informative. Such statements made in a noncommercial context between a disinterested third party and an individual interested in the purchase of a new car would be protected speech under all the previous decisions of the Court.[140] As the dissenters in *Rosenbloom v. Metromedia, Inc.*[141] pointed out, a constitutional test making protection of expression depend on the court's definition of material of "public interest" would place courts in the position of establishing what subjects are appropriate for public discussion. A content-oriented test of constitutional protection is the antithesis of the Court's first amendment decisions. In the libel area, the Court has abandoned the distinction (suggested in *Rosenbloom*) based on definition of what matters are "of public or general concern" and reverted to its earlier distinctions between private individuals and public officials or public figures.[142] The reluctance of the Court to define matters of public or general concern for purposes of libel law strongly indicates that it will not attempt to

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139. 421 U.S. at 822.

140. Assuming the statements were false, the only law that might apply to prohibit them would be libel. This in turn assumes that the state law on libel or commercial disparagement applies to things. In Gertz v. Welch, Inc., 418 U.S. 323 (1974), the Court made it clear that even false statements of fact are constitutionally protected unless they are made negligently. For a discussion of libel, see *Freedom of Speech, supra* note 6, at 602-12.

141. 403 U.S. 29 (1971). In *Rosenbloom,* Justice Marshall, dissenting, pointed out that if libel law is made to depend on a determination of public interest "courts will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government. . . . The danger such a doctrine portends for freedom of the press seems apparent." *Id.* at 79 (Marshall, J., dissenting).

142. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

do so in determining the constitutionality of commercial speech regulation. Thus, the stress on information and ideas of "clear public interest" in *Bigelow* may be viewed merely as a demonstration of the significance of commercial speech for democratic government.

Starting with the proposition that commercial speech may contain valuable ideas, the Court in *Bigelow* rejected the notion that such speech was not protected by the first amendment. It turned from the definitional process which it had employed in *Valentine* and *Breard* to a balancing test: "a court may not escape the task of assessing the first amendment interest at stake and weighing it against the public interest allegedly served by the regulation."[143] This recognition of balancing as the appropriate test for determining the constitutionality of regulations of commercial speech may not result in a radical break from the analysis of *Valentine*, however. The Court had held commercial speech unprotected because it was seen as an integral part of a commercial transaction subject to regulation. Preventing harm in the commercial transaction will normally be the "public interest" served in any regulation of commercial speech, and it will normally outweigh the first amendment interest of the speaker or advertiser. Thus, it appears that most commercial speech regulation will be upheld under a balancing test just as such regulation was upheld under *Valentine's* categorization approach. On the other hand, a few cases will be resolved against regulation under the balancing test when the state fails to proffer a substantial interest.

Although the *Bigelow* Court referred to balancing the first amendment interest against the public interest served by the state, scant attention was actually paid the first amendment interest in advertising a commercial abortion referral service. Instead, Justice Blackmun's opinion for the Court focused on the lack of any public interest to sustain the statute. The Court noted that there was no claim that the New York abortion referral service affected the

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143. 421 U.S. at 826. In Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels., 413 U.S. 376, 402-03 (1974) (citations omitted), Justice Stewart wrote in dissent:

> So long as Members of this Court view the First Amendment as no more than a set of "values" to be balanced against other "values" that Amendment will remain in grave jeopardy. . . .
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> . . . .
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> Those who think the First Amendment can and should be subordinated to other socially desirable interests will hail today's decision. But I find it frightening.

Justice Stewart's position in joining the *Bigelow* majority casts doubt upon his repudiation of balancing in *Pittsburgh Press*.

quality of medical care in Virginia,[144] that the advertisement was deceptive or fraudulent,[145] or that it related to a commodity or service that was then illegal in Virginia or New York.[146] Justice Blackmun thus characterized the state interest as the prevention of its citizens from hearing about activities beyond its borders, a view arguably supported by reference to the statute, which on its face forbade encouraging abortions not merely by advertisements for commercial referral services but by any "publication, lecture, advertisement or by the sale or circulation of any publication, or in any other manner . . . ."[147] An attempt to prevent persons from informing others of their legal rights is on its face an attempt to suppress the idea and is forbidden by the first amendment. By characterizing the state's

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144. 421 U.S. at 827. Thus, the case is distinguishable from Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963), in which advertising the price of glasses was forbidden even for out-of-state firms because it might result in poorer quality glasses sold or marketed by competing in-state firms. Competition among doctors and medical facilities for abortions was not so keen, especially in view of the fact that Virginia law prohibited abortions under most circumstances at the time the advertisement was published.

145. 421 U.S. at 828. The Court may be analogizing to libel here, theorizing that the utterance of an intentionally deceptive or fraudulent statement is an act intended to cause harm and that the forbidding of such a statement is a means of controlling an act within the state, regardless of its extraterritorial reference.

146. *Id.* The legality of abortion referral services in Virginia is misleading. Most abortions were illegal in Virginia under state law at the time of Bigelow's conviction. Thus, there were no Virginia abortion referral services because within the state there was no legal place for persons wanting abortions to be referred. Under these circumstances, in-state abortion referral agencies posed no problem and out-of-state agencies would have no significant effect unless they advertised their services — an act which, as in Bigelow's case, would bring them within the terms of the statute.

It should also be noted that the service advertised was performed outside the state and could not have been regulated directly by Virginia. Both the commerce clause and the privileges and immunities of United States citizenship prevent Virginia from prohibiting its citizens from using in New York services which are legal there.

147. VA. CODE §18.1-63 (1960) (repealed 1975). The statute on its face posed obvious problems of overbreadth. It surely could not constitutionally be applied to advocates of abortion who did not themselves engage in any commercial transactions involving abortion. However, after Bigelow's conviction, the legislature changed the statute to apply only to urging illegal abortions. The application of the former statute to Bigelow could not have chilled the first amendment rights of others because this subsequent amendment made it inapplicable to the acts for which he was convicted. Thus the Court refused to rule that the overbreadth of the statute was fatal.

The Court could still have employed overbreadth analysis to invalidate the statute for failure to give Bigelow an adequate warning. As applied in most instances, the statute was clearly unconstitutional. When he printed the ad, Bigelow knew the statute as written was contrary to the first amendment, but he could not have been sure whether it would, or constitutionally could, be applied to his conduct. Thus, the application of such a broad statute solely to Bigelow's conduct might have been viewed as a violation of due process.

interest as preventing its citizens from hearing about their legal rights, Justice Blackmun was able to conclude that "[t]his asserted interest, even if understandable, was entitled to little, if any, weight under the circumstances."[148]

Although *Bigelow* involved the advertising of a constitutionally protected right, the Court swiftly made it clear that the balancing test would apply to commercial speech even when the transaction advertised was subject to regulation. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[149] the Court struck down Virginia's prohibition on advertising the price of drugs. The avowed purpose of Virginia's law was to suppress price competition because such competition results in poorer professional services. The Court expressed some doubts as to the effectiveness of the statute in accomplishing this aim in view of the fact that professional standards are separately regulated. More significantly, it noted that the state could fix prices for drugs if it feared bad effects from price competition. By opting instead for suppressing truthful information, the state was in this sense *avoiding* regulation of the underlying transaction. Thus, the Court concluded that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients,"[150] reasoning that "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."[151]

The shift from a categorization approach to a balancing of interests test for commercial speech has enabled the Court to distinguish between laws protecting consumers in commercial transactions and laws attempting to suppress ideas communicated by persons engaged in commercial transactions. As a result, the Court is now likely to afford commercial speech first amendment protection rather than merely categorizing it as unprotected and, hence, subject to broad governmental regulation.

This transition is exemplified by the Court's decision in *Linmark Associates, Inc. v. Township of Willingboro*,[152] a case in which a ban on the use of "for sale" signs was invalidated. Many people might find great social utility in information on abortion services or the prices of drugs, but the use of "for sale" signs on property is not

148. 421 U.S. at 828.
149. 425 U.S. 748 (1976).
150. *Id.* at 773.
151. *Id.* at 770.
152. 431 U.S. 85 (1977).

likely to be accorded as high a place on a scale of social values. Time, place, and manner restrictions may be valid where the mode of expression affects a governmental interest unrelated to the content of speech. Moreover, the limited prohibition of signs on lawns appeared to be a limit on the place of speech that might be justified as a valid time, place, and manner restriction of a mode of expression that affected a governmental interest unrelated to the content of the speech. The Court, however, discerned that the restriction applied only to signs having a particular content, and that it was the content, not the location, that caused the harm the town council sought to prevent.

As it had done in the pharmacists' case, the Court in *Linmark Associates* carefully examined the legitimate interests that a state may have in regulating commercial speech. The state is, of course, legitimately concerned with the prevention of illegal activity, but the sale of a house is perfectly legal. The state may also attempt to protect a consumer from being injured in a commercial transaction; when false or misleading statements cause the consumer to enter into a transaction, they cannot be severed from the commercial act. No false or misleading statement was involved in *Linmark*, however, and the Court concluded that "[t]he Council's concern, then, was not with any commercial aspect of 'For Sale' signs — with offerors communicating offers to offerees — but with the substance of the information communicated to Willingboro citizens."[153] As the *Virginia State Board of Pharmacy* case had made clear, the government has no legitimate interest in suppressing ideas and information out of fear that citizens will take lawful action which is unwise.

In *Carey v. Population Services International*,[154] New York attempted to put forth a new state interest to justify suppression of advertisements: it prohibited the advertising or display of contraceptives on the grounds that they are offensive and embarrassing to those exposed to them. The Court rejected this interest as merely another attempt to suppress ideas or information because some people find them distasteful.[155]

In *Bates v. State Bar of Arizona*,[156] the Court again demonstrated that it will scrutinize carefully the interest alleged in regulating commercial speech. The dissenters found that a rule

153. *Id.* at 96.
154. 431 U.S. 678 (1977).
155. *Id.* at 701-02.
156. 433 U.S. 350 (1977).

prohibiting advertising by lawyers protected the public from misleading statements on the theory that because the services performed by an attorney are not standardized as are those of the pharmacist, any mention of prices for services would mislead. The majority, however, found that the routine legal services mentioned in the appellants' advertisement were sufficiently standardized and that, because this speech did not mislead, its prohibition was not justified.

Recently the Court distinguished the truthful advertising of legal services involved in *Bates* from in-person solicitation of clients. Although a total ban on advertising suggests a desire to suppress information, a ban on in-person solicitation is more likely an attempt to protect the consumer from being pressured into accepting unwanted services. In *Ohralik v. Ohio State Bar Association,*[157] the Court explained:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.[158]

### E. *Broadcasting Into the Home — ". . . Beep . . . Censorship"*

A similar governmental interest in protecting the rights of a potential captive audience was recognized by the Court in *FCC v. Pacifica Foundation,*[159] in which an order of the Federal Communications Commission citing the Pacifica Foundation for broadcasting "indecent" language was upheld. The language in question was a monologue by comedian George Carlin regarding the use of taboo words. The monologue was not obscene, as evidenced by the fact that the Court appeared to have no hesitation in appending a verbatim transcript of Carlin's monologue to the opinion in the case. The Court, nevertheless, upheld the FCC order which stated that sanctions could be imposed for broadcasting such material at two

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157. 436 U.S. 447 (1978).
158. *Id.* at 457 (footnote omitted).
159. 438 U.S. 726, *reh. denied,* 99 S. Ct. 227 (1978).

o'clock in the afternoon.[160] The decision was based on two special factors unique to broadcasting: the broadcast goes into the home and may affront citizens there before they can change the dial; further, it is impossible to limit access for children without affecting adults to some degree. Justices Brennan and Marchsll, dissenting, found these distinctions unpersuasive. Although they also would have balanced the speech interest against the individual's right in the privacy of his home not to be affronted by objectionable matter, the dissenters insisted that the balance had been struck wrongly: "It permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive unoffended minority."[161] They objected that the Court's balance focused on the listener who does not want to hear and ignored the listener who is eager to hear, arguing that

> [w]hatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection.[162]

Justices Powell and Blackmun subscribed to the opinion of the Court, emphasizing that the intrusive nature of broadcasting and its reach to children justified the FCC action. Thus, for the most part, Justice Stevens' opinion upholding the FCC order was for a majority of the Court. In one respect, however, Justices Powell and Blackmun disassociated themselves from Justice Stevens' opinion — they insisted that the Court cannot decide which speech is most valuable. Justice Stevens, in a portion of his opinion joined only by Chief Justice Burger and Justice Rehnquist, argued that indecent speech, like demonstrations and symbols, is not itself an opinion but merely a mode of communication. Justice Stevens also argued that the

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160. *Id.* at 750-51. The Commission has power under 47 U.S.C. §§ 312(a)(6), 312(b)(2), 503(b)(1)(E) (1976) to impose sanctions for violation of 18 U.S.C. § 1464 (1976). That section prohibits the utterance of any "obscene, indecent, or profane language by means of radio communication. . . ." Pacifica argued that the word indecent meant obscene and that Carlin's monologue was not obscene because it did not appeal to the prurient interest of the listener. Over the protests of four dissenters, the Court majority construed the statutory language disjunctively, as prohibiting "indecent" speech that was not obscene.

161. 438 U.S. at 766 (Brennan, J., dissenting).

162. *Id.* at 765-66.

regulation of indecent language in the broadcast media is wholly separate from any attempt to suppress ideas:

> If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content — or even to the fact that it satirized contemporary attitudes about four letter words — First Amendment protection might be required. But that is simply not this case.[163]

The current Court views radio and television as posing a peculiar problem because, unlike the print media, they are readily available to children. To the extent that the Commission has focused on this interest, it has not, in the opinion of the majority, attempted to suppress ideas generally: "The government's interest, in the 'well being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression."[164] The dissenters, on the other hand, assumed that because the materials were not obscene as to children, they were protected speech with respect to children. Yet, as with material that is obscene only as to children, indecent language may appeal to the child for reasons unrelated to particular points of view. It may be sought after (and used) simply for shock value. For these reasons the majority included it within the category of speech which may be given different treatment for juveniles.

## II. REGULATION FOR SPEECH REASONS

*It is often difficult to distinguish the pavement to hell from the pathway to heaven.*

Many laws prohibit certain speech or condition the legality of speech on further speech not desired by the speaker. The most common example, the propriety of which has never been seriously questioned, is procedural rules designed to allow speakers to proceed in turn.[165] While opposing points of view must be permitted, no ideas could be understood or rationally dealt with in a cacophony of conflicting voices. The confusion must be dissipated before expression can be effective. Rules of order, although they may temporarily

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163. *Id.* at 746

164. *Id.* at 749.

165. "No one has ever argued that speech should be free of the restraints of reasonable parliamentary rules . . . ." Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 23. *See also* A. MEIKLEJOHN, *supra* note 5, at 24-28.

silence a particular speaker, are necessary to prevent opposing speakers from using speech to suppress ideas.[166]

Another rule that deters some speech in order to promote speech interests is the "fairness doctrine" in radio and television. The Communications Act directs the FCC to grant broadcast licenses and renewals on a finding "that public interest, convenience, and necessity would be served . . . ."[167] Pursuant to its charge to base renewals on the "public interest," the FCC requires each broadcaster to cover controversial issues of public importance and to do so in a fair manner, presenting opposing viewpoints on each issue.[168] The obligation to present opposing views is not affected by the inability to find commercial sponsorship to pay for airing those views, and broadcasters have objected that this fact requires them to subsidize opposing views in two ways. First, if a broadcaster wishes to take a position on a controversial issue, it must also present the views of persons who disagree. Second, it is possible that the broadcaster will end up having to pay for the expression with which it disagrees. In order to avoid providing opposing views with an opportunity to be heard, and especially to avoid bearing the costs of airing those views, broadcasters may avoid making any statement on the issue.[169] Further, the fairness doctrine is enforced by a governmental agency, which raises the possibility of strict enforcement when the government is attacked and lax enforcement when a controversial government policy is explained and promoted.[170] Thus, the potential for suppressing ideas critical of the government is inherent in the "fairness" doctrine.

