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Broadcasting and Speech

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Broadcasting and Speech

Jonathan Weinberg†

It is illegal to speak over the airwaves without a broadcast license. The FCC grants those licenses, and decides whether they will be renewed, on the basis of a vague "public interest" standard. The resulting system of broadcast regulation conflicts, starkly and gratuitously, with ordinary free speech philosophy. In this Article, the author argues that that inconsistency is crucially linked to inadequacies in free speech theory itself. Conventional free speech theory ignores the extent to which imbalances of private power limit freedom of expression. It presupposes that public discourse takes place on a rational plane. The author explores the link between the philosophical failings of broadcast regulation and the empirical failings of free speech theory by identifying competing legal visions that underlie discussions of broadcasting and freedom of speech. The first of these visions, which forms the bases for ordinary free-speech philosophy, emphasizes hard-edged rules, individualism, a belief in overall private autonomy, and a sharp public-private distinction. The second, at the heart of our broadcast regulatory system, emphasizes situationally sensitive standards, altruism, the pervasive role of the government in structuring private ordering, and the pervasiveness of dependence and constraint. These competing visions, the author submits, are fundamentally irreconcilable; our speech regulatory law is driven by the contradiction between them.

INTRODUCTION

The field of broadcast regulation has seemed, of late, to be slipping into constitutional chaos. The Federal Communications Commission (FCC) has repealed the "fairness doctrine"—a regulatory mainstay since before there was an FCC—calling it unconstitutional.¹ The Supreme Court decision upholding the fairness doctrine, the FCC blithely stated, "cannot be reconciled with well-established constitutional precedent."² A D.C. Circuit decision a few years ago took the position that the entire

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1. Syracuse Peace Council, 2 F.C.C.R. 5043 (1987) (concluding that the fairness doctrine, on its face, violates the First Amendment and contravenes the public interest), *aff'd on narrower grounds*, 867 F.2d 654, 656 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

2. *Id.* at 5056 (discussing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)).

basis for our broadcast regulatory scheme is incoherent.³ Courts have seemed eager to strike down as unconstitutional federal statutes regulating broadcasting;⁴ Presidents Reagan and Bush vetoed bills on the same ground.⁵ The cable television regulatory scheme has been the subject of especially punishing judicial attack.⁶ Academics have joined the

3. *Telecommunications Research and Action Ctr. v. FCC*, 801 F.2d 501, 508-09 (D.C. Cir. 1986) (arguing that the Court's rationale for greater content regulation of broadcast than of print media rests on a "distinction without a difference . . . lead[ing] to strained reasoning and artificial results"), *cert. denied*, 482 U.S. 919 (1987).

4. *See, e.g., Beach Communications, Inc. v. FCC*, 965 F.2d 1103 (D.C. Cir. 1992) (striking down, as unconstitutional, statutory direction that certain satellite master antenna TV facilities be subject to local cable franchise requirement), *rev'd*, 113 S. Ct. 2096 (1993); *Edge Broadcasting Co. v. United States*, 20 Media L. Rep. (BNA) 1904 (4th Cir. 1992) (striking down, as unconstitutional, statutory restrictions on broadcast of lottery information and advertisements), *rev'd*, 113 S. Ct. 2696 (1993); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (striking down, as unconstitutional, legislation mandating that the FCC enforce a ban of all radio and television broadcasts of "indecent" materials), *cert. denied*, 112 S. Ct. 1281 (1992); *News Am. Publishing v. FCC*, 844 F.2d 800 (D.C. Cir. 1988) (striking down, as unconstitutional, legislation forbidding extension of waivers of newspaper-television cross-ownership rule); *Daniels Cablevision, Inc. v. United States*, 1993 U.S. Dist. LEXIS 12806 (D.D.C. Sept. 16, 1993) (striking down, as unconstitutional, three provisions of the Cable Television Consumer Protection and Competition Act of 1992); *Chesapeake & Potomac Tel. Co. v. United States*, No. 92-1751-A, 1993 U.S. Dist. LEXIS 11822 (E.D. Va. Aug. 24, 1993) (striking down, as unconstitutional, legislation prohibiting telephone companies from offering video programming within their service areas); *see also Preferred Communications v. City of Los Angeles*, 754 F.2d 1396, 1411 & n.11 (9th Cir. 1985) (finding that section 621(a)(1) of the Cable Communications Policy Act would be invalid if read, as the legislative history provides, to authorize exclusive cable franchising), *aff'd on narrower grounds*, 476 U.S. 488 (1986).

5. *See* 138 CONG. REC. H11477 (daily ed. Oct. 5, 1992) (President Bush vetoing the Cable Television Consumer Protection and Competition Act of 1992, arguing in part that its "must carry" provisions were unconstitutional); Memorandum of Disapproval for the Children's Television Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1456 (Nov. 5, 1988) (President Reagan vetoing the Children's Television Act of 1988, arguing that it would violate the First Amendment); Veto of the Fairness in Broadcasting Act of 1987, 23 WEEKLY COMP. PRES. DOC. 715 (June 19, 1987) (President Reagan vetoing the Fairness in Broadcasting Act of 1987, arguing that it is "antagonistic to the freedom of expression guaranteed by the First Amendment"). President Bush invoked the First Amendment in withholding his approval from the Children's Television Act of 1990, which became law without his signature. *See* Statement on the Children's Television Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1611-12 (Oct. 17, 1990).

6. *See, e.g., Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) (striking down FCC "must carry" rules requiring operators to transmit local over-the-air television broadcast signals as violative of the First Amendment), *cert. denied*, 486 U.S. 1032 (1988); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985) (same), *cert. denied*, 476 U.S. 1169 (1986); *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985) (holding that the city could not, consistently with the First Amendment, limit access to one region of the city to a single cable television company if public utility facilities in that region were physically capable of accommodating more than one system), *aff'd on narrower grounds*, 476 U.S. 488 (1986); *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978) (striking down FCC regulations imposing mandatory channel capacity, equipment, and access rules as unauthorized and probably unconstitutional), *aff'd on narrower grounds*, 440 U.S. 689 (1979); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.) (striking down FCC pay cable rules as unsupported by evidence, unauthorized by law, and unconstitutional), *cert. denied*, 434 U.S. 829 (1977); *Daniels Cablevision, Inc. v. United States*, 1993 U.S. Dist. LEXIS 12806 (D.D.C. Sept. 16, 1993) (striking down, as unconstitutional, three provisions of the Cable Television Consumer Protection and Competition Act of 1992); *Chesapeake & Potomac Tel. Co. v. United States*, No. 92-1751-A, 1993 U.S. Dist.

onslaught. Some have attacked specific aspects of the regulatory scheme,⁷ while others have suggested that the entire American broadcast regulatory system is hopelessly in conflict with core First Amendment values and should be discarded.⁸