At the same time, allowing broadcasters to do as they please may also result in suppression of ideas.[171] In the broadcast media,

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166. [C]onduct that obstructs or seriously impedes the utterance of another, even though verbal in form, cannot be classified as expression. Rather it is the equivalent of sheer noise. It has the same effect, in preventing or disrupting communication, as acts of physical force. Consequently it must be deemed action and is not covered by the First Amendment.

T. EMERSON, *supra* note 4, at 338.

167. 47 U.S.C. § 309(a) (1976).

168. In addition to the presentation of opposing views on controversial issues, broadcasters are bound to provide a right of reply to a person who is personally attacked during the discussion of a controversial public issue. *See* text accompanying notes 174 to 177 *infra*. Further, the statute requires broadcasters to afford "equal opportunities" to candidates for public office. 47 U.S.C. § 315(a) (1976). *See generally* H. NELSON AND D. TEETER, LAW OF MASS COMMUNICATIONS 411-15 (1969).

169. *See* Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 773-74 (1972).

170. *Cf.* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 148-70 (1973) (Douglas, J., concurring) (criticizing the Fairness Doctrine generally).

171. *See* Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641, 1642 (1967).

the government licenses one person or company to operate a station. If the licensor presents only his views and dissenters are unable to obtain a license, the effect of his monopoly is to suppress the ideas of others. Licensing provides the same opportunity for political favoritism as does the fairness doctrine. The government inevitably shuts off some speech, either directly, by regulating the broadcaster, or indirectly, by giving him an unregulated monopoly. Into this damned-if-you-do and damned-if-you-don't situation, the Supreme Court has ventured.

In the seminal case of *Red Lion Broadcasting Co. v. FCC*,[172] two aspects of the fairness doctrine were challenged in the Court. The first was the requirement that coverage of public issues accurately reflect opposing views. The requirement applies even if sponsors are not found for such views, and even if no outside organization has produced a program so that the broadcaster itself must present the opposing view.[173] Also under scrutiny were the "personal attack rules," which provided that a figure attacked in the course of discussing a public issue must be given an opportunity to respond personally. Writing for the Court, Justice White sustained these regulations on the theory that:

> [t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the air waves.
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> . . . It is the right of the viewers and listeners, not the right of the broadcasters which is paramount.[174]

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172. 395 U.S. 367 (1969). *Red Lion* was actually two cases. In the first, the Radio and Television News Directors Association challenged the fairness and personal attack rules on their face. The second case involved the application of the personal attack rule to Red Lion Broadcasting Company's refusal to provide author Fred Cook with a free opportunity to reply to an attack made on him on a sponsored television show.

173. *See generally Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949).

174. 395 U.S. at 389–90. Justice White's opinion is somewhat unclear here, for if the broadcaster is acting as a proxy, it must be on behalf of others who wish to use the airwaves. Discussion of listeners' rights is an entirely separate matter. If the proxy concept was the basis for decision, the fairness doctrine seems a mechanism for preventing licensing to be used to prefer particular ideas. If listeners' rights are truly paramount, the rationale would support a wide variety of reply legislation in other media.

In response to the broadcasters' contention that the fairness doctrine reduced discussion of public issues,[175] Justice White pointed out that Federal Communications Commission rules compelled broadcasters to engage in such discussion, and noted that "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications."[176] Ultimately, the Court relied on the scarcity of licenses and the promotion of a wider range of speech in upholding this regulation of broadcast speech:

> In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulation and ruling at issue here are both authorized by statute and constitutional.[177]

The fairness doctrine alone does not assure a hearing for all points of view. On most issues, there are more than two different views. In addition, the fairness doctrine generally permits the broadcaster, rather than an advocate, to present opposing views, and the statement of a view by a broadcaster opposed to it will usually be less powerful than the statement that an advocate would make. Unless the media give individuals a right of access, some viewpoints will not be heard. Many stations, however, have refused to accept advertisements on controversial political issues in order to avoid the implications of the fairness doctrine; for if they broadcast one point of view, they might be forced to give free time to opposing views. The FCC permitted this policy of the stations, but the Circuit Court for the District of Columbia held that the stations' refusal to sell editorial time to organizations wishing to expound their views on critical issues infringed upon the first amendment rights of such

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175. It is strenuously argued, however, that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective.

*Id.* at 392-93.

176. *Id.* at 393.

177. Id. at 400-01 (footnote omitted). References to claims of access suggest that despite Justice White's reference to listeners' rights, the Court was more concerned with the effect of limited access to cut off expression by nonlicensees.

groups.[178] In *CBS, Inc. v. Democratic National Committee*,[179] the Court reversed the decision of the District of Columbia Circuit and allowed broadcasters to exercise their editorial judgment to accept or reject paid editorial advertisements so long as they fulfilled the *general* requirements of the fairness doctrine to give adequate and "fair" coverage to public issues. In so doing, the *CBS* Court, per Chief Justice Burger, first reiterated the fairness-doctrine principle that the public must be provided with a balanced presentation on issues of public importance. Looking to the legislative history of the regulation of the airwaves, the Court discerned a clear intention that a substantial measure of journalistic independence for the broadcast licensee be maintained — "that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public."[180] Given this concept of journalistic autonomy, the Chief Justice concluded that the independent actions of the broadcasters at issue did not constitute governmental action and thus were not violative of the first amendment. Justice Stewart concurred in this portion of the opinion, analogizing the first amendment rights of broadcasters to those of the press — the protection *from* governmental interference rather than subjection to full first amendment strictures *as* government.[181]

Chief Justice Burger also believed that requiring stations to take such advertisements would enlarge governmental control of the media and would pose far more serious threats to free speech than would a paucity of political advertisements. Because controversial issues must, under the fairness doctrine, be discussed by licensees in some form or manner, Justice Burger concluded that the question was not "whether there is to be discussion of controversial issues of public importance on the broadcast media, but rather who shall determine what issues are to be discussed by whom and when."[182] In answering this question, he concluded that Congress could appropriately leave that decision to licensees and that such a policy would

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178. Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971) (rehearing denied), *rev'd sub nom.* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

179. 412 U.S. 94 (1973).

180. *Id.* at 116.

181. Justice Stewart stated: "To hold that broadcaster action is governmental action would thus simply strip broadcasters of their own First Amendment rights." *Id.* at 139 (Stewart, J., concurring). Justices Powell and Blackmun found it unnecessary to decide the state action point, while Justice Douglas assumed no governmental action despite his previous arguments which point the other way. *Id.* at 150 (Douglas, J., concurring).

182. *Id.* at 130. *See also* Jaffe, *supra* note 169, at 787-89.

in fact best serve the public interest, for were access to the airwaves determined on a first come first served basis, the control over the treatment of public issues would be transferred from the licensees, who are held accountable to the FCC, to the whim of private individuals who are not.[183] In this conclusion he was joined by Justices White, Powell and Blackmun. Justice Douglas argued not only that Congress could leave the decision to private licensees, but that it was compelled by the first amendment to do so, thus indicating his disagreement even with the limited governmental regulation permitted under *Red Lion*.[184]

Justice Brennan, in an opinion joined by Justice Marshall, dissented. He argued that the interests of the people as a whole in receiving the full spectrum of views should prevail over the first amendment rights of the broadcast licensees. Moreover, he contended that there is an independent first amendment interest in effective self-expression that must be considered in the proper balancing of conflicting first amendment claims. The dissent also pointed out that the government had conferred on broadcasters the power to refuse access to other groups seeking to use a broadcast frequency. Consequently, the dissenters reasoned, the government is responsible when broadcasters refuse to permit political advertisements. Contrary to the view of Justice Douglas, they found no abridgment of speech in requiring broadcasters to accept political advertisements, stating: "we are concerned here not with the speech of the broadcasters themselves but, rather, with their 'right' to decide which *other* individuals will be given an opportunity to speak in a forum that has already been opened to the public."[185] After acknowledging that implementation of their view might raise problems of favoritism of the wealthy who can afford political advertisements, impairment of the fairness doctrine and enlargement of governmental control over content, the dissenters argued that these problems were speculative and might be met by the Commission and licensees in future regulations.[186]

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183. 412 U.S. at 124-25.

184. "I did not participate in that decision [*Red Lion*] and, with all respect, would not support it." *Id.* at 154 (Douglas, J., concurring). Regretfully, Justice Douglas never faced up to the problems created by the need for government allocation of broadcast frequencies in the first instance, but rather viewed the issue solely in the time frame of the regulation of existing, licensed, broadcasters. He could justify this by disputing the scarcity theory since with cable television and UHF there seem to be a sufficient number of frequencies for all despite Justice White's contrary conclusion in *Red Lion*.

185. *Id.* at 199-200 (Brennan, J., dissenting) (emphasis in original) (footnote omitted).

186. *Id.* at 202-03.

While the *CBS* majority perceived no intent to suppress ideas in the lack of regulation, the dissent argued that the government was simply allowing others to suppress them. To a great degree, then, the disagreement on the Court revolved around (in addition to the extent to which the government is responsible for the licensees' refusal to accept political advertising) whether that policy promotes or defeats the interests of freedom of expression. When the interest served by the law is allegedly the promotion of expression, the Court will decide whether that interest is in fact advanced. A majority seemed willing to give the government the benefit of the doubt in *CBS*, but Justices Brennan and Marshall were not.

Altnough the Court has upheld governmental regulation when, in broadcasting, the nature of the media forced government into an active licensing role, it has struck down regulatory legislation dealing with newspapers. By leaving the press essentially unregulated, the government has avoided considering the content of newspapers and thus avoided any suspicion of the suppression of ideas. The monopoly power of large newspapers, however, enables them to suppress ideas. Nevertheless, when Florida enacted legislation requiring papers to give a right of reply to any candidate for public office whose personal character or official record was attacked — a variation of the broadcast media's fairness doctrine — the Court, in *Miami Herald Publishing Co. v. Tornillo*,[187] unanimously struck it down as violative of the first amendment. Chief Justice Burger, who delivered the opinion of the Court, explained:

> the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which "'reason' tells them should not be published" is unconstitutional.[188]

In addition to the fatal flaw of compelling persons to state ideas abhorrent to them, the Court found that the Florida statute would be likely to defeat rather than promote expression:

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187. 418 U.S. 241 (1974).

188. *Id.* at 256. Forcing speech against the speaker's will operates to suppress ideas in two ways. First, by its nature it suppresses the idea that the speaker disagrees with the ideas expressed. Second, a forced statement of opposing ideas tends to suppress the original idea both by making it less likely that the original idea will be expressed and by constantly undermining it.

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate . . . ."[189]

Moreover, a rule compelling the paper to print replies would reduce the space available for publication of matters that the publisher would otherwise have printed in his editorial discretion.[190]

Although the government is inescapably involved in regulation of the broadcast media, such regulation of newspapers is not inherently necessary. This makes the Court suspicious of any legislation directed at the printed word, and willing to erect a tough barrier to prevent government suppression of ideas in the print media. Nevertheless, the Court did indicate some openness to later argument, for Justice Burger framed his conclusion in burden-of-proof terms: "It has yet to be demonstrated how governmental regulation of this crucial process [editorial judgment as to newspaper content] can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."[191]

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189. *Id.* at 257 (footnote and citations omitted).

190. *Id.* at 256. This same argument might appear equally applicable to the broadcast media. Communication depends on sponsorship, and neither a newspaper nor a broadcast station can afford to publish or air more material than can be sponsored. On the other hand, the general requirements of fairness in the broadcast industry upheld in *Red Lion* are justified because the government is shutting off access to media to nonstation owners by the very act of allocating stations. Because the government is not involved in allocating newspaper ownership, it has no clear basis for conditioning publication on compliance with its ideas of what ought be published.

191. *Id.* at 258. Justices Brennan and Rehnquist concurred in a separate opinion which stated that the decision did not take a position on "retraction" statutes, which require a paper to print a retraction of a defamatory falsehood. Justice White's concurrence emphasized the impact of *Tornillo* on libel law. His criticism of *Gertz, see* note 140 *supra,* in the *Tornillo* concurrence is that the combination leaves "people at the complete mercy of the press." Justice White had argued in his dissent in *Gertz* that an action should lie for any harmful false statement about a private person, for if it did not, the injured person could not vindicate his or her reputation. This suggests he would find even retraction statutes defective under *Tornillo.*

## III. SPEECH AS EVIDENCE OF UNFITNESS

*No one cares how much you object as long as you are not in a position to do something about it.*

The balancing test is also used when the government attempts to prevent injury to its operations by prohibiting persons with certain beliefs from obtaining positions of employment from which they might engage in harmful conduct. Here the government does not attempt to prevent speech per se, but rather uses the speech as an indicator of whether a person will perform his job properly or, conversely, in a manner deleterious to the interests of the government. Judicial contention in this area has centered on the degree of deference to be accorded the causal linkage asserted to exist between speech and action. If the employment requirement at issue is narrowed to a test that demonstrates a high likelihood that the applicant will misuse his position, the Court will sustain it. An unfortunate application of this analysis is *American Communications Association v. Douds*.[192]

In order for labor organizations to secure advantages under the National Labor Relations Act, their officers were required by section 9(h) of the act to file affidavits that they were not members of the Communist Party. That section also required the affiants to swear that they did not believe in, were not members of and did not support any organization that believes in, or teaches the overthrow of, the United States government by force or by any illegal or unconstitutional method. The Court pointed out that this legislation was not directed at suppressing the speech of communists — "[s]ection 9(h) is designed to protect the public not against what Communists and others identified therein advocate or believe, but against what Congress has concluded they have done and are likely to do again"[193] — but recognized that the law had a tendency to restrain

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192. 339 U.S. 382 (1950).

193. *Id.* at 396. Another example of a law aimed at preventing future conduct which is evidenced by present words is 18 U.S.C. § 871(a) (1976), which prohibits "knowingly and willfully . . . [making] any threat to take the life of or inflict bodily harm upon the President of the United States." In Watts v. United States, 394 U.S. 705 (1969) (per curiam), the Court reversed a conviction for violation of the statute on the ground that the statements of defendant were "political hyperbole" and not a true threat, but avoided deciding whether the statute is violated when such a threat is accompanied by an "apparent" determination to carry it out, or only when the speaker in fact intended to carry it out. When the issue arose again in Rogers v. United States, 422 U.S. 35 (1975), the Court again avoided a decision based on statutory interpretation, reversing the conviction on the grounds of prejudicial error because the trial court had given instructions to the jury without notifying the defendant or his counsel.

speech and that first amendment arguments therefore had to be considered:

> In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9(h) pose continuing threats to that public interest when in positions of union leadership.[194]

In balancing these interests, the Court gave great weight to its belief that Congress was attempting to deal with an evil other than ideas: "[*W*]e have here no statute which is either frankly aimed at the suppression of dangerous ideas nor one which, although ostensibly aimed at the regulation of conduct, may actually 'be made the instrument of arbitrary suppression of free expression of views.' "[195] The Court concluded that the statute could not have been used as an instrument of suppression because persons affected could continue to hold their beliefs without punishment if they gave up their positions in the labor movement, and only a small number of persons with these beliefs were affected by the statute.[196]

In 1950 the Court appeared willing to sustain any loyalty requirement that the legislature could rationally conclude might prevent harmful conduct by holders of particular jobs; it consistently upheld statutes that denied employment on the basis of membership in certain organizations. Thus, a requirement that candidates for public office in Maryland swear that they were not engaged "in one way or another in the attempt to overthrow the government by force or violence," and that they were not knowingly a member of an organization engaged in such an attempt was upheld in *Gerende v.*

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194. 339 U.S. at 400.