LEXIS 11822 (E.D. Va. Aug. 24, 1993) (striking down, as unconstitutional, legislation prohibiting telephone companies from offering video programming within their service areas); *Century Fed., Inc. v. City of Palo Alto*, 710 F. Supp. 1552 (N.D. Cal. 1987) (concluding that the city's access channel, universal service, and state-of-the-art requirements violated the First Amendment); *Pacific West Cable Co. v. City of Sacramento*, 672 F. Supp. 1322 (E.D. Cal. 1987) (holding that exclusive cable franchising scheme violated cable operator's First Amendment rights); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987) (same); *Century Fed., Inc. v. City of Palo Alto*, 648 F. Supp. 1465 (N.D. Cal. 1986) (holding that exclusive cable franchising scheme violated the First Amendment). *But see* *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540 (7th Cir. 1989) (rejecting a constitutional challenge to a cable franchise agreement), *cert. denied*, 493 U.S. 1044 (1990); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986) (rejecting a constitutional challenge to the city's de facto exclusive franchise), *cert. denied*, 480 U.S. 910 (1987); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982) (upholding district court's rejection, on motion for preliminary injunction, of First Amendment challenge to cable regulatory scheme); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981) (reversing preliminary injunction, based on the First Amendment, blocking city's exclusive cable franchising scheme), *cert. dismissed*, 456 U.S. 1001 (1982); *Turner Broadcasting Sys. v. FCC*, 819 F. Supp. 32 (D.D.C.) (rejecting a constitutional challenge to "must carry" provisions of the 1992 Cable Television Consumer Protection and Competition Act), *cert. granted*, 62 U.S.L.W. 3207 (U.S. Sept. 28, 1993) (No. 93-44); *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580 (W.D. Pa. 1987) (rejecting a First Amendment challenge to city's franchise fee and "public access" requirements), *aff'd on narrower grounds*, 853 F.2d 1084 (3d Cir. 1988); *Berkshire Cablevision v. Burke*, 571 F. Supp. 976 (D.R.I. 1983) (rejecting a First Amendment challenge to "public access" requirement), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985).

7. *See, e.g.*, Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401 (1989) (attacking FCC ownership rules as constitutionally suspect); Thomas G. Krattenmaker & L.A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151 (arguing that the fairness doctrine is incoherent and unworkable).

8. *See, e.g.*, JONATHAN W. EMORD, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT (1991) (arguing that only a property rights model for broadcast regulation can ensure adequate protection for freedom of speech and press); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987) (contending that broadcast licensing is unjustifiable and has provided a vehicle for blatant content censorship); MATTHEW L. SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES: CONTROLLING THE CONTENT OF PRINT AND BROADCAST (1986) (arguing that neither economic nor psychological rationales support differential treatment of print and broadcast media); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 209 (1982) (urging "that the perception of broadcasters as community trustees . . . be replaced by a view of broadcasters as marketplace participants"); Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 137-38 (1990) (arguing that the interference rationale for broadcast licensing is nonsensical); William T. Mayton, *The Illegitimacy of the Public Interest Standard at the FCC*, 38 EMORY L.J. 715 (1989) (arguing that the current regulatory scheme, under which the FCC exercises broad "public interest" power, is based on a misinterpretation of the Communications Act of 1934); Laurence H. Winer, *The New Media Technologies and the Old Public Interest Standard*, 29 JURIMETRICS J. 377 (1989) (concluding that the public interest standard for broadcast media should be discarded). All of these authors agree that our broadcast regulatory system is fundamentally misguided; they do not all agree on what we should do with it now, sixty-five years after the Radio Act of 1927 set us on this course.

Other academics, by contrast, argue that we should extend the current broadcast regime. *See*,

Our broadcast regulatory scheme is certainly vulnerable to attack. The Federal Communications Commission (FCC) distributes a limited number of broadcast licenses to selected individuals and corporations based on its determination of the "public interest." The FCC has declared it illegal for any unlicensed entity to engage in mass communication over the airwaves. This is all rather odd. Ordinary First Amendment philosophy strongly disfavors government licensing of speakers;⁹ the broadcast regulatory system, by contrast, embraces such licensing. The Supreme Court first justified this system with reference to "the problem of interference": because of the danger of competing broadcasters interfering with one another, "if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves."¹⁰ That explanation, though, has been the target of withering attack: "Economists, political scientists and lawyers generally agree" that the interference rationale for public-interest licensing is "nonsensical."¹¹ It is "simply silly";¹² it "has worn so thin that continuing to refute it would be gratuitous."¹³

As a result, some commentators describe the 1927 decision to create a government agency to regulate broadcasting through public-interest

e.g., Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 289 (1992) ("It is worthwhile to consider . . . a compulsory hour of public affairs programming per evening, . . . content review of children's television by nonpartisan experts, or guidelines to encourage attention to public issues and diversity of view."). Substantive proposals for *greater* regulation, however, are less destabilizing than are arguments that our entire broadcast regulatory scheme is fundamentally unconstitutional. They typically can be made within the ruling constitutional paradigm for broadcasting. *See, e.g.*, Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 5 F.C.C.R. 5297 (1990) (concluding that a blanket prohibition of "indecent" radio and television comports with constitutional standards), *vacated sub nom.* Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992).

9. *See generally* Near v. Minnesota, 283 U.S. 697, 713 (1931) (striking down a statute on the ground that it effectively imposed a licensing system on newspaper owners and publishers who charged official misconduct).

10. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388-89 (1969). It is well-accepted that [b]roadcasting is the transmission of electromagnetic waves over the radio spectrum. When more than one station in a particular geographical area simultaneously attempts to use the same piece of spectrum space, the result is chaos. Thus, for the spectrum to have reliable utility, the right to exclusive use of a portion [of the spectrum] must be protected.

BENNO C. SCHMIDT, JR., FREEDOM OF THE PRESS VS. PUBLIC ACCESS 126 (1976). According to proponents of the interference rationale, in light of the physical scarcity of the broadcast spectrum, "[g]overnment allocation and regulation of broadcast frequencies are essential"; and given "the need for such allocation and regulation, . . . nothing in the First Amendment . . . prevent[s] the Commission from allocating licenses so as to promote the 'public interest.'" FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 799 (1978).

11. Hazlett, *supra* note 8, at 137-38 (footnotes omitted); *see also* LEE C. BOLLINGER, IMAGES OF A FREE PRESS 87-88 (1991) ("It is a decisive fact about broadcast regulation that the primary rationales used to justify that system . . . are illogical.").