195. 339 U.S. at 402–03 (footnote and citations omitted).

196. *Id.* at 404. When the purpose of a statute is clearly to suppress an idea, the Court has not considered how many people are directly affected by the statute. Even if the statute is purportedly based on an interest unrelated to the suppression of ideas, it will not be insulated from careful judicial review because it applies to only a small number of people; if it could be insulated on this ground, the cumulative effect of several separate laws might stifle expression. Nevertheless, the Court may, as it did in *Douds,* find some support for its belief that the statute furthers an interest unrelated to speech when only a small proportion of those holding an idea are affected by the statute. When, as in *Garner, see* text accompanying notes 198 & 199 *infra,* public employment is involved, many people are affected by restrictions. This greater impact on expression, however, was weighed by the Court against the greater need the government has in insuring the proper performance of its functions.

*Board of Supervisors.*[197] Similarly, in *Garner v. Board of Public Works,*[198] the Court upheld a requirement that all employees of the city of Los Angeles take an oath that they had neither advised, advocated or taught the violent overthrow of the government within the previous five years, nor been a member of any organization that did so.[199] And in *Adler v. Board of Education,*[200] the Court upheld the "Feinberg Law," which applied a loyalty test to public school teachers in New York and permitted teachers to be

> denied . . . the privilege of working for the school system of the State of New York because, first, of their advocacy of the overthrow of the government by force or violence, or, secondly, by unexplained membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force and violence, and known by such persons to have such purpose.[201]

The Court held that this system did not deny one such teacher any rights under the first amendment:

> His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice. Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence.[202]

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197. 341 U.S. 56, 56-57 (1951) (emphasis omitted).

198. 341 U.S. 716 (1951).

199. I further swear (or affirm) that I do not advise, advocate or teach, and have not within the period beginning five (5) years prior to the effective date of the ordinance requiring the making of this oath or affirmation, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California and that I am not now and have not, within said period, been or become a member of or affiliated with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America or of the State of California.

*Id.* at 718-19.

200. 342 U.S. 485 (1952).

201. *Id.* at 492.

202. *Id.* at 493. The New York system upheld in *Adler* was subsequently repudiated in Keyishian v. Board of Regents, 385 U.S. 589 (1967), *see* note 212 *infra.*

During the same year that the Court decided *Adler,* it took its first steps towards limiting the use of loyalty tests as a condition of employment. Rather than directly employing the balancing test to strike down legislation that focused on speech as an indicator of unfitness, the Court began to invalidate such laws through an application of the overbreadth doctrine, finding them too broadly drafted to indicate a sufficiently strong causal link with the interest asserted.[203] More narrowly drawn statutes are rarely as effective in preventing people likely to abuse their position from holding office. Statistically, the percentage of people who would use their position to harm the government is likely to be higher in a group drawn from members of the Communist Party than from another, random, sampling of the population, and it is very difficult, for example, to prove that someone has knowledge of an organization's illegal ends and particularly that such person has the specific intent to further those ends. Because of such problems of proof, the overbroad statute, which imposes some disability because of associational activity, is likely to have an incremental effect on national security. At the same time, however, it cuts many people off from employment although the likelihood of their being unsatisfactory employees is small. Thus, the Court's more recent use of overbreadth in this context has been inextricably linked to a balancing analysis.

In *Wieman v. Updegraff,*[204] the case which marks the beginning of the use of overbreadth analysis to limit the use of loyalty oaths, the Court was faced with an oath that Oklahoma's highest court had construed to exclude persons from government service "solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged."[205] The Court held the oath requirement invalid under the overbreadth doctrine, pointing out that "innocent" membership in an organization posed no danger to the state: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process."[206] By including speech and association that supplied no evidence of potential for harmful conduct, the oath raised suspicion that it was directed at ideas rather than the protection of the public from harmful conduct. After *Wieman,* the Court applied the ancillary doctrine in an increasingly more stringent manner when analyzing such oaths.

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203. *See Ancillary Doctrines, supra* note 9, at 705-14 for a discussion of overbreadth.

204. 344 U.S. 183 (1952).

205. *Id.* at 190.

206. *Id.* at 191.

In *Shelton v. Tucker*,[207] the Court struck down a requirement that teachers list all their associational ties because such a listing could deter associational rights under the first amendment despite the fact that "[m]any such relationships could have no possible bearing upon the teacher's occupational competence or fitness."[208] The Court explained that:

> even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[209]

An even more stringent application of the overbreadth doctrine was made in *Elfbrandt v. Russell*,[210] in which state employees of Arizona were subject to discharge for being knowing members of the Communist Party or any other organization which had as its purpose the overthrow by force or violence of the state or federal government. In striking down the statute, the Court pointed out that a knowing member who did not personally subscribe to the illegal purposes of the party would pose no danger to the state: "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees."[211] Thus, the *Elfbrandt* Court concluded that "[a] law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' . . . ."[212]

The overbreadth doctrine has also been applied in the area of national security. In *Aptheker v. Secretary of State*,[213] the Court was faced with a federal law that prohibited application for a United States passport by any member of a communist organization that

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207. 364 U.S. 479 (1960).

208. *Id.* at 488.

209. *Id.* (footnotes omitted).

210. 384 U.S. 11 (1966).

211. *Id.* at 17.

212. *Id.* at 19 (citations omitted). The extent to which the Court's resort to ancillary doctrines rather than direct balancing of interests has led to greater protection for expression is illustrated by Keyishian v. Board of Regents, 385 U.S. 589 (1967). In that case, the Court struck down a New York statute which had, in substantially the same form, been upheld in *Adler*. Instead of overruling *Adler*, however, the *Keyishian* Court distinguished it on the basis that the parties there had not attacked the statute as being unconstitutionally vague. *See Ancillary Doctrines, supra* note 9, at 717.

213. 378 U.S. 500 (1964).

was required to register by a final order of the Subversive Activities Control Board. The Court noted that the law applied to both knowing members and those who did not know that the organization with which they were associated was a "communist" organization or that it sought to further the aims of the world communist movement and that it did not take into account the member's degree of activity in the organization or commitment to its purpose. Similarly, the statute applied regardless of the purpose of the proposed travel or the country to which the individual desired to go. On these facts the *Aptheker* Court decided that national security could be protected by a more narrowly drawn statute.[214]

Innocent membership in an illegal organization does not suggest illegal action; similarly, abstract rhetoric can be dismissed as such an indicator. A specific purpose to overthrow the government by violence is, however, a sufficient indicator that the individual would use an influential position to act. Because there has been no overt act, an individual with such a purpose may not be proceeded against criminally,[215] but he may be subject to disability legislation that is directed at the possibility of action and not speech. Thus, in *Baird v. State Bar of Arizona*[216] and *In re Stolar*,[217] the Court invalidated state requirements that applicants for admission to the bar state whether they had been a member of an organization that advocates the overthrow of the government of the United States by force. Justice Stewart, concurring in both cases in a swing opinion, wrote in *Baird*:

> Our decisions have made clear that such inquiry must be confined to knowing membership to satisfy the First and Fourteenth Amendments. . . . It follows from these decisions that mere membership in an organization can never, by itself, be sufficient ground for a state's imposition of civil disabilities or criminal punishment. Such membership can be quite different from knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals.[218]

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214. *Id.* at 514.

215. *See* Scales v. United States, 367 U.S. 203 (1961); Yates v. United States, 354 U.S. 298 (1957). *See also* the discussion of the clear and present danger test in *Freedom of Speech, supra* note 6, at 563–73.

216. 401 U.S. 1 (1971).

217. 401 U.S. 23 (1971).

218. 401 U.S. at 9 (1971) (Stewart, J., concurring) (citations omitted). Justice Stewart also concurred in In re Stolar, 401 U.S. at 31. Chief Justice Burger and Justices Blackmun, Harlan and White dissented in these two cases on the ground that

In *Law Students Civil Rights Research Council, Inc. v. Wadmond,*[219] on the other hand, the Court upheld questions on New York's bar application that were used to decide whether an applicant complied with a rule mandating a belief in the form of, and loyalty to, the government of the United States. The questions asked whether the applicant had ever been a member of an organization knowing that it advocated or taught that the federal or state government should be overturned by unlawful means, and, if so, whether the applicant had the specific intent to further such aims. The *Wadmond* Court found that such questions were precisely tailored to discovering the type of knowing membership that previous cases had held was criminally punishable,[220] and indicated that knowing membership in a society advocating unlawful acts was sufficient evidence that the member would use bar admission at some later time to commit such acts.

Justice Black, joined by Justice Douglas, dissented from this portion of the opinion on the ground that the question was overbroad because it did not specify that the organization's advocacy be directed to inciting or producing imminent lawless action and that it be likely to do so.[221] A dissenting opinion by Justices Marshall and Brennan stated that such questions constituted "an indiscriminate and highly intrusive device designed to expose an applicant's political affiliations to the scrutiny of screening authorities."[222] They focused on the vice of the first question, which asked about knowing membership without specific intent to accomplish the unlawful aims of the group, and concluded that, taken together, the questions affected discussion more than necessary to protect against misuse of position because advocacy of revolution in the far distant future presented no likelihood of immediate acts.[223]

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the questions asked merely comprised part of the groundwork for further investigation into the applicant's character.

219. 401 U.S. 154 (1971).

220. *Id.* at 165. It should be noted that the Court posited that had the plain language of the rule been the only evidence before it, more substantial constitutional questions might have been raised. Given the state committee's narrow construction of the questions — placing the burden of proof on the government, interpreting "form of government" to refer only to the federal and state constitutions and restricting "belief" and "loyalty" to the taking of an oath of loyalty to those constitutions — the Court had little trouble upholding them. It viewed the questions thus interpreted as constituting no more than a reasonable means of ascertaining that the applicant was not summarily taking an oath with which he actually disagreed. *Id.* at 162-64.

221. *Id.* at 184 (Black, J., dissenting).

222. *Id.* at 196 (Marshall, J., dissenting).

223. *Id.*

In *Communist Party of Indiana v. Whitcomb*[224] the state of Indiana had required as a prerequisite to gaining a place on the ballot that the officers of a political party or organization file an affidavit that it did not "advocate the overthrow of local, state or national government by force or violence . . . ."[225] The Communist Party of Indiana challenged this requirement, but a three-judge court upheld it.[226] The party then filed an affidavit which tracked the statute, but added:

> The term advocate as used herein has the meaning given it by the Supreme Court of the United States in *Yates v. United States,* 354 U.S. 298 at 320, the advocacy and teaching of concrete action for the forcible overthrow of the government, and not of principles divorced from action."[227]

The election board rejected the affidavit for failure to meet the statutory requirements on the theory that the statute required the oath-taker to forswear even the abstract doctrine that the government should be overthrown. Prior cases had made it clear that such an oath could not be required of a public official in a non-sensitive position,[228] but the state argued that those cases did not apply to elected positions because advocacy of the overthrow of government by force is incompatible with the use of democratic procedures. The Court responded by pointing out the devastating effect such a limitation would have — " '[o]ther rights, even the most basic, are illusory if the right to vote is undermined' "[229] — and by suggesting that a group could be barred from the ballot only if it urged illegal action rather than overthrow as abstract doctrine.[230]

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224. 414 U.S. 441 (1974). This was the first case in which the Court addressed the problem of loyalty oaths for elective officials in a full opinion since affirming Maryland's oath in Gerende v. Board of Supervisors, 341 U.S. 56 (1951).

225. 414 U.S. 442-43.

226. *Id.* at 444. The opinion of the lower court was not reported.

227. *Id.*

228. *See, e.g.,* text accompanying notes 231 to 235 *infra.*

229. Communist Party of Ind. v. Whitcomb, 414 U.S. 441, 450 (1974) (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)). Justice Powell, joined by Chief Justice Burger and Justices Blackmun and Rehnquist concurred in the result on the ground that such an affidavit was not required of Republican and Democratic parties and thus improperly discriminated in violation of the equal protection clause of the fourteenth amendment. He did not pass on the first amendment objections although he noted that *Yates* and its progeny might not control. *Id.* at 453 n.3 (Powell, J., concurring).

230. *Id.* at 450. Advocacy of a doctrine of violent overthrow is not itself illegal, and it is indeed doubtful that a known advocate would ever succeed at the polls. Moreover, success might make it even more unlikely that the doctrine would be converted to action, as a successful candidate would be likely to perceive the democratic process as

Even in areas more closely related to the national security, the Court has applied the overbreadth doctrine and, in the process, has accorded significant weight to the protected associational rights of employees. In *United States v. Robel,*[231] for example, it struck down a statute that made any employment in a defense facility unlawful for a member of an organization under a final order to register with the Subversive Activities Control Board. The Court reaffirmed the government's power to keep from sensitive positions persons who would disrupt national defense, but found that this statute affected persons who posed no such danger[232] and warned that the concept of the "national defense" statute could not be viewed as an end in and of itself justifying any use of congressional power. When the means chosen cut deeply into an employee's right of association and forced him to make a choice between surrendering his organizational affiliation and giving up his job, the majority required a more narrowly drafted statute.

Justices White and Harlan dissented on the ground that the danger of acts resulting from persons like Robel was greater than the Court thought. According to the dissenters, "[s]ome Party members may be no threat at all, but many of them undoubtedly are, and it is exceedingly difficult to identify those in advance of the very events which Congress seeks to avoid."[233] Accordingly, they would have struck the balance in favor of the governmental determination that the interest of the employee in remaining a member of the Communist Party was less substantial than the public interest in

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a preferable alternative means to his goal of changing society. If a candidate urged specific illegal acts, however, his election might place him in a position to violate the law in the manner he had suggested or in a similar fashion. Thus, the danger of action by an advocate of specific illegal acts might be sufficiently great to justify a law preventing such a person from obtaining elective office because the law might be perceived as directed at illegal acts rather than criticism of the government.

231. 389 U.S. 258 (1967).

232. That statute casts its net across a broad range of associational activities, indiscriminately trapping membership which can be constitutionally punished and membership which cannot be so proscribed. It is made irrelevant to the statute's operation that an individual may be a passive or inactive member of a designated organization, that he may be unaware of the organization's unlawful aims, or that he may disagree with those unlawful aims. It is also made irrelevant that an individual who is subject to the penalties of § 5(a)(1)(D) may occupy a nonsensitive position in a defense facility. Thus § 5(a)(1)(D) contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights.

*Id.* at 265-66 (footnotes omitted).