12. L.A. Powe, Jr., *Mass Communications and the First Amendment: An Overview*, 55 LAW & CONTEMP. PROBS. 53, 69 (1992).

13. Daniel D. Polsby, *Candidate Access to the Air: The Uncertain Future of Broadcaster Discretion*, 1981 SUP. CT. REV. 223, 257-58.

allocation¹⁴ as a mistake.¹⁵ These critics suggest that the right to use the frequency spectrum should have been treated as a simple property right, bought and sold on the market, and subject to common-law property rules.¹⁶ That, after all, is the way we distribute the right to communicate in print. We allow people to *own* the resources of communication, rather than allocating them administratively.¹⁷ Regulating broadcast via a property-rights system, critics say, would have been both consistent with First Amendment values and economically efficient.¹⁸ Our current system, they contend, is neither.¹⁹

The constitutional attacks on our broadcast regulatory system have force. Ordinary First Amendment jurisprudence insists that if the government must engage in licensing, it may not rely on informal, vague, or discretionary criteria and procedures.²⁰ Licensing criteria must be sharpened and objective.²¹ As a general matter, the government may not reg-

14. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (superseded 1934). Before 1927, the Secretary of Commerce exercised some supervision over broadcasting but had little real statutory authority. See generally POWE, *supra* note 8, at 54-60 (detailing the Secretary's attempts to regulate broadcasting under the Wireless Ship Act of 1910 and the Radio Act of 1912). The 1927 Radio Act was superseded by the Communications Act of 1934, 47 U.S.C. §§ 151-160 (1988).

15. See, e.g., ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 108-50 (1983). Others call it a raw power grab. See, e.g., Hazlett, *supra* note 8 at 152-65 (arguing that the Radio Act of 1927 departed from ordinary First Amendment principles in a self-conscious attempt to benefit powerful incumbent radio broadcasters and members of Congress at the expense of weaker broadcasters, would-be broadcasters, consumers, and the U.S. treasury).

16. The leading article supporting this position is Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959).

17. If we were to regulate print as we do broadcast, we might establish a Federal Paper Commission, with members appointed by the President, with the job of allocating the right to communicate in print (or perhaps allocating newsprint itself) among the populace without regard to who owns what. See Jonathan Weinberg, *Questioning Broadcast Regulation*, 86 MICH. L. REV. 1269, 1271-72 (1988) (book review). Instead, we rely on a property-rights system: in order to write my thoughts on a piece of paper, copy the paper, and distribute the copies to others, I must first own the paper and the copier, or have permission from their owner(s) to use them. These rules structure our mass communications system in far-reaching ways: only those who own paper, photocopiers, printing presses, and the like, and those operating at their sufferance, can engage in mass communications. See *infra* notes 217-25 and accompanying text.

18. On economic efficiency, see Coase, *supra* note 16, at 18:

Quite apart from the malallocations which are the result of political pressures, an administrative agency which attempts to perform the function normally carried out by the pricing mechanism operates under two handicaps. First of all, it lacks the precise monetary measure of benefit and cost provided by the market. Second, it cannot, by the nature of things, be in possession of all of the relevant information possessed by the managers of every business which uses or might use radio frequencies, to say nothing of the preferences of consumers for the various goods and services in the production of which radio frequencies could be used.

See also *id.* at 27 ("It is sometimes implied that the aim of regulation in the radio industry should be to minimize interference. But this would be wrong. The aim should be to maximize output.").

19. See generally sources cited *supra* note 8.

20. See *infra* notes 51-55 and accompanying text.

21. See *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2401-02 (1992). Government licensing of speakers in accordance with vague or uncertain standards generally violates the First Amendment because it "makes it difficult to distinguish . . . between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power," and intimidates would-be speakers

ulate speech on the basis of its content; in the rare cases in which content restrictions are allowed, they must be clear and specific.²² The broadcast regulatory system, however, is essentially defined by vague and inscrutable standards used to control both the identity of the persons licensed to own stations²³ and the content of what those persons may say.²⁴ While our First Amendment philosophy decries vagueness and discretion in government regulation of speech, the broadcast regulatory system positively celebrates them. While First Amendment jurisprudence denies government the power to license speakers (or to reward or punish their speech) on the basis of its own views as to what private speech would best serve the "public interest," the broadcast regulatory system places that government power at its core. The interference rationale cannot justify any of this.

The inconsistency of our regulatory scheme with First Amendment philosophy, however, is not the end of the story. In this Article, I take the argument a step further: I believe that while our broadcast regulatory scheme *is* fundamentally flawed, the situation is more complicated than the critics of broadcast regulation have allowed.²⁵ It is complicated in part because our freedom-of-speech philosophy, which I have described as inconsistent with our broadcast regulatory system, itself conflicts with much of what we know about the world. That philosophy is rooted in the notion that we process speech on a rational level, "that there is on the whole a preponderance among mankind of rational opinions and rational conduct,"²⁶ and that we can thus properly treat speech as a competition of ideas in a metaphorical marketplace. It further assumes that this rational competition of ideas is substantially unaffected by the huge disparities in economic resources available to various speakers and proponents of different views.

None of these assumptions, however, is completely true. Our public debate is to a large extent "dominated, and thus constrained, by the same

into "censoring their own speech." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-58 (1988).

22. *See, e.g., Smith v. Goguen*, 415 U.S. 566 (1974) (striking down a state flag-misuse statute as vague).

23. *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965) (setting out criteria governing FCC comparative licensing process). *See generally infra* text accompanying notes 66-109.

24. *See, e.g., Syracuse Peace Council*, 2 F.C.C.R. 5043, 5049 (1987) (stating that the FCC's "fairness doctrine," in effect for over 50 years, "necessarily involves a vague standard, the application and meaning of which is hard to predict"), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). *See generally infra* text accompanying notes 110-32.

25. *Cf. Lee C. Bollinger, Jr., Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 16 (1976) ("The very weakness of [the arguments supporting current broadcast regulation] suggests that there is something more here than first meets the eye.")

26. JOHN STUART MILL, ON LIBERTY 24 (Library of Liberal Arts ed. 1956) (1859).

forces that dominate social structure."²⁷ It is doubtful that the marketplace of ideas meaningfully exposes all ideas to scrutiny; the system is too pervasively dominated by large commercial gatekeepers that are unlikely to give time to less-conventional or offensive views.²⁸ Moreover, individuals' reactions to speech are largely determined by experience, psychological propensities, societal roles, half-submerged prejudices, and socialization.²⁹ The packaging and frequency of messages may be more persuasive than the rational force of their arguments. The emotive and experiential impact of messages often may be more important than their rational impact.³⁰

I propose in this Article that the two problems I have discussed—the inconsistency of our broadcast regulatory system with core First Amendment philosophy, and the fact that that philosophy itself lacks factual mooring—are linked. Broadcast regulation is marked by a crucial procedural failing—it relies on ad hoc, situationally sensitive judgments by regulators seeking to advance a vaguely defined “public interest.” Ordinary freedom-of-speech philosophy is marked by a substantive failing—it refuses to recognize the ubiquity of inequality and private power as a limitation on freedom. Relying on insights developed by authors associated with critical legal studies, I will argue that the respective failings of our broadcast regulatory and First Amendment philosophy are central to the link between them. They are, I suggest, two sides of a single coin.