233. *Id.* at 287 (White, J., dissenting).

excluding him from employment in the defense industry. In reaching this conclusion Justices White and Harlan relied heavily on their view that the executive and legislative branches were better able to determine what constitutes a threat to the national security and that the statute's effect on general associational rights was minimal.[234]

The *Robel* majority abjured balancing because they did not believe it proper for the Court to label one substantial interest as more important than another. Rather, given the clear conflict between two valid goals, the Court viewed its role as one of determining whether Congress had adopted constitutional means to achieve those goals: "we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way 'balanced' those respective interests."[235] Thus, the *Robel* Court did not balance the general interest in national security against the interest of freedom of speech; the Court did balance interests, however, in the context of its overbreadth analysis. The governmental interest balanced was not the general interest in national security, but rather the need for the statute at issue, with its effect on free speech, as opposed to a more narrowly drafted (and hence less restrictive) law. The marginal utility of the statute challenged in *Robel* was slight when viewed in this manner, and it was that marginal utility that was weighed against the statute's effect on free speech. In the words of the Court in *O'Brien,* such a law will be upheld only "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of [the legitimate governmental] interest."[236]

While most of the cases discussed above have involved denial of employment predicated upon speech that suggested the speaker would have used his official position to disrupt governmental

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234. *Id.* In refuting the majority's reliance on *Aptheker* and *Scales, see* text accompanying notes 213 & 214 *supra,* the dissent stated that

> denying the opportunity to be employed in some defense plants is a much smaller deterrent to the exercise of associational rights than denial of a passport or a criminal penalty attached solely to membership, and the Government's interest in keeping potential spies and saboteurs from defense plants is much greater than its interest in keeping disloyal Americans from traveling abroad or in committing all Party members to prison. The "delicate and difficult" judgment to which the Court refers should thus result in a different conclusion from that reached in the *Scales* and *Aptheker* cases.

*Id.* at 288.

235. *Id.* at 268 n.20. *See* Gunther, *Reflections on* Robel: *It's Not What the Court Did, But the Way That It Did It,* 20 STAN. L. REV. 1140 (1968).

236. 391 U.S. at 377.

operations, situations may also arise in which employees are discharged for speech that indicates political differences with superiors. When the employee's job involves policy decisions, political views opposed to superiors may be viewed as inconsistent with the nature of the job. In *Elrod v. Burns*,[237] various officials of the Cook County Democratic organization were sued for dismissing Republican non-civil-service employees upon assumption of office. The defendants justified this patronage practice as necessary to ensure effective government by promoting the efficiency and political loyalty of public employees so as to guarantee that representative government would not be undercut by obstructive tactics. Justice Powell, in dissent, was impressed with this interest, stating that patronage positions enhanced the democratic process by stimulating political activity and thereby making government more accountable.[238] In addition, Justice Powell pointed out that patronage provided incentives to work for candidates for lesser offices.[239] In balancing these interests against the protected associational rights incident to employment, he believed that, in light of the limited role that patronage plays in governmental hiring, the awarding of jobs on a patronage basis did not constitute an impermissible abridgment of free speech.[240]

The majority, on the other hand, argued that a person's political views are irrelevant to his motivation or quality of performance in jobs that do not involve the formulation of policy, that inefficiency results from the wholesale replacement of large numbers of public employees, and that patronage encourages support of the party with the greatest chance of winning and discourages expressions of support for minority parties.[241] These arguments undercut the position that patronage fosters the democratic process, but more important to the Court's decision was its view that the resultant impairment of first amendment rights required that the interests asserted by the government withstand exacting scrutiny:

> In summary, patronage dismissals severely restrict political belief and association. Though there is a vital need for government efficiency and effectiveness, such dismissals are on balance not the least restrictive means for fostering that end. There is also a need to insure that policies which the electorate

237. 427 U.S. 347 (1976).
238. *Id.* at 379 (Powell, J., dissenting).
239. *Id.* at 384.
240. *Id.* at 388.
241. *Id.* at 360-69.

> has sanctioned are effectively implemented. That interest can be fully satisfied by limiting patronage dismissals to policymaking positions. Finally, patronage dismissals cannot be justified by their contribution to the proper functioning of our democratic process through their assistance to partisan politics since political parties are nurtured by other, less intrusive and equally effective methods. More fundamentally however, any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms.[242]

At one extreme, a law barring all who disagree with any policy of the government from certain positions might have an incremental effect in weeding out persons who would deliberately frustrate governmental operations; but that incremental effect would be insignificant in the face of the law's impact on speech. Patently, the law would be aimed at speech in disagreement with the government rather than protecting the efficiency of governmental operations. Every member of the Court would join in striking it down. At the other extreme, a law forbidding particular positions to those who admit they would use them to destroy the government would clearly protect legitimate governmental interests because its purpose would be to deal with threatened conduct and not to destroy ideas. It would be sustained unanimously. In between these extremes lie the differences in degree that have generated differences among the justices, differences which reflect varying attitudes towards the significance of the danger faced and the degree of incremental protection that the challenged law affords. Some members of the Court have been more deferential to the legislature than have others, but the application of the balancing test and the doctrine of overbreadth in civil cases challenging disability statutes ordinarily reflects differences in appreciation of the underlying facts rather than a disagreement over the principles involved.

## IV. SPEECH OF SPECIAL GROUPS IMPAIRING GOVERNMENTAL FUNCTIONS

*Swift movement is difficult for person with foot in mouth*
*—Ancient Proverb*

The Court has singled out a variety of special groups and held that their speech may be limited to a greater extent than that of the general public. These include civil service employees, prisoners and

242. *Id.* at 372-73.

military personnel. Each of these groups has a special relationship with the government, and legislatures, after finding that certain speech interferes with that relationship, have enacted legislation ostensibly aimed at assuring that such groups perform their obligations properly rather than at suppressing their ideas.

### A. *Civil Service Employees — Protecting the Privileged by Deprivation*

The earliest cases concerning special-group restrictions arose out of the prohibition of political activities by civil service employees. In upholding the Hatch Act,[243] which applied such restrictions to federal employees, the Supreme Court in *United Public Workers v. Mitchell*[244] stated:

> [T]his Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government.
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> . . . .
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> . . . Congress recognizes danger to the service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections.[245]

Justices Black and Rutledge dissented from the Court's determination, concluding that the restrictions imposed by the act were unconstitutional on their face. Justice Douglas dissented on the ground that, with respect to industrial workers such as the plaintiff whose case was decided, the absence of direct dealings with the public eliminated any basis for fear that governmental favor might be channeled through political connections. He argued that the concern that government workers might be pressured into political activity should not suffice to deny them the right to engage in such activity. The appropriate remedy, according to Justice Douglas, would have been to proscribe pressure brought by superiors, not to

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243. 18 U.S.C. § 61h (Supp. V 1940) (current version at 5 U.S.C. § 7324 (1976)). The Hatch Act prevented officers and employees in the executive branch of the federal government, with certain exceptions, from taking "any active part in political management or in political campaigns."

244. 330 U.S. 75 (1947). Although a number of civil service employees had challenged the Hatch Act, the Court found that the case was ripe only as to Mr. Poole, an employee in the United States Mint who, unlike the others, had already engaged in political activity.

245. *Id.* at 96-98.

deprive the workers of their rights.[246] Although Justice Douglas refused to pass on the merits of the claims of other federal employees, Justice Black would have found the Hatch Act unconstitutional as to them also, because he believed that a law proscribing government officials from granting or denying favors for political purposes would satisfy the government's legitimate interests without impairing the political activities undertaken by government employees in their spare time. He also argued that the statute was both vague and overbroad.

The arguments of the *Mitchell* dissenters were reviewed twenty-six years later in *United States Civil Service Commission v. National Association of Letter Carriers*[247] as a majority of the Court again upheld the constitutionality of the Hatch Act in the face of a first amendment challenge. Writing for the Court, Justice White first pointed out that the law was neutral as to ideas expressed:

> The restrictions so far imposed on federal employees are not aimed at particular parties, groups, or points of view, but apply equally to all partisan activities of the type described. . . . Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls.[248]

Such legislation is particularly unlikely to be directed at suppressing ideas because its function is to insulate employees from pressures from the party in power.[249] To the argument that laws that forbid granting benefits and promotions for political purposes could end these evils without restricting speech, Justice White replied that "for many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs it is not enough merely to forbid one employee to attempt to influence or coerce another."[250]

246. *Id.* at 126 (Douglas, J., dissenting in part). Both Justice Black and Justice Douglas argued that the claims of all the plaintiffs were ripe for decision. Justice Douglas, however, refused to consider the issues posed by plaintiffs other than Poole because the majority opinion did not reach them. Justice Black's dissent applied to all plaintiffs; Justice Rutledge joined Justice Black's dissent as applied to Poole, but agreed with the majority that the complaint of the other plaintiffs was not ripe for adjudication. *Id.* at 104-26.

247. 413 U.S. 548 (1973).

248. *Id.* at 564.

249. Although the executive branch of the federal government is often controlled by a party other than the majority party in Congress, the Congress has sufficient power in appropriations and confirmations to assure that executive officers do not force employees to work politically against the dominant power in Congress. Further, the law has been maintained during the many years when the same party controlled the presidency and both the House and the Senate.

250. *Id.* at 566 (footnote omitted).

In a dissent joined by Justices Brennan and Marshall, Justice Douglas appeared to argue for unregulated individual political activity: "In the areas of speech, like religion, it is of no concern what the employee says in private to his wife or to the public in Constitution Hall."[251] Although the dissenters made clear their view that so long as an employee's outside activities do not impair his performance on the job the government may not impose regulations upon these activities, the bulk of the dissenting opinion focused on the vagueness of the law, as typified by operative language such as "an active part . . . in political campaigns." Justice Douglas' opinion argued that the Civil Service Commission had too much discretion in ruling upon prohibited activities and hence chilled innocent speech,[252] and made similar arguments with respect to a law regulating the political activity of state employees in his dissenting opinion in a companion case, *Broadrick v. Oklahoma*.[253] The majority, however, upheld the state law challenged in *Broadrick* as pursuing a legitimate governmental interest and stated that when the state sanction applies to conduct as opposed to pure speech, the doctrine of facial overbreadth should be applied sparingly.[254] Justice

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251. *Id.* at 597 (Douglas, J., dissenting). Justice Douglas elaborated the point by stating that

> no one could object if employees were barred from using office time to engage in outside activities whether political or otherwise. But it is no concern of Government what an employee does in his spare time, whether religion, recreation, social work, or politics is his hobby — unless what he does impairs efficiency or other facets of the merits of his job. Some things, some activities do affect or may be thought to affect the employee's job performance. But his political creed, like his religion, is irrelevant.

*Id.*

252. *Id.* at 596.

> There is no definition of what "an active part . . . in political campaigns" means. . . .
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> . . . .
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> The Commission, on a case-by-case approach, has listed 13 categories of prohibited activities, 5 C.F.R. § 733.122(b), starting with the catch-all "include but are not limited to." So the Commission ends up with open-end discretion to penalize X or not to penalize him.

*Id.* at 595-99.

253. 413 U.S. 601 (1973).

254. *Id.* at 613-15.

> [T]he plain import of our cases, is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct — even if expressive — falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.

*Id.*

Douglas' *Broadrick* dissent argued that such laws cannot be valid — "[t]hose who work for government have no watered-down constitutional rights. So far as the First Amendment goes, I would keep them on the same plane as all other people"[255] — but he was alone in focusing exclusively on the speaker's right to speak. The remaining dissenters, Justices Brennan, Stewart and Marshall, avoided pronouncing on the constitutionality of statutes that regulate political activity generally[256] and focused on the asserted defects of vagueness and overbreadth in the statute at issue.[257] Thus, a clear majority of the Court was apparently willing to accept the legitimacy of a reasonably tailored statute banning political activity in the civil service absent a finding of intent to suppress the ideas which would be expressed.

### B. *Military Personnel — "Theirs not to reason why"*

Civil service employees are not the only group to have special restrictions on their speech rights. In *Parker v. Levy*[258] the Court emphasized that the distinctive factors of military society mandated a less stringent application of first amendment protections in holding that a soldier could be convicted under the Code of Military Justice for urging Black enlisted men not to go to Vietnam.[259]

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255. *Id.* at 621 (Douglas, J., dissenting).

256. Whatever one's view of the desirability or constitutionality of legislative efforts to restrict the political activities of government employees, one must regard today's decision upholding § 818 of the Oklahoma Merit System of Personnel Administration Act as a wholly unjustified retreat from fundamental and previously well-established First and Fourteenth Amendment principles.

*Id.* at 621–22 (Brennan, J., dissenting) (footnote omitted).

257. The dissenters noted that "the critical phrase of the Oklahoma Act — no employee shall 'take part in the management or affairs of any political party or in any political campaign' — is left almost wholly undefined." *Id.* at 624 (Brennan, J., dissenting). Further, the dissenters argued that the rules of the State Personnel Board promulgated under the act were overbroad. One rule stated that "[a]n employee in the classified service may not wear a political badge, button, or similar partisan emblem, nor may such employee display a partisan political sticker or sign on an automobile operated by him or under his control." *Id.* at 626–27. As the dissent pointed out, even the Court conceded that a ban on the wearing of buttons or the display of bumper stickers might be impermissible. *Id.* at 627. The majority, nevertheless, concluded that the statute, even if susceptible to some improper applications, was not substantially overbroad.

258. 417 U.S. 733 (1974).

259. *Id.* at 758. The Court explained:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible

Quoting from an opinion of the United States Court of Military Appeals, the *Levy* Court explained that:

> "[t]he armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected."[260]

The status of a soldier has two aspects. As a part of the military, a soldier must react to commands with obedience rather than inquiry in order properly to perform his function. At the same time, because the soldier is a citizen whose vote counts equally with all others in impacting the decisionmaking process, he must be free to question and criticize the military policies of his country. The majority viewed obedience and discipline as the heart of the military, however, and perceived the articles under which Levy was convicted[261] as directed at achieving military competence rather

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> within the military that which would be constitutionally impermissible outside it.

*Id.* The Court provided no new test but stated that the proper standard for reviewing the articles of the Military Code for vagueness is the standard that applies to criminal statutes regulating economic affairs, *id.* at 756, and emphasized that speech interests should be accorded "less weight" in the military context. In that context, the Court feared that the consequence of hampering military efficiency could be the destruction of society.

260. *Id.* at 759 (quoting United States v. Priest, 21 C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972)).

261. Uniform Code of Military Justice, arts. 90(2), 133-34, 10 U.S.C. §§ 890, 933-934 (1970) (current version at 10 U.S.C. §§ 890, 933-934 (1976)). Article 133 of the Uniform Code of Military Justice provided: "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct." Article 134 provided:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Appellant Army Captain Howard Levy, an opponent of the war in Vietnam, was charged with violating these articles by, among other things, stating that Black soldiers "should refuse to go to Viet Nam and if sent should refuse to fight." The majority explained:

> Since appellee could have had no reasonable doubt that his public statements urging Negro enlisted men not to go to Vietnam if ordered to do so were both "unbecoming an officer and a gentleman," and "to the prejudice of good order and discipline in the armed forces," in violation of the provisions of Arts. 133

than at suppressing speech or ideas. The limitation on the appellant's speech was thus upheld as a promotion of discipline not intended to suppress ideas.

Justice Douglas, dissenting, would not have made a special case for the military: "On its face there are no exceptions — no preferred classes for whose benefit the First Amendment extends, no exempt classes."[262] He argued that "[u]ttering one's beliefs is sacrosanct under the First Amendment. Punishing the utterances is an 'abridgment' of speech in the constitutional sense."[263] Moreover, Justice Douglas was not awed by the necessities of military discipline. In his view, obedience to orders and rules forbidding subordinates to countermand them were proper, but restrictions on ideas about those orders were not. The other dissenters[264] in *Levy* were able to avoid committing themselves on the issue of the status of the military for first amendment purposes because they would have invalidated the court-martial on the ground that the articles[265] were too vague.[266]

### C. *Prisoners — Stirring up Stir*

Prisoners are perhaps the foremost special group whose speech rights have been considered recently. As the thirteenth amendment recognizes,[267] convicted criminals lose many freedoms guaranteed other citizens. Although their liberty has been taken away by due process of law, and they have no right to vote,[268] society cannot so

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and 134, respectively, his challenge to them as unconstitutionally vague under the Due Process Clause of the Fifth Amendment must fail.

417 U.S. at 757.

262. 417 U.S. at 768 (Douglas, J., dissenting). It should be noted that Professor Emerson, the most noted absolutist scholar, would leave the military out of his system of freedom of expression and apply different rules. T. EMERSON, *supra* note 4, at 57.

263. 417 U.S. at 772 (footnote omitted).

264. Justice Stewart wrote a dissent in which Justices Douglas and Brennan joined. Justice Marshall did not participate in the case.

265. *See* note 261 *supra.*

266. It may be that military necessity justifies the promulgation of substantive rules of law that are wholly foreign to civilian life, but I fail to perceive how any legitimate military goal is served by enshrouding these rules in language so vague and uncertain as to be incomprehensible to the servicemen who are to be governed by them.

*Id.* at 788 Stewart, Brennan & Douglas, JJ., dissenting (footnote omitted). *See also Ancillary Doctrines, supra* note 9, at 711-12, 721 n.197.

267. "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted,* shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1 (emphasis supplied).

268. *See* Richardson v. Ramirez, 418 U.S. 24 (1974).

easily or so confidently rid itself of their voices and ideas. As the Court pointed out in *Procunier v. Martinez*,[269] a case involving the power of prison officials to censor mail that "unduly complained" or expressed "inflammatory views," "[w]hatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech."[270] The Court also focused on the interest of outsiders in receiving information, and, rather than summarily accepting the proffered interest in maintaining prison discipline, turned for guidance to cases, such as *O'Brien*,[271] that had balanced incidental restrictions on first amendment rights against legitimate governmental interests:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression . . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.[272]

Thus, the diminshed legal status of prisoners was not viewed as determinative, and because the *Martinez* Court found no reason other than suppression of ideas for the broad censorship authorized by the California rules, it struck them down. Justices Douglas, Brennan and Marshall concurred, arguing that the rights of the prisoners and their correspondents were infringed.[273]

The recognition of first amendment rights in communications of prisoners with others is not unlimited. In *Pell v. Procunier*[274] and *Saxbe v. Washington Post Co.*[275] (which was summarily decided on the authority of *Pell*), the Court held that prison rules forbidding press interviews with particular inmates designated by newsmen

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269. 416 U.S. 396 (1974).

270. *Id.* at 408.

271. 391 U.S. 367 (1968). *See* text accompanying notes 70 to 79 *supra.*

272. 416 U.S. at 413 (paraphrasing United States v. O'Brien, 391 U.S. 367 (1968)).

273. Justice Marshall's concurrence, joined in by Justice Brennan and in part by Justice Douglas, was particularly eloquent.

> When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. . . . It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit.

*Id.* at 428 (Marshall, J., concurring).

274. 417 U.S. 817 (1974).

275. 417 U.S. 843 (1974).

were constitutional as to state and federal prisons respectively. The regulations in *Pell* were challenged by prisoners and newsmen; in *Saxbe*, the regulations were challenged by the press alone. In *Pell*, the regulations had been enacted in response to prison riots which prison officials had attributed in part to the leadership power that certain inmates derived from being the focus of press attention. Given this justification and the fact that alternative means of communication were available to prisoners,[276] the *Pell* Court had little difficulty in finding that the rules were directed to the legitimate governmental interest of security in prisons: "So long as this restriction operates in a neutral fashion, without regard to the content of the expression, it falls within the 'appropriate rules and regulations' to which 'prisoners are necessarily subject,' . . . and does not abridge any First Amendment freedoms retained by prison inmates."[277] Because the rule at issue was merely a particularized version of a general rule limiting visitation rights to relatives of prisoners, the *Pell* majority found it unnecessary to balance the government's interest in prison security against the requirements of the first amendment. With respect to the rights of reporters to interview prisoners, in neither case was the press placed in a less advantageous position than the general public and, the Court held, the press was not entitled under the first amendment to be placed in a more advantageous position. Newsmen do not have first amendment rights superior to those of the public in general.[278]

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276. For example, the rule permitted prisoners to visit with their relatives, clergy, attorneys, and old friends. 417 U.S. at 824-25 n.4. *See also* 417 U.S. at 849 (dictum). Prisoners may also communicate through the mails, *see* Procunier v. Martinez, 416 U.S. 396 (1974).

277. 417 U.S. at 828 (footnote omitted).

This past term, in Bell v. Wolfish, 99 S. Ct. 1861 (1979), the Supreme Court again upheld prison rules affecting expression. The federally operated Metropolitan Correctional Center in New York City, designed primarily for pretrial detainees, prohibited inmates from receiving hardback books not mailed directly from publishers, book clubs or bookstores. The rule was justified by a concern that such materials would be used to smuggle contraband into the prison. The majority noted that the rule was content neutral, that alternative means of obtaining reading material were available and that the impact of the rule on pretrial detainees was limited to sixty days. In this context, the Court held that the "considered judgment" of prison officials concerned with security "must control in the absence of prohibitions far more sweeping than these." *Id.* at 1880. The primary thrust of the dissent of Justices Stevens and Brennan was an argument that the center conditions were punishment and thus a violation of the due process rights of pretrial detainees, but Justice Marshall's dissent emphasized that any limitation on expression must be justified by "compelling necessity" and that the government failed to meet this burden. *Id.* at 1892 (Marshall, J., dissenting).

278. *See, e.g.*, 417 U.S. at 834; 417 U.S. at 849.

The *Pell* dissenters, Justices Powell, Douglas, Brennan and Marshall, found the regulations overbroad in their "total ban on all media interviews with any individually designated inmate on any matter whatsoever."[279] Justice Powell argued in his *Saxbe* dissent that the security problems posed by media-created "big wheels" could be resolved by narrower regulations that would have a much less drastic impact on press access to prisoners.[280] Justice Stewart for the majority acknowledged that some interviews with model prisoners posed no danger to security, but was clearly impressed by the "expert judgment" of the United States Attorney General that "such a selective policy would spawn serious discipline and morale problems of its own by engendering hostility and resentment among inmates who were refused interview privileges granted to their fellows."[281]

Deference to the decisions of prison officials reached a high-water mark in *Jones v. North Carolina Prisoners' Labor Union Inc.*,[282] when the Court upheld prison rules prohibiting inmates from soliciting other inmates to join the North Carolina Prisoners Labor Union, barred all meetings of the union within the prison, and refused to deliver packets of union publications that had been mailed in bulk to several inmates for redistribution among other prisoners. The district court had granted injunctive relief allowing inmate-to-inmate solicitation to the union on the grounds that neither experts in the field nor the court upon its own evaluation had reached a consensus that such an association of inmates would necessarily disrupt the operation of the penal institution.[283] Justice Rehnquist, writing for a majority of the Supreme Court, stated: "Appellant prison officials concluded that the presence, perhaps even the objectives, of a prisoners' labor union would be detrimental to order and security in the prisons . . . . It is enough to say that they have not been conclusively shown to be wrong in this view."[284] Confident

279. 417 U.S. at 839 (Douglas, J., dissenting). Justice Powell concurred in *Pell* insofar as the Court held that prisoners do not have the right to speak to particular newsmen, but dissented in both *Pell* and *Saxbe* as to the denial of access to newsmen. 417 U.S. at 835–36 (Powell, J., concurring in part and dissenting in part); 417 U.S. at 850–75 (Powell, J., dissenting).

280. 417 U.S. at 873.

281. *Id.* at 849. Justice Stewart emphasized that the regulations were not part of an attempt to conceal prison conditions. This conclusion was derived from the history of the enactment of the regulations, the permission of correspondence and media visits to prison.

282. 433 U.S. 119 (1977).

283. North Carolina Prisoner's Labor Union, Inc. v. Jones, 409 F. Supp. 937, 942–45 (E.D.N.C. 1976).

284. 433 U.S. at 132.

that the regulation of intra-inmate communication served legitimate penal purposes, the Court indicated no need to apply overbreadth analysis. After noting that "an inmate does not retain those First Amendment rights that are 'inconsistent with his status as a prisoner . . .,' "[285] the opinion concluded that balancing favored the interests of the institution.[286]

Justices Marshall and Brennan challenged the Court's standards as constituting a wholesale abandonment of traditional principles of first amendment analysis. They argued in dissent that the majority's willingness to defer to prison officials solely on the basis of the rationality of their decisions was mistaken and that the courts should assume greater responsibility when reviewing regulations that limit prisoners' speech.[287]

Perhaps the most interesting and yet inconclusive case in the prison context was decided last year. In *Houchins v. KQED*,[288] the Court by a four-three margin reversed a district court order granting media representatives access to the Santa Rita jail. Prior to the commencement of the suit, persons who knew an inmate could visit him, but there was no general press access to interview prisoners. After suit was filed alleging that this policy prevented the effective dissemination of information about prison conditions to the public, a policy of monthly tours was instituted. The tours did not include the disciplinary areas, cameras and tape recorders were not allowed, and those on the tour could not interview inmates. The jail officials claimed that the policy was necessary to protect inmate privacy and to minimize security and administrative problems. The district court had found that "a more flexible press policy at Santa Rita [was] both desirable and attainable."[289]

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285. *Id.* at 129 (quoting *Pell*, 417 U.S. at 822).
286. *See id.* at 129-33.
287. *See id.* at 139-49 (Marshall, J., dissenting).
288. 438 U.S. 1 (1978).
289. *Id.* at 7.

> "As to the inmates' privacy, the media representatives commonly obtain written consent from those inmates who are interviewed and/or photographed, and coverage of inmates is never provided without their full agreement. As to pre-trial detainees who could be harmed by pre-trial publicity, consent can be obtained not only from such inmates but also from their counsel. Jail "celebrities" are not likely to emerge as a result of a random interview policy. Regarding jail security, any cameras and equipment brought into the jail can be searched. . . . [T]here was substantial testimony to the effect that ground rules laid down by jail administrators, such as a ban on photographs of security devices, are consistently respected by the media."

*Id.* at 23 n.11 (Stevens, J., dissenting) (quoting unreported opinion of the district court).

In reversing the district court, Chief Justice Burger's opinion announcing the judgment of the Court did not rely on the need for deference to administrative judgment in the operation of the jails; it was based squarely on the principle that the press has no greater right to access to prisons than does the public in general.[290] Moreover, the Chief Justice argued that the Constitution does not compel the government to provide information on demand: "There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information."[291] He did note, however, that the petitioners had other available means to discover jail conditions, including letters from inmates and interviews with inmates' counsel, former inmates, visitors and prison personnel.

Justice Stewart's concurrence agreed that the first amendment did not grant a right of access, but argued that when access is permitted it must be equal access — equal in a flexible sense that accommodates the practical distinctions between the press and the general public. Justice Stewart then argued that access was effective for the self-informing purposes of the general public even if cameras and recording equipment were barred, but that the restrictive rule denied effective access to the media. He concurred with the reversal of the district court order, however, on the ground that the order gave the press access to areas and sources of information from which the public on tours had been excluded.[292]

Justice Stevens, in a dissent joined by Justices Brennan and Powell, disputed the majority's denial of the existence of a constitutional right of access:

> The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution. . . .
>
> In addition to safeguarding the right of one individual to receive what another elects to communicate, the First Amendment serves an essential societal function. Our system of self-government assumes the existence of an informed citizenry. . . . Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.[293]

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290. *See* note 278 and accompanying text *supra*.
291. 438 U.S. at 14.
292. *Id.* at 16–19 (Stewart, J., concurring).
293. *Id.* at 30–32 (Stevens, J., dissenting) (footnotes omitted).

At times the government fails to provide access to information because it would be too costly to do so;[294] other times, the refusal is premised on the need for secrecy to conduct sensitive operations such as negotiations or military actions.[295] Denial of access for the purpose of suppressing discussion of prison conditions, however, does not appear to be a legitimate governmental end, and this is what the dissenters saw in prison policy at Santa Rita: "While prison officials have an interest in the time and manner of public acquisition of information about the institutions they administer, there is no legitimate penological justification for concealing from citizens the conditions in which their fellow citizens are being confined."[296]

Because Justices Marshall and Blackmun did not participate in the *Houchins* decision, there is still no pronouncement by a majority of the Court on a right to access. Thus, the Court may eventually find that rules such as those at issue in *Houchins* mask government cover-ups and abridge speech. Indeed, with respect to the amount of deference to be accorded prison regulations, Justices Brennan and Marshall have consistently urged that the right of the citizen to speak cannot be abridged in any context unless the government shows a compelling need unrelated to the suppression of speech. A majority of the Court, however, has consistently held that stringent requirement too burdensome on the attainment of legitimate governmental aims.

## V. REQUIRING NONINCRIMINATING DISCLOSURE TO AID GOVERNMENT FUNCTIONS

*Silence must indeed be golden, because the state is so anxious to make people give it up.*

In a variety of instances, an agency of the government may seek to compel an individual to reveal his beliefs, private statements and associations. The government may want information for the purpose of drafting legislation, monitoring the administration of existing

294. The federal government has made much information available under the Freedom of Information Act, 5 U.S.C. § 552 (1976), but it has not been without cost. *See generally* Sykes, *Of Men And Laws: Murphy, Cornford, Arnold, Potter, Parkinson, Peter, Maccoby, And Gall*, 38 MD. L. REV. 37, 54 (1978).

295. Even the dissenters acknowledged the need for secrecy in grand jury proceedings, in the conferences of the Court and in executive sessions of other official bodies. *Id.* at 34-35 (Stevens, J., dissenting). The Freedom of Information Act, 5 U.S.C. § 552(b) (1976) has many exceptions in areas where Congress has deemed secrecy important. *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978); EPA v. Mink, 410 U.S. 73 (1973).

296. 438 U.S. at 36 (Stevens, J., dissenting) (footnote omitted).

laws, or prosecuting criminal acts. Forced disclosure of discussions or associations intended to be private, however, may have an inhibiting effect on free expression. In 1958 Chief Justice Warren listed the ways in which compelling a witness to testify about his beliefs might deter free speech:

> The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous. This effect is even more harsh when it is past beliefs, expressions or associations that are disclosed and judged by current standards rather than those contemporary with the matters exposed. Nor does the witness alone suffer the consequences. Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy. Beyond that, there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time.[297]

Despite this effect on freedom of speech, the Court has permitted some legislative investigation into beliefs, associations, and expression, as such investigation is inherent in the legislative process. Such inquiries must, however, be related to, and in furtherance of, a legitimate legislative task; they may not be used for the personal aggrandizement of the investigator or to punish those being investigated. "The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness."[298] In other words, the Court will apply a "balancing test" in evaluating forced disclosures by legislatures.

In *Sweezy v. New Hampshire*, [299] Justice Frankfurter, in a concurring opinion joined by Justice Harlan, applied the balancing test to protect an unwilling witness who had refused to answer questions of the New Hampshire Attorney General pertaining to lectures he had given and to his associations with the Progressive Party. Justice Frankfurter argued that:

> the inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the well-being of

297. Watkins v. United States, 354 U.S. 178, 197-98 (1957).
298. *Id.* at 198.
299. 354 U.S. 234 (1957).

> our kind of society that it cannot be constitutionally encroached upon the basis of so meagre a countervailing interest of the State as may be argumentatively found in the remote, shadowy threat to the security of New Hampshire allegedly presented in the origins and contributing elements of the Progressive Party and in petitioner's relations to these.[300]

A majority of the Court, however, avoided direct balancing by applying ancillary doctrines. After noting that the New Hampshire Attorney General had been directed to " 'make full and complete investigation with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state,' "[301] the *Sweezy* Court ruled that the vagueness of this authorization made it unclear whether the questions involved were pertinent to the object of the legislature's interest: "The lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority."[302] Accordingly, the Court reversed Sweezy's contempt conviction on the ground that he was denied due process of law.