Our freedom-of-speech philosophy can be seen as reflecting a larger worldview emphasizing individualism and a sharp public-private distinction. In this worldview, the private sphere is the natural home of individual freedom, and the government should not intervene in that sphere except in exceptional circumstances. Values are for each individual to choose; they are neither objective nor communally determined. Paternalism has no place in government decisionmaking. The law should restrain government arbitrariness and bias through clear, black-letter rules.

In contrast, our system of broadcast regulation can be seen as reflecting a competing worldview. That worldview emphasizes the community rather than the individual. It stresses that government plays a

27. Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 786 (1987); accord Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 3-4 (1985); see also CHARLES E. LINDBLOM, *POLITICS AND MARKETS* 201-21 (1977) (arguing that the business elite molds public opinion through the media).

28. See TODD GITLIN, *INSIDE PRIME TIME* 92-93, 189-90, 192, 254-55 (1983) (discussing television networks' reluctance to air controversial programs); EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* 16-18 (1988) (emphasizing advertiser influence over broadcast programming).

29. See *infra* notes 266-80 and accompanying text.

30. See *infra* notes 288-91 and accompanying text.

pervasive role in structuring private ordering, and that dependence and constraint characterize the so-called "private" sphere. Because, under this approach, values are objective or communally determined, government paternalism is often appropriate. Government actors should apply the law through individualized, situationally-sensitive decisionmaking.

The contradiction between the two worldviews I have described helps explain why the conflict between ordinary free speech philosophy and our system of broadcast regulation is inescapable: our overall speech law is glaringly schizoid. Both our broadcast regulation rules and our conflicting First Amendment philosophy reflect important but incomplete visions found throughout our legal system. These two visions cannot be reconciled, but neither can they be wholly suppressed. As a result, while calls to "fix" our broadcast system by making broadcast more like print have substantial merit, doing so will not make the broadcast system's problems go away. No change in the law could do that.

In Part I of this Article, I explain the inconsistency of our system of broadcast regulation with ordinary First Amendment philosophy; in Part II, I discuss the inadequacy of that philosophy itself. In Part III, I attempt to situate both our free speech philosophy and our system of broadcast regulation within the larger framework of the competing worldviews I have discussed. In Part IV, I take a look at the doctrinal consequences of all this, asking if there is any way to build a workable regulatory structure for the electronic mass media.

I

PUBLIC-INTEREST LICENSING AND THE FREE SPEECH TRADITION

A. *A Quick Tour of Free Speech Philosophy*

I will argue in this Part that public-interest licensing of broadcast speakers is inconsistent with usual First Amendment philosophy. To make that point, I will start by setting out a brief and incomplete sketch of that philosophy. I will return to that sketch later;³¹ my goal now is simply to introduce a few relevant themes.³²

Ordinary First Amendment philosophy emphasizes the ability of every citizen to speak freely in the "marketplace of ideas"; government has only a limited prerogative to interfere with that speech. Public debate must incorporate a wide diversity of speakers and views. Government may play no role that allows it the opportunity to limit or skew that diversity. The resulting marketplace of ideas is a forum in which individuals, and society as a whole, can decide what is true and

31. See *infra* text accompanying notes 374-81.

32. See generally Weinberg, *supra* note 17, at 1282-85 (discussing ideals underlying First Amendment doctrine).

right.³³ Free speech, further, does not merely advance the discovery of truth; it fosters political self-government.³⁴ Some see it as definitional to the process of self-determination that constitutes democracy.³⁵ Some see it as arming the people with the information and ideas that they need to govern themselves.³⁶ Some see it as providing a check on the state apparatus for the benefit of a citizenry not involved in the daily workings of government.³⁷ In any event, government may not assert any control over the processes of mass communication that would bias those processes, and it may not limit the agenda of public debate: that debate must be "uninhibited, robust, and wide-open."³⁸

This view of freedom of speech incorporates a vision of the citizenry as ultimate sovereign, for whose sake open debate must be preserved, and of the government as untrustworthy, insecure, and inclined to suppress criticism in covert or overt ways.³⁹ That vision has important doctrinal consequences.⁴⁰ The government may not, without good and sufficient reason, restrict individuals' ability to speak.⁴¹ Such an action, even if designed to serve legitimate goals and neutral as to the content of the speech, must bear a burden of justification under the First Amendment.⁴²

33. See *infra* notes 176-92 and accompanying text. For alternative visions of free speech focusing on the right of individual self-expression, see generally C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989) (advocating a liberty-based theory of the First Amendment); THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 4-7 (1966) (focusing on the right of the individual to self-fulfillment through speech); *infra* note 179 and accompanying text.

34. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 771-72, 776-77 (1978); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Grosjean v. American Press Co.*, 297 U.S. 233, 249-50 (1936). See generally *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (confirming First Amendment protection of paid political advertisements).

35. See Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 279-83 (1991).

36. See Letter from James Madison to W.T. Barry (Aug. 4, 1822), quoted in Eric G. Olsen, Note, *The Right to Know in First Amendment Analysis*, 57 TEX. L. REV. 505, 506 (1979).

37. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; cf. *New York Times Co. v. United States*, 403 U.S. 713, 723-24 (1971) (Douglas, J., concurring) (stating that the "dominant purpose of the First Amendment was to prohibit . . . governmental suppression of embarrassing information").

38. *New York Times Co.*, 376 U.S. at 270.

39. See BOLLINGER, *supra* note 11, at 20.

40. See generally Jonathan Weinberg, *Broadcasting and the Administrative Process in Japan and the United States*, 39 BUFF. L. REV. 615, 643-45 (1991) (discussing the implications for broadcast regulation of U.S. constitutional philosophy).

41. See, e.g., *United States v. Grace*, 461 U.S. 171 (1983) (striking down a ban on picketing on the sidewalks in front of the U.S. Supreme Court building).

42. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding city regulation of public music concerts after finding the regulations content-neutral and narrowly tailored to serve a significant government interest); *Schneider v. State*, 308 U.S. 147 (1939) (striking down content-neutral ordinance prohibiting distribution of handbills). See generally Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987). The government may preclude individual speech on, or using, government property, assuming that that property is not deemed a "public forum," but even there the government regulation must be substantively reasonable and viewpoint-

Government restrictions of speech on the basis of *content* are particularly disfavored.⁴³ The government has little power to restrict speech merely because the communicative impact of that speech may be harmful. The government may restrict speech based on its communicative impact when necessary "to further a state interest of the highest order,"⁴⁴ but may not do so simply to uphold its own general notion of the public interest or to advance its own values.⁴⁵

Further, the government may not, as a general matter, restrict individuals' speech because of things they have said in the past⁴⁶ or things they propose to say in the future.⁴⁷ Thus, in 1931 the Supreme Court struck down a law allowing state authorities to secure an injunction against the publication of a "malicious, scandalous, and defamatory" newspaper.⁴⁸ The publisher of such a newspaper would have been subject to suit for damages under then-existing constitutional doctrine. Nonetheless, the Court said, to allow the government to seek a court order forbidding further publication would be "the essence of

neutral. See, e.g., *United States v. Kokinda*, 497 U.S. 720 (1990) (upholding, as reasonable, a regulation prohibiting solicitation of funds on Postal Service premises).