On the same day that it decided *Sweezy*, the Supreme Court rendered a similar decision in *Watkins v. United States*.[303] Watkins had refused to answer questions about acquaintances who had engaged in Communist Party activity in the past but who no longer did so. The Court reversed his contempt conviction on the ground that he was not told how these questions were pertinent to the subject under inquiry by a subcommittee of the House Committee on Un-American Activities: "Petitioner was thus not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process Clause of the Fifth Amendment."[304]

When the pertinency of the question to the subject of legislative inquiry was clear, however, the Court has demanded that the witness respond. In *Barenblatt v. United States*,[305] the witness before the House Committee on Un-American Activities had refused to answer questions concerning his membership in the Communist Party and his knowledge that another named individual was a party

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300. *Id.* at 265 (Frankfurter, J., concurring).

301. *Id.* at 236-37 (citing to Joint Resolution Relating to the Investigation of Subversive Activities, 1953 N.H. LAWS, ch. 307).

302. *Id.* at 254.

303. 354 U.S. 178 (1957).

304. *Id.* at 215.

305. 360 U.S. 109 (1959).

member. The subject matter of the investigation had been identified as communist infiltration of education, and particularly the activities of the named person — who had identified Barenblatt as a party member — concerning whom Barenblatt refused to testify. Barenblatt claimed that the inquiry was not pertinent to the legislative purpose because it was not aimed at revolutionary action but rather at the theoretical classroom discussion of communism. The Court rejected this argument as representing too narrow a view of the legislature's legitimate investigatory process. Given the Court's finding of a legitimate purpose underlying the investigation — self-preservation — Justice Harlan concluded that the appropriate test for compelling disclosure was "a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown . . .,"[306] and that the balance had to be struck in favor of the latter.[307] In passing, he disclaimed any power in the Court to examine the motive of the legislature: "So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."[308] Nevertheless, his statement that "[h]aving scrutinized this record we cannot say that the unanimous panel of the Court of Appeals which first considered this case was wrong in concluding that 'the primary purposes of the inquiry were in aid of legislative processes' "[309] suggests concern for just such a motive. As in *O'Brien*,[310] direct inquiry into legislative motivation was spurned as too subjective for the Court to handle; the Court could only require that the law or investigation be precisely defined to serve a

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306. *Id.* at 126.

307. *Id.* at 134.

308. *Id.* at 132. Justice Harlan cited Arizona v. California, 283 U.S. 423, 455 (1931), and cases cited therein for this proposition. One case cited in the Arizona decision was McCray v. United States, 195 U.S. 27 (1904), in which the Court had stated that

> no instance is afforded from the foundation of the government where an act which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that, in our constitutional system, the judiciary was not only charged with the duty of upholding the Constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial, and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation.

*Id.* at 54.

309. 360 U.S. at 133.

310. O'Brien v. United States, 391 U.S. 367 (1967). *See Freedom of Speech, supra* note 6, at 559–63.

governmental interest other than the suppression of ideas and protect against frivolous assertions of governmental interest by balancing the interest against the interest in free speech.

Justice Black, dissenting in an opinion joined by Justices Warren and Douglas, began by asserting that the questions directly impinged upon associational rights and abridged freedom of speech and that such questions should never be subject to legislative or judicial balancing.[311] Even if some form of balancing might be appropriate, he continued, the wrong interests were balanced by the majority, for Barenblatt's interest in refraining from revealing his communist affiliations was not private but rather "the interest of the people as a whole in being able to join organizations, advocate causes and make political 'mistakes' without later being subjected to governmental penalties for having dared to think for themselves."[312] Similarly, Justice Black argued that the governmental interest in learning about Barenblatt's associations in order to formulate laws affecting the educational process was to be distinguished from a truly substantial interest in self-preservation. The nation would not fall because Congress was not able to determine whether Barenblatt was a communist. The majority were apparently more willing to focus on the governmental interest. *Barenblatt* demonstrates that once the government interest is balanced and found significant, it will be presumed genuine, and the Court will uphold the questions without delving into their actual impact on persons under investigation.

Simultaneously with *Barenblatt,* the Court decided *Uphaus v. Wyman.*[313] There, as in *Sweezy,* the Court was faced with an investigation by the New Hampshire Attorney General, who had requested Uphaus to produce a list of names of persons who attended the summer camp of World Fellowship, Inc., of which he was executive director. This time the New Hampshire Supreme Court held as a matter of state law that the inquiry was authorized and desired by the legislature in order to determine whether there were any subversive persons within the state. Uphaus had "participated in 'Communist Front' activities" and many of the speakers invited to

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311. Justice Black's denigration of the balancing test in *Barenblatt* is consistent with his position that the first amendment is an absolute prohibition, so that no restriction on the content of speech is permissible. *See* Black, *The Bill of Rights,* 35 N.Y.U. L. REV. 865 (1960). *See also* Cahn, *Mr. Justice Black and First Amendment "Absolutes": A Public Interview,* 37 N.Y.U. L. REV. 549 (1962). But even Justice Black would have balanced interests in litigation involving regulation of the time, place and manner of speech. *See* note 2 and accompanying text *supra.*

312. 360 U.S. at 144 (Black, J., dissenting).

313. 360 U.S. 72 (1959).

the camp had either been members of the Communist Party or had connections or affiliations with it or one of the organizations cited as subversive by the United States Attorney General. That these facts revealed no criminal activity was not viewed as significant by the Court, for in legislative investigations, as distinguished from criminal prosecutions, the investigative powers of the state are not circumscribed by the need to present sufficient evidence of subversion. Rather, the facts before the Court in *Uphaus* evinced a sufficient nexus between the organization and subversive activities to justify legislative inquiry. Consequently, the governmental interest in self-preservation was found sufficiently compelling to override the associational rights of those affected by the legislative inquiry.

Justices Black and Douglas, of course, dissented directly on first amendment grounds — the inquiry was viewed as abridging freedom of speech and association, and thus no possible state interest could justify it. They also joined Justice Brennan, dissenting with Chief Justice Warren, in rejecting the Court's decision on the ground that the only purpose of the investigation revealed by the record was to expose these persons to obloquy, not to engage in legislation.[314] Because they concluded that the only purpose demonstrated was the abridgment of first amendment rights, the dissenters believed that the questions were improper. The basis for the former conclusion was that the exposure of named persons was the only substantive result of the attorney general's investigations. The majority, on the other hand, viewed this exposure merely as an inescapable incident of a legitimate investigation of the presence of subversives in the state.

In 1963 the Court demonstrated that in some instances it would be more circumspect in its analysis of legislative inquiries by requiring a substantial relationship between the information sought and a compelling state interest, thus expanding the modicum of protection accorded reluctant witnesses. The chairman of the Florida Legislative Committee had stated that his committee was investigating communist activities, including the infiltration of communists into organizations active in the fields of race relations and the reform of social practices by litigation and administrative pressure. Pursuant to this inquiry, he requested the president of the Miami branch of the NAACP to bring his membership lists to a hearing and to use them as a basis for his testimony.[315] In *Gibson v. Florida*

314. *Id.* at 82 (Brennan, J., dissenting).

315. The refusal of the witness Gibson to bring his organization's membership lists to the hearing was "based on the ground that to bring the lists to the hearing and to

*Legislative Investigation Committee*,[316] the Court ruled that the record was insufficient to show the substantial connection between the Miami branch of the NAACP and the Communist Party which, as the Florida committee had conceded, was prerequisite to demonstrating the immediate substantial state interest necessary to sustain the inquiry. There was no suggestion that the NAACP itself was a subversive organization and no substantial evidence of communist infiltration of the association. Because the discovery of communist membership in the NAACP could not have been the object of the legislative investigation, the Court found that the NAACP was itself the focus of the inquiry, and held that this purpose could not justify the inquiry.[317]

The dissenters, Justices Harlan, Clark, Stewart and White, pointed out that the questions had focused on twelve named individuals who allegedly had some connection with the NAACP so that the secrecy of their membership was already compromised. They argued that the questions pertained merely to the accuracy of the existing allegations that communists had infiltrated certain activities and that limiting such a narrow inquiry would effectively prevent investigation until the committee knew the answers to the questions at issue.[318]

*Gibson* was the basis for the Court's opinion when New Hampshire's law mandating an investigation of subversive activities[319] produced another confrontation. This time the witness, DeGregory, informed the New Hampshire Attorney General that he was not a communist, knew of no communist activities (or even of the existence of the Communist Party within the state) during the preceding six and one-half years and refused to answer questions about his activities and associations prior to that time. In *DeGregory v. Attorney General*,[320] the Court stated that "[t]he present record is

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utilize them as the basis of his testimony would interfere with the free exercise of Fourteenth Amendment associational rights of members and prospective members of the N.A.A.C.P." Gibson v. Florida Legislative Comm., 372 U.S. 539, 543 (1963). He was willing, however, to answer questions on communist infiltration of the organization based on his own personal knowledge. *Id.*

316. 372 U.S. 539 (1963).

317. *Id.* at 547-49. The Court distinguished *Barenblatt* on the grounds that it was founded on a holding that "the Communist Party is not an ordinary or legitimate political party, as known in this country, and that, because of its particular nature, membership therein is *itself* a permissible subject of regulation and legislative scrutiny." *Id.* at 547 (emphasis in original). No such predicate of potential subversion was shown for the NAACP.

318. *See id.* at 585 (White, J., dissenting).

319. *See* text accompanying note 301 *supra*.

320. 383 U.S. 825 (1966).

devoid of any evidence that there is any Communist movement in New Hampshire,"[321] or any danger of sedition against the state itself and found no power to probe the past when no present need was shown: "New Hampshire's interest on this record is too remote and conjectural to override the guarantee of the First Amendment that a person can speak or not, as he chooses, free of all governmental compulsion."[322] Justice Harlan, joined by Justices Stewart and White, again dissented. He argued that "New Hampshire . . . should be free to investigate the existence or nonexistence of Communist Party subversion, or any other legitimate subject of concern to the State, without first being asked to produce evidence of the very type to be sought in the course of the inquiry."[323]

The net result of these cases is to require the legislature to define clearly the information sought and to demonstrate its relevance to a proper legislative purpose. Apparently, the legislature must then establish some basis for believing that the information relates to a serious existing problem rather than a hypothetical possibility. The degree to which the Court should force the investigating committee to demonstrate the existence of the problem has generated sharp disagreement among the justices. The complaint of the dissenters in *DeGregory* and *Gibson* seems sensible — it is unfair to require proof that what one is searching for exists before allowing the search to proceed. Thus, so long as the object of the inquiry is to determine the existence of a danger with which the legislature could deal, these members of the Court would have permitted the inquiry. The appointments of Justices Burger, Blackmun, Powell, Rehnquist and Stevens raised the possibility that at least three of the new judges might combine with Justices White and Stewart to form a new majority on this issue. *DeGregory,* however, remains the last statement by the full Court, and it found a majority sensitive to the great potential for using the investigatory power to stifle powerless dissent. Because an investigatory committee can receive voluntary information from any witness, including government infiltrators into subversive groups, it would appear highly unlikely that a serious threat to national security will exist without some knowledge of it coming to the attention of the committee. Thus, requiring a showing of a basis for believing that the danger under investigation

321. *Id.* at 829.

322. *Id.* at 830. Justice Douglas, writing for the Court, stated that "the staleness of both the basis for the investigation and its subject matter makes indefensible such exposure of one's associational and political past — exposure which is objectionable and damaging in the extreme to one whose associations and political views do not command majority approval." *Id.* at 829-30 (footnote omitted).

323. *Id.* at 830 (Harlan, J., dissenting).

exists does not seem onerous or suicidal, and it can provide important protection to the speech and association rights of dissidents.

More recently, the forced disclosure problem was presented to the Supreme Court in a different context. In *Branzburg v. Hayes*,[324] the matter to be disclosed was not speech or association, but acts observed by, or reported to, the witness, who was a reporter. Branzburg sought to avoid disclosing the identity of persons he had observed possessing, making or using illicit drugs, primarily hashish and marijuana. In a companion case the appellant, also a journalist, sought to avoid appearing before a grand jury to answer questions concerning what he had observed in the headquarters of the Black Panther organization. Because the witnesses were newsmen whose ability to inform the public arguably depended on the ability to keep sources confidential, the first amendment was invoked as a defense to forced disclosure. Disclosure of the identities of informants could deter the giving of such information to newsmen and thus diminish one of the core functions of the press — the dissemination of news. Although the *Branzburg* majority acknowledged that "without some protection for seeking out the news, freedom of the press could be eviscerated,"[325] they concluded that the evidence before them failed to demonstrate that disclosure would result in a significant constriction of the flow of news. Returning to the notion that the government may incidentally impair speech if it does so in pursuance of a legitimate nonspeech purpose — "[i]t is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability"[326] — the Court resorted to the balancing test in ruling that the testimony of reporters may be compelled:

> On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.[327]

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324. 408 U.S. 665 (1972).
325. *Id.* at 681.
326. *Id.* at 682.
327. *Id.* at 690-91.

The Court held that the guidelines of *Gibson*, the establishment of a nexus between the information desired and the legitimate function of the government,[328] had been met: "The grand jury called these reporters as they would others — because it was likely that they could supply information to help the Government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment."[329]

Justice Powell concurred, emphasizing that the Court might not require disclosure when the information bore "only a remote and tenuous relationship to the subject of investigation" or if there were no "legitimate need of law enforcement."[330] Justice Stewart, joined by Justices Brennan and Marshall, dissented. They would have permitted compulsory disclosure only when the government is able to demonstrate that the information sought is "*clearly* relevant to a *precisely* defined subject of governmental inquiry."[331] The dissenters would have required that the government:

> (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[332]

As in *Gibson*,[333] the differences between the two major groups on the Court revolved around the degree of necessity that must be shown before the information must be revealed. In *Branzburg*, the Court found too onerous the requirement of a demonstration that the

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328. *See* text accompanying notes 316 & 317 *supra*.

329. 408 U.S. at 701.

330. *Id.* at 710 (Powell, J., concurring). The needs of law enforcement also prevailed over an asserted newspaper privilege in Zurcher v. Stanford Daily, 436 U.S. 547 (1978), in which the Court permitted a search warrant to be used by police to search the newspaper's files for evidence of the identity of perpetrators of a crime. The defendant's need for information in his defense also overrode a claimed newsman's privilege in New York Times Co. v. Jascalevich, 99 S. Ct. 6, 11 (1978) (White, Marshall, J.J.) in which Myron Farber of the New York Times was held in contempt for refusal to turn over his notes to the judge who requested them in order to determine whether they were relevant to the defense in a criminal case. Justices White and Marshall, acting as Circuit Justices, refused to stay the contempt order. Justice Marshall indicated that he thought Farber's claim of privilege should be granted, but *Branzburg* and United States v. Nixon, 418 U.S. 683 (1974), *see* note 337 *infra*, had made it clear that the Court would not agree.

331. 408 U.S. at 740 (Stewart, J., dissenting) (emphasis in original).

332. *Id.* at 743 (footnotes omitted).