43. See generally Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 29-35 (1975) (arguing for the use of the equality principle to protect against content censorship); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) (exploring the content-based/content-neutral distinction under the First Amendment). But see Marc A. Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L. REV. 1657 (1987) (arguing that constitutional libel law should make distinctions based on content).

44. *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)); see also *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (government may punish a speaker for "words . . . intended to produce, and likely to produce, imminent disorder").

Modern First Amendment philosophy thus rejects the approach of cases such as *Frohwerk v. United States*, 249 U.S. 204 (1919), and *Debs v. United States*, 249 U.S. 211, 216 (1919), that the government may criminalize speech with the "natural tendency and reasonably probable effect" of impeding government objectives. Justice Kennedy has questioned whether even compelling justification and narrow tailoring should be sufficient to save a content-based restriction outside of "historic and traditional categories long familiar to the bar," *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 112 S. Ct. 501, 514 (1991) (Kennedy, J., concurring in the judgment), but he had to twist into a pretzel to avoid the consequences of those words in *Burson v. Freeman*, 112 S. Ct. 1846, 1858-59 (1992) (Kennedy, J., concurring) (upholding ban on electioneering outside polling places).

45. See, e.g., *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 685 (1959) (striking down a statute that prohibited the exhibition of films portraying "acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior") (quotation omitted). But see *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding an ordinance restricting the location of adult theaters); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973) (approving an order enjoining the exhibition of "obscene, pornographic films").

46. See *Near v. Minnesota*, 283 U.S. 697 (1931); see also *Lowe v. SEC*, 472 U.S. 181 (1985) (construing a statute to avoid government registration of certain investment advice newsletters).

47. See *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (refusing injunction sought by the United States against publication of the Pentagon Papers); *id.* at 714-15 (Black, J., concurring); *id.* at 720 (Douglas, J., concurring); *id.* at 724-25 (Brennan, J., concurring); *id.* at 730 (White, J., concurring).

48. *Near v. Minnesota*, 283 U.S. at 701-02 (1931) (quotation omitted).

ensorship."⁴⁹

Licensing schemes, indeed, are inherently suspect even when they do not incorporate explicit content distinctions. In 1938, the Supreme Court considered a city ordinance forbidding any person to distribute written material without first obtaining permission from a government official. The Court held that the ordinance "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship."⁵⁰

Finally, to the extent that the government can at all limit individuals' ability to speak through a licensing-like process, it must rely on neutral, objective, and mechanical criteria and procedures. Because government "discretion has the potential for becoming a means of suppressing a particular point of view,"⁵¹ any licensing requirement must contain "narrow, objective and definite standards to guide the licensing authority."⁵² "If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion' by the licensing authority, 'the danger of censorship and of abridgement of our precious First Amendment freedoms is too great' to be permitted."⁵³

Thus, a few years ago, the Supreme Court struck down a city ordinance giving a government officer discretion, within the bounds of the "necessary and reasonable," to grant or deny permission to place newspaper vending machines on public sidewalks.⁵⁴ The Court conceded that there might be circumstances in which the city could legitimately deny a permit: the vending machines might be found to interfere with other uses of the sidewalks. The ordinance was unconstitutional, however, because the city's discretion was not limited by clear-cut rules. The vague regulatory scheme made "*post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria . . . far too easy."⁵⁵ It could prevent courts from detecting government's "illegitimate abuse of censorial power," and could therefore "intimidate[] parties into cen-

49. *Id.* at 713.

50. *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938).

51. *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2401 (1992) (quoting *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 649 (1981)).

52. *Id.* (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969)).

53. *Id.* at 2401-02 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940) and *Southeastern Promotions v. Conrad*, 420 U.S. 546, 553 (1975)).

54. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *see also* *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (invalidating an ordinance giving the city discretionary control over public demonstrations); *Staub v. City of Baxley*, 355 U.S. 313 (1958) (invalidating an ordinance giving the city discretionary control over solicitation by dues-charging organizations); *Kunz v. New York*, 340 U.S. 290, 295 (1951) (invalidating an ordinance giving the city the discretionary control over public worship meetings); *Saia v. New York*, 334 U.S. 558 (1948) (invalidating an ordinance giving the city the discretionary control over use of sound amplification devices).

55. *Lakewood*, 486 U.S. at 758.

soring their own speech."⁵⁶ The regulatory scheme was particularly "threatening" because it involved a "multiple or periodic licensing requirement," ensuring that newspapers were "under no illusion regarding the effect of the 'licensed' speech on the ability to continue speaking in the future."⁵⁷

B. *The Nature of Our Broadcast Regulatory System*

Broadcasting is speech.⁵⁸ Indeed, much of broadcasting is political speech, in a quite uncontroversial sense of "political." The innocent or naive, therefore, might expect it to be covered by the rules I have set out above. In fact, though, our broadcast regulatory system takes a path of its own. I shall explore that path at some length in order to make clear how far it wanders from the route of ordinary free speech philosophy.

The central requirement of our broadcast system is set out in the Communications Act of 1934:⁵⁹ "No person shall . . . operate any apparatus for the transmission of . . . communications . . . by radio" except with a license granted by the Federal Communications Commission [FCC], a government agency.⁶⁰ The FCC is to grant a license to an applicant only "if public convenience, interest, or necessity will be served thereby";⁶¹ the term of that license may not be longer than five to ten years, depending on the medium.⁶² The Commission may renew the license only on the basis of a similar finding that renewal would serve the "public interest, convenience, and necessity."⁶³

56. *Id.* at 757-58.

57. *Id.* at 759-60; *see also* *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (invalidating a licensing scheme as enforced against sexually oriented businesses engaged in First Amendment activity).

58. *See* *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) (noting that "radio [is] included in the press whose freedom is guaranteed by the First Amendment").

59. 47 U.S.C. §§ 151-160 (1988). Under the statute, the FCC exercises regulatory authority over all forms of interstate communication via spectrum or wire, excluding federal governmental uses. *See id.* §§ 152, 305. The FCC succeeded the Federal Radio Commission, which regulated broadcasting under the Radio Act of 1927, ch. 169, 44 Stat. 1162 (superseded 1934). A variety of sources provide useful general background on the law made by the FCC. They include STANLEY M. BESEN ET AL., *MISREGULATING TELEVISION: NETWORK DOMINANCE AND THE FCC* (1984); T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE* (3d ed. 1993); DONALD M. GILLMOR ET AL., *MASS COMMUNICATION LAW* 683-904 (5th ed. 1990); DOUGLAS H. GINSBURG ET AL., *REGULATION OF THE ELECTRONIC MASS MEDIA* (2d ed. 1991); ERWIN G. KRASNOW ET AL., *THE POLITICS OF BROADCAST REGULATION* (3d ed. 1982); VINCENT MOSCO, *BROADCASTING IN THE UNITED STATES* (1979); LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* (1987).

60. 47 U.S.C. § 301 (1988). "Radio," in this context, refers to the electromagnetic spectrum generally; "communications . . . by radio" thus include television, unknown when the statute was enacted in 1934.

61. *Id.* § 307(a); *see also id.* § 309(a) ("public interest, convenience, and necessity").

62. *Id.* § 307(c). Television licenses are granted for a term of five years; radio licenses for a term of seven years; and nonbroadcast licenses (for dissemination of radio communications to someone other than the general public, as in taxi or ambulance radio services) for a term of ten years.

63. *Id.*

The holder of a broadcast license is required to operate in the public interest. The nature of this requirement, however, has been hazy over the years. Near the beginning of our broadcast regulatory history, the Federal Radio Commission elucidated the public interest as follows:

Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interests of individuals or groups of individuals. . . . In a sense a broadcasting station may be regarded as a sort of mouthpiece on the air for the community it serves, over which its public events of general interest, its political campaigns, its election results, its athletic contests, its orchestras and artists, and discussion of its public issues may be broadcast.⁶⁴

More recently, the FCC has described operation in the public interest as relating to the provision of nonentertainment programming responsive to community needs.⁶⁵

Three key problems arise for the Commission in implementing its public-interest mandate. First, when several applicants seek mutually exclusive broadcast authorizations, how is the agency to decide whose licensure would best serve the "public interest"? Second, when a licensee has completed one or more license terms and is seeking renewal, how is the Commission to evaluate whether that licensee's speech to date has adequately served the "public interest"? Finally, how is the Commission to decide when a licensee's speech during the license term has deviated so far from the "public interest" that it warrants some sort of punishment?

1. *Selecting the Licensee*

During the FCC's first thirty years, procedures for selecting among competing would-be licensees were unabashedly discretionary and content-sensitive.⁶⁶ The FCC exercised particularly broad power in deciding which of two qualified applicants for a broadcast license would better serve the public interest. It saw its role as one of reacting, in each unique instance, "an over-all relative determination upon an evaluation of all factors, conflicting in many cases."⁶⁷ In one case, for example, the agency chose an applicant because the Commissioners saw it as more likely to "encourage broadcasts on controversial issues or topics of current interest to the community," to "cooperat[e] with civic interests," and to "provide . . . opportunity for local expression."⁶⁸ On appeal, the

64. Great Lakes Broadcasting Co., 3 F.R.C. ANN. REP. 32 (1929), *modified on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930).

65. See Revision of Programming & Commercialization Policies, 98 F.C.C.2d 1076, 1091-92 (1984), *on reconsid.*, 104 F.C.C.2d 357 (1986), *rev'd in part sub nom.* Action for Children's Television v. FCC, 812 F.2d 741 (D.C. Cir. 1987).

66. See Weinberg, *supra* note 40, at 655-56.

67. Johnston Broadcasting Co. v. FCC, 175 F.2d 351, 356-57 (D.C. Cir. 1949).

68. *Id.* at 358. Further, the winning applicant's proposed staffing plan seemed to the

D.C. Circuit upheld that emphasis on the applicant's proposed programming: "[I]n a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service."⁶⁹

Because this process was so highly discretionary, it was susceptible to considerable hidden bias. In the 1950s, the Commission was stung by allegations that Commissioners had solicited and received bribes in licensing proceedings.⁷⁰ Moreover, the success or failure of many license applicants appeared to be determined by their Democratic or Republican political leanings.⁷¹ The Commission thereafter sought to inject more formality into the comparative process. Its 1965 *Policy Statement on Comparative Broadcast Hearings* laid out a plan for a more mechanical examination of applications.⁷²

Under the current regime, inaugurated by the 1965 *Policy Statement*, the Commission compares competing applicants primarily with reference to three factors: (1) the extent and size of the applicants' holdings in other media outlets;⁷³ (2) the extent to which the station owners personally would participate in management (with bonuses to be added if they were local residents), had participated in local civic affairs, had experience in the broadcast field, or were members of minority groups;⁷⁴ and (3) the size of the audience that the applicants' proposed

Commission to promise "a much more effective provision for program preparation and presentation." *Id.* at 358-59.

69. *Id.* at 359 (footnote omitted). The court, however, ordered that the matter be remanded to the Commission on the ground that certain engineering data attached to the prevailing application had never been sworn to by the applicant. *Id.* at 354-56.

On the comparative criteria developed by the FCC before 1965, see generally H. Gifford Irion, *FCC Criteria for Evaluating Competing Applicants*, 43 MINN. L. REV. 479 (1959).

70. See *Investigation of Regulatory Commissions and Agencies: Hearings Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. 553-1934 (1958) (Miami channel 10 affair); *id.* at 4889-935, 5055-266, 5297-348, 5497-535, 5621-45 (Pittsburgh channel 4 affair); BERNARD SCHWARTZ, *THE PROFESSOR AND THE COMMISSIONS* 194-203, 252-53 (1959).

71. Specifically, applicants owning newspapers that had endorsed Eisenhower in the preceding election were more successful in FCC comparative proceedings than applicants owning newspapers that had endorsed Stevenson. See Bernard Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655, 689-94 (1959).

72. 1 F.C.C.2d 393 (1965).

73. The Commission stated in 1965 that it would disfavor applicants with outside media holdings, in order to promote "a maximum diffusion of control of the media of mass communications." *Id.* at 394. It would consider the significance of an applicant's interests in other media to be a function of the extent of the applicant's stake in the other media; the degree to which the other media were in, or close to, the community being applied for; and the degree to which the other media were significant in terms of size, regional or national coverage, and influence. *Id.* at 394-95.

74. See *id.* at 395-96; see also *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). Under *FM Broadcast Assignments*, 101 F.C.C.2d 638, 645-47 (1985), *aff'd sub nom.* *National Black Media Coalition v. FCC*, 822 F.2d 277 (2d Cir. 1987), the FCC also awards an enhancement credit to operators of daytime-only AM stations seeking FM licenses. In *Mid-Florida Television Corp.*, 69 F.C.C.2d 607, 651-52 (1978), *set aside on other grounds*, 87 F.C.C.2d 203 (1981), the FCC awarded

signals could reach.⁷⁵

This approach, however, has not succeeded in converting the process from a discretionary to a mechanical one. Indeed, it works quite badly.⁷⁶ Comparative hearing results are neither consistent nor predictable.⁷⁷ The Commission has found no meaningful and fair way to tally up an applicant's strengths and weaknesses, or to compare one applicant to another; it has referred to "slight," "moderate," "substantial," "dis-

an enhancement credit for female ownership, but that preference seems to be moribund following *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992), declaring it unconstitutional.