333. *See* text accompanying notes 316 to 318 *supra*.

information sought would be helpful before permitting the questions that would determine what would ultimately be found. "It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made."[334]

Only Justice Douglas would have eliminated all power to engage in compulsory disclosure. In his view, "[s]ooner or later, any test which provides less than blanket protection to beliefs and associations will be twisted and relaxed so as to provide virtually no protection at all."[335]

> [T]he people, the ultimate governors, must have absolute freedom of, and therefore privacy of, their individual opinions and beliefs regardless of how suspect or strange they may appear to others. Ancillary to that principle is the conclusion that an individual must also have absolute privacy over whatever information he may generate in the course of testing his opinions and beliefs.[336]

The principles which Justice Douglas set forth in *Branzburg* are closely related to the arguments made by ex-president Nixon to justify refusing to release tapes of his discussions with subordinates, as required by a subpoena issued pursuant to an indictment charging those subordinates with various offenses against the United States.[337]A president needs to obtain as much information and advice as possible to make sound decisions, and revelation of his private discussions may deter others from adequately informing or advising him. He also needs to know whether officials within his administration have been engaged in criminal actions, though a president's involvement in plotting the commission of an unlawful act would not be expression entitled to first amendment protection.[338] In situations such as that presented in *United States v.*

334. 408 U.S. at 701–02.

335. *Id.* at 720 (Douglas, J., dissenting).

336. *Id.* at 714.

337. *See* United States v. Nixon, 418 U.S. 683 (1974). The indictment concerned the well-known "Watergate" break-in — the unlawful trespass on the Democratic Party National Headquarters at the Watergate complex in the District of Columbia — and the attempt to frustrate the investigation and prosecution of the persons involved. President Nixon was named as an unindicted co-conspirator in the "cover-up."

338. President Nixon's claim was based on a concept of executive privilege derived from the nature and function of the office of the president. He did not base the claim on the first amendment. In setting forth the reasons for nondisclosure of presidential discussions, he, of course, never suggested enabling the president to commit crimes without detection as a justification for the privilege. Instead, he argued that inquiry into plotting crimes would jeopardize the other interests which support the existence of executive privilege.

*Nixon*,[339] however, the protected discussion will inevitably be so intertwined with references to the president's illegal conduct that it cannot be isolated. An argument might therefore be made that the tapes of such presidential discussions should be protected in their entirety.[340]

From this perspective, the claim of executive privilege may be viewed as essentially a first amendment claim similar to that of *Branzburg*, but with the interests at stake writ large.[341] Although the need for privacy to promote the free exchange of ideas exists in all personal communications, it is especially acute with respect to presidential conversations: to reach decisions that will be most beneficial to society, the president and his subordinates must be free to explore a wide range of alternatives. Such discussions often involve input that many officials would be unwilling to express freely except in private. At the same time, the very magnitude of a president's decision increases the importance of the discussions as a basis for the electorate to judge his performance and hold him accountable.[342] If corruption exists at the highest level of government, it affects many more people adversely than a single criminal act. Thus, the government's asserted interest in disclosure of such discussions also appears substantial.

In *Nixon*, the Supreme Court analyzed the President's claim of executive privilege by applying a balancing test: "In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice."[343] Recognizing that no special need to protect military, diplomatic, or sensitive national security secrets had been asserted, the Court unanimously rejected the

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339. 418 U.S. 683 (1974).

340. As a practical matter, President Nixon could not have raised his fifth amendment rights when the tapes were requested. Politically it would have been suicide. In addition, his fifth amendment rights would apply to his testimony but not to his recordings, although the first amendment applied to both.

341. The purpose of the textual discussion of *Nixon* is to demonstrate that the issue of the scope of executive privilege is similar to the issues generated by a first amendment claim and that the Court's response was consistent with its approach in free speech cases.

342. In construing the Freedom of Information Act, Justice Douglas, in particular, emphasized the first amendment considerations associated with keeping the public informed of governmental operations. He may have believed that government officials surrender some of the first amendment rights they would have as private citizens to keep discussions confidential. *See* EPA v. Mink, 410 U.S. 73, 105-11 (1973) (Douglas, J., dissenting).

343. 418 U.S. at 711-12 (footnote omitted).

President's assertion of a privilege calculated to protect free discussion, concluding:

> when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.[344]

The argument about the legitimacy of such an executive privilege implicates issues of history and concepts of separation of powers far beyond the scope of this Article; but with respect to the first amendment aspects of the claim, the Court's opinion followed its prior rulings. As a majority of the current Court now hold, disclosure may be required if requested for a legitimate purpose other than suppression of speech. Because the purpose of the disclosure at issue in *Nixon* — requests for tapes in criminal trials — was the discovery of criminal conduct or exculpatory evidence, the Court found no constitutional impediment; the demands of the fair administration of criminal justice prevailed.

Two other disclosure cases involved bank records. The Bank Secrecy Act of 1970[345] authorizes the Secretary of the Treasury to prescribe certain bank record-keeping and recording requirements that have "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."[346] Financial institutions are required to keep records of their customers' identities and to make microfilm copies of their checks and certain other transactions. Reports to the federal government of large transactions of currency either inside or outside of the country are required, as are reports of United States citizens or residents, and nonresidents doing business in the United States, with respect to their transactions and relationships with foreign financial institutions. A variety of plaintiffs, including banks, bank customers, and the American Civil Liberties Union, sought to enjoin the enforcement of the Act in *California Bankers Association v. Shultz*.[347] Although much of the case was devoted to consideration of questions of search and seizure under the fourth amendment and self-incrimination under the fifth amendment, the

344. *Id.* at 713.

345. 12 U.S.C. §§ 1730d, 1829b, 1951-1959 (1976); 31 U.S.C. §§ 1051-1062, 1081-1083, 1101-1105, 1121-1122 (1976).

346. 12 U.S.C. §§ 1829b(a)(2), 1951(b) (1976); 31 U.S.C. § 1051 (1976).

347. 416 U.S. 21 (1974).

ACLU also raised the first amendment argument that the requirements could be used to discover the names of its members and contributors, thereby deterring membership in the association. Although recognizing that an organization might have standing to assert the rights of its members to be free from compelled disclosure of their membership, and that absent a countervailing governmental interest such disclosure could not be compelled, a majority of the Court replied that the attack on bank record-keeping requirements was premature because the petitioners had not shown any attempt by the government to obtain the records.[348] The challenge to the foreign reporting requirements was also dismissed on the ground that there was no concrete controversy because the ACLU had not alleged that it regularly engaged in foreign currency transactions.[349]

Justices Douglas, Brennan and Marshall each filed a separate dissent. Justice Douglas condemned the record-keeping provisions for overbreadth, citing primarily first amendment cases[350] and arguing that because such provisions were aimed at discovering criminal activity their prospective use to obtain indirectly an account of one's ideology, interests or opinions was impermissible. Justice Brennan agreed with Justice Douglas but also would have held the Act void for vesting excessively broad authority in the Secretary of Treasury.[351] Justice Marshall focused more directly on the first amendment claims:

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348. *Id.* at 56 n.26. The Court here cited Laird v. Tatum, 408 U.S. 1 (1972), as authority for the proposition that the first amendment claims were not concrete enough to present a "case and controversy." *Laird* involved not a requirement of record-keeping or disclosure to the government, but a military practice of keeping files on individuals. The procedural point on justiciability masked a decision based on the first amendment. The existence of the files chilled activity that might be recorded for fear of adverse use of the files. If the keeping of the files violated the first amendment, therefore, there should be standing to challenge the practice before the files were actually used. The Court, however, concluded that it was impossible to determine whether the files had a legitimate purpose until they were used. In effect, this conclusion amounts to a finding that such files are constitutional though some uses of them may not be.

349. 416 U.S. at 75-76. It should be noted that Justices Powell and Blackmun concurred specially because under the regulations the domestic reporting requirements were only on transactions of over $10,000. They believed that a significant extension of the reporting requirement would pose "substantial and difficult constitutional questions . . . ." *Id.* at 78 (Powell, J., concurring).

350. *See id.* at 86 n.7 (Douglas, J., dissenting). "Where fundamental personal rights are involved as is true when as here the Government gets large access to one's beliefs, ideas, politics, religion, cultural concerns and the like — the Act should be 'narrowly drawn' . . . to meet the precise evil." *Id.* at 85-86. Justice Douglas did not clearly distinguish between speech rights derived from the first amendment and privacy concerns of other derivation, however.

351. *Id.* at 91-92 (Brennan, J., dissenting). *See also* discussion of narrow construction of delegation of authority in *Ancillary Doctrines, supra* note 9, at 701-03.

> The threat of disclosure entailed in the existence of an easily accessible list of contributors may deter the exercise of First Amendment rights as potently as disclosure itself. . . . More importantly, however slight may be the inhibition of First Amendment rights caused by the bank's maintenance of the list of contributors, the crucial factor is that the Government has shown no need, compelling or otherwise, for the maintenance of such records.[352]

It seemed apparent from the scope of the record-keeping requirement that it was not directed towards discovering the identity of members of associations, but was intended to provide a data bank for discovery of particular illegal acts. Until the information is sought for use, however, one cannot be certain whether the purpose was legitimate. Thus, despite the existence of some chilling effect on speech, the majority considered the case premature. All the justices agreed that the case turned on the need for information as weighed against the effect on expression. The majority wanted to make sure that government would be able to take all legitimate steps and, therefore, upheld the law pending a showing that the government had an illegitimate purpose. The dissenters simply gave less weight to the legislative concern — to the asserted governmental interest — in their anxiety to be certain that the law was not directed at innocent speech and association.

Subsequently, the Court in *Eastland v. United States Servicemen's Fund*[353] was confronted with an attempt by the government to use bank data. The Senate Subcommittee on Internal Security, pursuant to its inquiry into the effect of subversive activities in the United States, issued a subpoena duces tecum to a bank for all records involving the account of U.S.S.F.[354] The U.S.S.F. had established coffeehouses near military installations and assisted the publication of papers for distribution in military installations, all in opposition to the war in Vietnam. In an action to enjoin the implementation of the subpoena and for a declaratory judgment that

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As Justice Brennan had argued in United States v. Robel, 389 U.S. 258, 269-82 (1967) (Brennan, J., concurring), delegation of power that potentially affects fundamental rights in broad and indefinite terms should be void.

352. 416 U.S. at 98-99 (Marshall, J., dissenting).

353. 421 U.S. 491 (1975).

354. The Senate had authorized a study of "the administration, operation, and enforcement of the Internal Security Act of 1950 . . .," and the "extent, nature, and effect of subversive activities in the United States," specifically "infiltration by persons who are or may be under the domination of the foreign government . . . controlling the world Communist movement. . . ." S. Res. 341, 91st Cong., 2d Sess., 116 CONG. REC. 1974 (Jan. 30, 1970).

the subpoena and the Senate resolutions authorizing it were void, the Fund and two of its members argued that the sole purpose of the subpoena was to harass and chill the organization and its members in the exercise of their first amendment rights, and to dry up the financial support of the organization. The plaintiffs further alleged that the subpoena had been issued to the bank rather than to the U.S.S.F. in order to deprive the organization of its right to protect private records such as sources of contribution.[355]

The Court, however, ruled that the members of the subcommittee and their chief counsel could not be enjoined because their acts were protected under the speech and debate clause[356] of the Constitution. "[O]nce it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference";[357] the " 'courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province.' "[358]

Three concurring justices indicated that while the speech or debate clause protected the committee against an injunction, it still might be possible to enjoin the bank from producing the records at issue because that clause insured "only that a Member of Congress or his aide may not be called upon to defend a subpoena against constitutional objection, and not that the objection will not be heard at all."[359] The subpoenaed bank was not in the jurisdiction in which suit was brought and thus had not been made a party to it. The

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355. 421 U.S. at 495. The Court explained that previous cases made clear "that in determining the legitimacy of a congressional act [the Court] do[es] not look at the motives alleged to have promoted it." *Id.* at 508. Disclaimer of a decision based on motivation should not blind the observer to the influence apparent motivation has had on the use of other doctrines of the Court.

356. U.S. CONST. art. I, § 6, cl. 1: "For any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place."

357. 421 U.S. at 503. The speech and debate clause has recently been used to protect publications of congressmen. Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972). The crucial questions revolved around whether the act of a congressman or his or her assistant was done as part of the legislative function. In *Eastland,* the Court easily found that inquiries by congressional committees were part of the legislative function.

358. 421 U.S. at 506 (quoting Tenney v. Brandhove, 341 U.S. 367, 368 (1951)).

359. 421 U.S. at 516 (Marshall, Brennan & Stewart, JJ., concurring).

> I write today only to emphasize that the Speech or Debate Clause does not entirely immunize a congressional subpoena from challenge by a party not in a position to assert his constitutional rights by refusing to comply with it. . . . This case does not present the questions of what would be the proper procedure, and who might be the proper parties defendant, in an effort to get before a court a constitutional challenge to a subpoena *duces tecum* issued to a third party.

*Id.* at 513-17 (footnote omitted).

Senators and their counsel were therefore the only parties to the suit, but the emphasis in the majority opinion on the legitimacy of the investigation suggests that they would have upheld the subpoena even if the bank were a party because the information was relevant to a proper legislative inquiry.[360]

Justice Douglas dissented tersely on the ground that "no official . . . may invoke immunity for his actions for which wrongdoers normally suffer."[361] Nevertheless, by filing suit solely against the congressional committee, the plaintiffs placed themselves in the worst possible position — forcing a confrontation between the speech or debate clause and the first amendment. The concurring justices avoided the clash by suggesting that there were other means for protecting the plaintiffs' speech interest, while the majority seemed to give little consideration to those claims.

The Court upheld similar disclosure requirements in *Buckley v. Valeo*.[362] As part of a statutory scheme to regulate campaign spending, Congress had required presidential campaign committees to keep a record of persons contributing more than ten dollars and to file a report containing the names and addresses of each person who contributed over one hundred dollars in a calendar year with the Federal Election Commission. In addition, individuals contributing more than one hundred dollars to advocate election of a particular candidate were required to file a statement with the Commission. The Court recognized that such compelled disclosure might substantially infringe upon the exercise of free speech and accordingly subjected the reporting and disclosure requirements[363] to "exacting scrutiny."[364] These requirements were upheld, however, because the

360. Even the most cursory look at the facts presented by the pleadings reveals the legitimacy of the USSF subpoena. Inquiry into the sources of funds used to carry on activities suspected by a subcommittee of Congress to have a potential for undermining the morale of he Armed Forces is within the legitimate legislative sphere.

*Id.* at 506.

361. *Id.* at 518 (Douglas, J., dissenting).

362. 424 U.S. 1 (1976) (per curiam).

363. The Court also struck down the statute's expenditure ceiling on first amendment grounds. *See* text accompanying notes 102 to 107 *supra*.