75. See, e.g., *Susan S. Mulkey*, 4 F.C.C.R. 5520, 5521 (1989) (granting a slight comparative preference for superior coverage). In the 1965 *Policy Statement*, the Commission stated that it would also consider (1) the applicant's proposed program service, to the extent that the differences between the proposals were "material and substantial," going "beyond ordinary differences in judgment" to demonstrate one applicant's "superior devotion to public service," 1 F.C.C.2d at 397; (2) an applicant's record as licensee of other broadcast outlets, if "unusually good" in the sense of showing "unusual attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs," or "unusually poor," as manifested by "a failure to meet the public's needs and interests," *id.* at 398; and (3) the applicant's character (that is, whether it has been found guilty of criminal or other bad acts), *id.* at 399. An addendum to the 1965 *Policy Statement* added the availability of auxiliary power equipment as an additional comparative factor. See Addendum to *Policy Statement on Comparative Broadcast Hearings*, 2 F.C.C.2d 667 (1966).

Today, however, as a practical matter, the Commission rarely allows proposed program service or past broadcast record to be placed in issue. See *Random Selection (Lottery)*, 4 F.C.C.R. 2256, 2266 n.17 (1989) (describing current comparative process). *But see* *Simon Geller*, 90 F.C.C.2d 250, 273-76 (1982) (granting an applicant substantial preference for proposed programming), *remanded on other grounds sub nom.* *Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984). When those factors are put in issue, they are "seldom" or "only in extraordinary cases" dispositive. *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 F.C.C.R. 2664, 2666 (1992). The Commission has deleted character from the list of comparative criteria; character is now considered only in connection with the minimum qualifications for licensing. See *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179 (1986). Auxiliary power, similarly, no longer plays a significant role.

An unrelated factor, not mentioned in the 1965 *Policy Statement*, however, has played a dispositive role in the comparative process. Under 47 U.S.C. § 307(b) (1988), the FCC is required to award licenses so as to provide "fair, efficient, and equitable distribution of radio service." Where applicants are proposing to serve different communities of license, and the Commission determines that one of those communities should be preferred under § 307(b), the Commission eliminates all applicants not proposing to serve that community. See *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955); *WHW Enters., Inc. v. FCC*, 753 F.2d 1132, 1134-38 (D.C. Cir. 1985); *Random Selection (Lottery)*, 4 F.C.C.R. at 2258 (notice of proposed rulemaking).

76. The comparative hearing process has been the target of virtually unceasing criticism. The Commission itself recently stated that the process "can be described most charitably as laborious, exceedingly time consuming, expensive and often result[ing] in choices based on, at most, marginal differences." *Random Selection (Lottery)*, 4 F.C.C.R. at 2256. See generally STEPHEN R. BARNETT ET AL., *LAW OF INTERNATIONAL TELECOMMUNICATIONS IN THE UNITED STATES* 107 (1988) (comparative hearing process is "absurd," and has attracted "devastating criticism that is now virtually unanimous"); HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 53-73 (1962); Robert A. Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1, 39-55 (1971); Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 237-43 (1978); Weinberg, *supra* note 40, at 657-58.

77. See *Random Selection (Lottery)*, 4 F.C.C.R. at 2258-59; BARNETT ET AL., *supra* note 76, at 107; Robinson, *supra* note 76, at 238-40.

tinct," "clear," and "enhanced" "pluses," "merits," "demerits" and "preferences," and has sought to balance them via "administrative 'feel.'" ⁷⁸ Often, competing applicants for a broadcast license differ only marginally in terms of the criteria the Commission has set out. As a result, the FCC's choices among them are necessarily arbitrary. ⁷⁹

The foundational problem is that nobody has devised reliable mechanical criteria for figuring out which broadcast applicants, if licensed, would best serve the "public interest." It is doubtful that the Commission can by any means find the "best" applicant of a group in which all satisfy basic qualifications; but it is certain that the Commission's purportedly uniform, objective standards are not doing the

78. See, e.g., *Simon Geller*, 102 F.C.C.2d 1443, 1452-53 (1985); *Cowles Fla. Broadcasting, Inc.*, 60 F.C.C.2d 372, 411, 414, 416, 422 (1976), *rev'd sub nom. Central Fla. Enters. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979). *Geller* was a comparative hearing upon license renewal treated by the Commission as if it were an initial hearing. *Cowles* was a comparative hearing upon license renewal. Comparative renewal hearings and initial hearings are similar in their inability to balance comparative factors in any meaningful or satisfying way. See *infra* notes 90-109 and accompanying text.

79. See, e.g., *Merrimack Valley Broadcasting, Inc.*, 99 F.C.C.2d 680, 682 (1984); *Greater Wichita Telecasting, Inc.*, 96 F.C.C.2d 984, 994 (1984) (Rivera, Comm'r, concurring); *Alexander S. Klein, Jr.*, 86 F.C.C.2d 423, 424-25 (1981). Commissioner Robinson thus complained in *Cowles* that while it would be "almost invariably . . . insufficient for making the choice" if the Commission were to confine itself to verifying applicants' minimal qualifications, the Commission's efforts to go beyond that verification, and decide which is truly the best applicant, have been "productive of nothing but senseless waste of resources." *Cowles Fla. Broadcasting, Inc.*, 60 F.C.C.2d at 444 (Robinson, Comm'r, dissenting).

The Commission's basic qualifications for licensing are themselves to some extent subjective as well. See, e.g., *Henry v. FCC*, 302 F.2d 191, 194 (D.C. Cir.) (FCC not required to grant a license to an otherwise qualified sole applicant who has not "demonstrate[d] an earnest interest in serving a local community by evidencing a familiarity with its particular needs and an effort to meet them"), *cert. denied*, 371 U.S. 821 (1962). While the FCC has achieved some uniformity by embodying these judgments in published rules, rather than in ad hoc decisions in individual cases, the rules themselves have changed over time. For example, while the Commission requires broadcast applicants to be of good "character," see *supra* note 75 and accompanying text, it has shifted over time on the issue of how good one's character must be. Compare *Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1196-98 (1986) (limiting the categories of felony convictions which establish bad character for purposes of basic qualifications) with *Character Qualifications in Broadcast Licensing*, 5 F.C.C.R. 3252 (1990) (expanding the range of misconduct relevant to character to include all felony convictions), *on reconsider.*, 6 F.C.C.R. 3448 (1991); see also *Licensee Participation in Drug Trafficking*, 66 Rad. Reg. 2d (P & F) 1617 (1989). See generally *Character Qualifications in Broadcast Licensing*, 87 F.C.C.2d 836 (1981).