364. 424 U.S. at 64. The basis for the "exacting scrutiny" test was the language of the Court's opinion in NAACP v. Alabama, 357 U.S. 449, 463 (1958), in which the Supreme Court dissolved a civil contempt fine of $100,000 against the NAACP for refusal to disclose its membership lists to state authorities. In that case it was very likely that the desire to obtain membership lists was part of a plan to destroy the association, and the government was unable to proffer a convincing need for disclosure of the organization's members. Thus, the Court found the disclosure order failed to withstand "exacting scrutiny." The context in *Buckley*, however, made it very unlikely that membership lists were sought for the purpose of destroying political parties.

government's interest in regulating federal election campaigns was deemed "substantial,"[365] and because the "disclosure requirement . . . appear[ed] to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."[366]

The *Buckley* Court noted that the balance might shift in favor of nondisclosure for some minority parties and independent candidates because the governmental interest in deterring corruption and the purchase of elections by large contributors was significantly less substantial with respect to candidates of small minority parties.[367] Conversely, the damage to the associational rights of the members of such parties would be significantly increased because of the parties' greater vulnerability to reductions in contributions and reprisal. The Court, however, found that no appellant in the case before it had made a factual showing of harm sufficient to tip the balance in its favor.[368] As to the appellants' claim that a blanket exemption from disclosure requirements should be granted minority parties lest irreparable injury to their associational rights be inflicted before the requisite evidence could be gathered, the Court stated that "[w]here it exists the type of chill and harassment [required to justify relief] can be shown,"[369] and concluded that no blanket exemption was necessary.

The cases discussed thus far in this section have favored the government's attempts to get information when it can demonstrate the information might be used for purposes other than suppression of ideas. Despite the Court's rejection of inquiry into motivation, the *Gibson* doctrine[370] remains available if the Court suspects the legislature is trying to suppress speech rather than engaging in proper legislative inquiry. That is, the Court may demand that the legislature demonstrate the existence of a significant danger before

365. 424 U.S. at 66-68. The Court listed three interests to be satisfied by a disclosure requirement. First, it is a source of information that helps voters in deciding for whom to vote. Second, it deters corruption and the appearance of corruption by making large contributions and expenditures public. Finally, it is a means of detecting violations of the other requirements of the campaign financing laws. *Id.*

366. *Id.* at 68.

367. *Id.* at 70-71. The splinter party candidate is virtually certain to lose, so the danger that contributions to his campaign are for the purpose of controlling his actions after election is virtually nonexistent.

368. *Id.* at 71-72.

369. *Id.* at 74. Chief Justice Burger dissented from this portion of the opinion on the ground that the governmental interest in such low thresholds as $10 and $100 for reporting requirements was so insubstantial that it did not outweigh the contributors interest in expression. *Id.* at 239 (Burger, C.J., dissenting in part).

370. *See* notes 316 to 318 and accompanying text *supra*.

interrogating witnesses, and confine its questions to those closely relevant to the showing of danger that has been made.

This year the Court was again confronted with the first amendment issues involved in compelling disclosure, although, as in *Branzburg*,[371] the compulsion stemmed from the functioning of the judicial system itself, rather than from a statute. In *Herbert v. Lando*,[372] the plaintiff Herbert sued Columbia Broadcasting System, Inc., producer and editor Barry Lando, reporter Mike Wallace, and *The Atlantic Monthly* magazine for a report on the television show "Sixty Minutes" and an article in *The Atlantic Monthly,* both of which allegedly defamed him. In pretrial discovery proceedings, Herbert asked a number of questions to which Lando objected. The questions could be grouped into five categories:

> "1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with the "60 Minutes" segment and the Atlantic Monthly article;
> "2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;
> "3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;
> "4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and
> "5. Lando's intentions as manifested by his decision to include or exclude certain material."[373]

The defendants claimed that these questions infringed upon their rights under the first amendment, but the Supreme Court disagreed, ruling that the plaintiff in a defamation suit may inquire about the state of mind of the defendants and, more specifically, about editorial discussions that precede allegedly defamatory publications.

Questions about thoughts and beliefs evoke an Orwellian spectre of the Big Brother who insists on knowing the ideas and beliefs of every citizen in order to control them.[374] The questions asked of Lando, however, were intended to cast light on his past actions, not

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371. *See* text accompanying notes 324 to 336 *supra.*

372. 99 S. Ct. 1635 (1979).

373. *Id.* at 1652 (Brennan, J., dissenting in part) (quoting 2d Cir. opinion, 568 F.2d 974, 983 (1977)).

374. G. ORWELL, 1984 (1949).

to alter thought patterns or prevent future misconduct, and the Court apparently perceived no threat of invasion of personal thoughts and beliefs when the inquiry is predicated upon past activities. Even Justices Brennan and Marshall agreed that inquiry into the editor's "thought processes" — his "thoughts, opinions and conclusions" — would not discourage the editorial thought process, reasoning that "[s]ince a journalist cannot work without such internal thought processes, the only way this aspect of the editorial process can be chilled is by a journalist ceasing to work altogether."[375] The only inhibiting effect that the Court attributed to an inquiry into the editor's state of mind was that associated with publication of material the editor believed to be false. But, in the words of the Court, "if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and other cases have held to be consistent with the First Amendment."[376]

The defendants argued that permitting questions about editorial discussions could result in the suppression of opinions and information. If statements by an editor expressing doubt over the truth of allegations could be used as evidence that the decision to publish was made with knowledge of falsity or reckless disregard of truth, editors might be reluctant to voice such doubts. The Court, however, was not convinced that such speech would be significantly affected by permitting pre-trial discovery:

> Moreover, given exposure to liability when there is knowing or reckless error, there is even more reason to resort to pre-publication precautions, such as a frank interchange of fact and opinion. Accordingly, we find it difficult to believe that error-avoiding procedures will be terminated or stifled simply because there is liability for culpable error and because the editorial process will itself be examined in the tiny percentage of instances in which error is claimed and litigation ensues.[377]

In sum, a clear majority of the Court was convinced that the inquiries into the editorial process were necessary to ascertain whether the defendants had acted properly, and were not designed to

375. 99 S. Ct. at 1657 (Brennan, J., dissenting in part). Justice Marshall stated that "[r]egardless of whether strictures are placed on discovery, reporters and editors must continue to think, and to form opinions and conclusions about the veracity of their sources and the accuracy of their information." *Id.* at 1665 (Marshall, J., dissenting in part).

376. *Id.* at 1646. In New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964), the Court held that a public official must prove "actual malice" — making a statement knowing it to be false, or having a "reckless disregard" for its truth — to prevail on a suit for defamation relating to his official conduct.

377. 99 S. Ct. at 1648.

suppress ideas or information. But the Court was careful to note its concern that trial judges insist on the relevance of such questions and restrict discovery when " 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . . ' Fed. Rule Civ. Proc. 26(c)";[378] and Justice Powell concurred to emphasize the duty of the district court to consider first amendment interests in ruling on discovery. "I join the Court's opinion," he wrote, "on my understanding that in heeding these admonitions, the district court must ensure that the values protected by the First Amendment, though entitled to no constitutional privilege in a case of this kind, are weighed carefully in striking a proper balance."[379]

Striking a proper balance was also the key to Justice Brennan's opinion concurring in part and dissenting in part. He objected that Justice Powell did not make clear exactly what first amendment values should be weighed by the district court[380] and argued that, because only discovery of editorial discussions threatened to inhibit free speech, an editorial privilege with respect to such discussions should be recognized and the speech interests served by the privilege balanced against the interest in preventing and redressing attacks upon reputation. To overcome this privilege, Justice Brennan would require a public-figure plaintiff to establish "to the prima facie satisfaction of a trial judge, that the publication at issue constitutes defamatory falsehood . . . . "[381]

The majority responded to Justice Brennan's analysis by noting that the complaint must allege a defamatory falsehood and that an affidavit or verified complaint would appear to satisfy any requirement of a prima facie establishment of a defamantory falsehood.[382] In addition, Justice Powell's concurrence pointed out that the district court could delay enforcing a discovery demand in the hope of a resolution of issues through summary judgment.[383] Thus, if no real issue of defamatory falsehood was posed, defendants would be able to resist discovery. In this light, the Court viewed Justice Brennan's requirements as a mere "formalism" that should not be embedded in the Constitution.

Justice Stewart dissented on the ground that inquiries into the editorial process were irrelevant to the issue at trial. He argued that the issue in public-figure defamation actions is whether the

378. *Id.* at 1649.
379. *Id.* at 1651 (Powell, J., concurring).
380. *Id.* at 1659 n.14 (Brennan, J., dissenting in part).
381. *Id.* at 1660.
382. *Id.* at 1648 n.23.
383. *Id.* at 1651 n.4 (Powell, J., concurring).

defendant knew the defamatory statement was untrue or published it in reckless disregard of its truth or falsity, and that the reason for publishing the statement was simply not relevant to the suit.[384] Therefore; he would have remanded the case with directions to the trial court to measure each proposed question strictly against the *New York Times* criteria.[385] The majority rejoined that the trial court had used the proper criteria and the correctness of its decisions on relevance was not before the Court,[386] but perhaps more can be made of Justice Stewart's relevancy point than appeared in his opinion. Journalists, like other humans, will form opinions about the people whose actions they observe. This can easily lead the journalist to dislike a particular public figure, and while reporters would insist that their personal feelings did not affect their reporting, a jury might believe that dislike of the plaintiff led to a reckless disregard for the truth. Fear of such a misguided jury determination might lead reporters to be especially reluctant to write articles critical of persons they believe to be reprehensible. The most relevant evidence of knowing falsity or reckless disregard of truth is the information that was available to the reporter prior to publication. The minor value that evidence of the journalist's attitudes towards the plaintiff might have in resolving the crucial issue would appear to be outweighed by its prejudicial effect.[387] Such considerations may well underlie Justice Stewart's insistence that the publisher's motivation is irrelevant to the case.

Finally, Justice Marshall, alone among the justices, would have accorded editorial discussions an absolute privilege. Unlike the majority, he was convinced that discovery of editorial deliberations would deter journalists from expressing doubts as to the accuracy of information. While he admitted that evidence of such statements might be relevant to the issue of whether the journalist acted in reckless disregard for the truth, he argued that other means to establish deliberate or reckless disregard for the truth are sufficient. "To the extent that such a limited privilege might deny recovery in some marginal cases," he wrote, "it is, in my view, an acceptable price to pay for preserving a climate conducive to considered editorial judgment."[388]

Although almost all the justices agreed that expression would not be inhibited by inquiry into the journalists's "internal editorial

384. *Id.* at 1661 (Stewart, J., dissenting).

385. *See* note 305 *supra.*

386. 99 S. Ct. at 1650 n.27.

387. *See* Quint, *Toward First Amendment Limitations on the Introduction of Evidence: The Problem of* United States v. Rosenberg, 86 YALE L.J. 1622 (1977).

388. 99 S. Ct. at 1667 (Marshall, J., dissenting).

processes," they divided on the need for inquiry into the prepublication editorial discussions. The majority found no serious impairment of discussion even here, while Justices Brennan and Marshall foresaw a significant effect on expression. Justice Brennan would have required a stronger preliminary showing of need for such discussions, while Justice Marshall concluded that alternative evidentiary sources made any need for discovery of editorial processes so marginal that it was insignificant in the face of the impact it would have to deter expression.

*Summary and Conclusion*

An idea is an abstraction. Its expression requires a person to express it and a means to communicate it. Although the government has no legitimate purpose in suppressing ideas, it may have a legitimate interest in regulating the particular speaker or the particular means chosen for expression. The Supreme Court has ruled that the state has a legitimate concern in protecting the public from injuries inflicted by the means used to communicate[389] or by acts linked to the speech.[390] It has also held that the government may protect its ability to govern by insisting that the speech be consistent with the function of the speaker in society when the speech either indicates that the speaker will not properly perform his job[391] or is itself inconsistent with proper performance.[392] The government may also have a legitimate interest in increasing speech and the dissemination of information, whether by attempting to provide greater access for opposing views[393] or by obtaining information it needs to make wise decisions.[394]

Government action justified by legitimate governmental interests may decrease the expression of ideas; indeed, the justification may be a pretext for suppressing the idea. Decisions such as *Bates*,[395] *Bellotti*,[396] *Buckley*[397] and *Linmark*[398] demonstrate that the

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389. *See* Section I (Speech Plus) *supra.*

390. *See* Section ID (Commercial Speech) *supra.*

391. *See* Section III (Speech as Evidence of Unfitness) *supra.*

392. *See* Section IV (Speech of Special Groups Impairing Governmental Functions) *supra.*

393. *See* Section II (Regulation for Speech Reasons) *supra.*

394. *See* Section V (Requiring Non-Incriminating Disclosure to Aid Government Functions) *supra.*

395. Bates v. State Bar, 433 U.S. 350 (1977), discussed at pp. 421-22 *supra.*

396. First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978), discussed at pp. 409-10 *supra.*

397. Buckley v. Valeo, 424 U.S. 1 (1976), discussed at pp. 407-09 *supra.*

398. Linmark Assoc. Inc. v. Township of Willingboro, 431 U.S. 85 (1977), discussed at pp. 420-21 *supra.*

Court will carefully scrutinize the governmental action and will find it unconstitutional if analysis reveals that the concern of the state was to suppress the expression of ideas. When a legitimate governmental interest is furthered, the Court has usually stated that it will weigh that interest against the resulting impairment of speech. The Court has reserved the power to invalidate legislation on the ground that it impairs expression too greatly even though the law is the only possible means of furthering a legitimate governmental interest.[399] It has, however, never exercised this power. Instead, when the Court has struck down a law as a result of weighing interests, it has resorted to ancillary doctrines such as overbreadth and vagueness. Through the use of these ancillary doctrines, the Court has avoided weighing the general value of the governmental goal against the value of speech, weighing instead the incremental degree to which a governmental interest is furthered by the particular form of challenged action against the impact on expression that results from the use of that form.[400] Thus, for example, the issue is not whether national security is more important than freedom of expression. Rather, it is whether a specific loyalty test which inhibits expression will further national security enough to justify using it instead of an alternative that also protects national security without as severe an impact on speech. In this more specific balancing process, the views of the justices on the degree to which expression is impaired and the degree to which the legitimate interest is furthered have often differed. There is, however, no real disagreement on the nature of the task they perform.

The balancing decisions of the Supreme Court are consistent with the theory that the first amendment's prohibition on abridging the freedom of speech is simply a statement that suppression of ideas is not a legitimate governmental purpose. In view of the difficulty of detecting that purpose, the Court has created prophylactic rules designed to assure that the forbidden purpose does not underlie specific governmental acts. This theory explains balancing as an attempt by the Court to evaluate interests asserted by the government in terms of their potential as thoughtless or deliberate pretexts to suppress speech. The weighing is not scientific. Indeed, as the Court perceives society responding to its standards it may

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399. *See* United States v. O'Brien, 391 U.S. 367, 388-89 (1968) (Harlan, J., concurring), discussed at pp. 401-03 *supra*.

400. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967), discussed at pp. 440-41 *supra*.

determine either that they are not effective to forestall deliberate suppression of ideas, or that they stifle needed governmental action, and refine its standards in the light of experience.

This Article is the final installment of a comprehensive three-part discussion of the theory of the first amendment as applied by the Supreme Court.[401] The theory itself, however, may be only one example of a more comprehensive theory of the nature of the Constitution. Other provisions in that document can be viewed as authorizing or prohibiting not specific acts, but specific purposes. From this perspective, the changes, cycles and developments in constitutional doctrine may be seen as proper behavior for a Court charged with implementing a purposive document with only limited means for divining governmental purpose. The decisions of the Court often may not be commanded by the Constitution, but in a society steeped in the common law tradition, they may be within the appropriate discretion of a Court charged with using the means available to it to enforce the Constitution's commands.[402]

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401. The first two articles are Bogen, *The Supreme Court's Interpretation of the Guarantee of Freedom of Speech,* 35 MD. L. REV. 555 (1976); Bogen, *First Amendment Ancillary Doctrines,* 37 MD. L. REV. 679 (1978).

402. *See generally* Monaghan, *The Supreme Court, 1974 Term — Foreward: Constitutional Common Law,* 89 HARV. L. REV. 1 (1975).