The Commission similarly has shifted its views of the point at which the nature and extent of an applicant's media holdings is such that the "public interest" absolutely precludes the applicant from being awarded a given license. See, e.g., *Revision of Radio Rules & Policies*, 7 F.C.C.R. 2755 (1992) (relaxing limits on multiple ownership). See generally GINSBURG ET AL., *supra* note 59, at 180-207. Regulation in this area necessarily involves the drawing of arbitrary lines, and the inquiry has had its own political content. In *News Am. Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988), the court struck down a statute barring extensions of existing waivers of a rule generally prohibiting common ownership of a daily newspaper and a broadcast station in the same market. The only two waivers outstanding when the statute was enacted applied to properties owned by Rupert Murdoch. The law is thought by some to have been passed in part because of Senator Kennedy's frustration with Murdoch's Boston newspaper. See Allan R. Gold, *Kennedy vs. Murdoch: Test of Motives*, N.Y. TIMES, Jan. 11, 1988, at A13.

job.⁸⁰ The agency thus has had to choose between making subjective determinations, overtly or covertly, in aid of making the best possible selections, or following the mechanical rules at the cost of making selections that do not necessarily serve the statute's larger "public interest" goals.

The Commission itself is dissatisfied with the existing comparative licensing process.⁸¹ The D.C. Circuit recently directed the Commission to reconsider whether its "integration" preference, relating to the participation of owners in management, in fact advances the public interest in any meaningful way.⁸² The Commission has proposed to eliminate from the comparative process all of the factors currently considered other than the extent and size of the applicants' holdings in other media outlets (a criterion the FCC proposes to rethink), the size of the audience the applicants' signals would reach, and minority status.⁸³ It has proposed to add to the list of comparative factors a preference for applicants promising not to sell or otherwise transfer the station for at least three years,⁸⁴ and perhaps another for applicants who successfully request the allotment of new broadcast frequencies through rulemaking.⁸⁵ It has proposed to tote up the preferences through an "objective and rational" point system rather than the present, more amorphous, approach.⁸⁶

The Commission hopes, through these changes, to be able to reach "swifter, more certain choices," avoiding the need to rely on "subjective and imprecise" factors that emphasize "relatively slight distinctions

80. Thus Commissioner Wiley's dissent in *Cowles*:

I personally cannot believe that the American public derives any benefit out of the existing process by which we attempt to apply objective criteria (for example, integration of ownership and management) to the largely subjective (and, in most cases, unanswerable) question of which applicant will provide the best future service.

Cowles Fla. Broadcasting, Inc., 60 F.C.C.2d at 431 (Wiley, Comm'r, dissenting). See generally STEPHEN G. BREYER, *REGULATION AND ITS REFORM 72-89* (1982); Lon L. Fuller, *Adjudication and the Rule of Law*, 54 AM. SOC'Y INT'L L. PROC. 1, 7-8 (1960); Matthew L. Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC, and the Courts*, 88 YALE L.J. 717 (1979) (arguing that the FCC cannot choose licensees on a principled basis so long as it seeks to base its decisions on incommensurable criteria).

81. See *Random Selection (Lottery)*, 4 F.C.C.R. 2256 (1989) (characterizing comparative process as inefficient, costly, and of doubtful benefit to the public).

82. See *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir.), cert. denied, 113 S. Ct. 57 (1992). The Commission defended the integration preference in *Anchor Broadcasting*, 8 F.C.C.R. 1674 (1993).

83. See *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 F.C.C.R. 2664 (1992). The agency has also proposed to continue the existing "day-timer" preference, and has left open the question of whether to continue granting a preference based on applicants' past or proposed local residence. *Id.* at 2667-68.

84. *Id.* at 2668. This preference would revive, in large part, the "anti-trafficking" policy discarded in the early years of the Reagan administration. See *Transfer of Broadcast Facilities*, 52 Rad. Reg. 2d (P & F) 1081 (1982).

85. See *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 F.C.C.R. at 2668.

86. *Id.* at 2668-69.

among the applicants."⁸⁷ It is hardly clear, though, that the new proposals will avoid the dilemma posed by comparative licensing so far: the agency cannot simultaneously have an objective and nondiscretionary selection process on the one hand, and a process adept at "select[ing] . . . the applicant that will best serve the public interest"⁸⁸ on the other. Indeed, it seems likely that the Commission's proposal will cause many (if not most) comparative proceedings to end in ties, with two or more applicants sharing the same number of points. The Commission's proposal leaves open the question of how these ties are to be broken, but appears to favor random selection or a first-to-file preference.⁸⁹ Both of these minimize agency discretion, but neither is well-tailored to selecting the "best" applicant as that concept has been conventionally understood.

2. *Renewal*

Discretion and subjectivity play significant roles in the renewal of licenses as well. When a new applicant seeks to be awarded a license in place of the incumbent, the FCC must again hold a comparative hearing.⁹⁰ The Commission must consider incumbent and new applicants in a single comparative proceeding, not "unreasonably weighted" in favor of the incumbent licensee. It must decide, on the basis of that comparison, whose licensure would best serve the public interest.⁹¹ In evaluating the incumbent's record, the Commission must look to the station's nonentertainment programming, in particular its local news and public affairs programming, and it must evaluate how the licensee has responded to community needs and problems.⁹² It grants the incumbent licensee a "renewal expectancy" preference on a showing that its past record has been "sound, favorable and substantially above . . . mediocre."⁹³

87. *Id.* at 2664.

88. *Id.* at 2665.

89. *Id.* at 2668-69. The Commission also suggested the possibility of giving the license to the applicant with the greatest broadcast experience, but cautioned that that approach might disadvantage women and minorities—something that would, in the Commission's view, cause the plan to violate statutory law. *See id.* at 2667, 2669.

All this suggests that the Commission's recent proposal may simply be a backhanded way of reviving its 1989 suggestion to award new broadcast licenses through random selection. *See* Random Selection (Lottery), 4 F.C.C.R. 2256 (1989). The FCC abandoned this initiative in the face of nearly unanimous opposition from the industry and the bar. *See FCC Revamping Comparative Hearing Process*, BROADCASTING, May 14, 1990, at 31; *Few Choose to Follow FCC's Bouncing Ball*, BROADCASTING, June 19, 1989, at 50.

90. *See* *Citizens Communications Ctr. v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971) (interpreting 47 U.S.C. § 309(e)).

91. *Id.* at 1214; *see also* *Central Fla. Enters., Inc. v. FCC*, 598 F.2d 37, 41 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979).

92. *See, e.g.,* *Radio Station WABZ, Inc.*, 90 F.C.C.2d 818, 840-42 (1982), *aff'd sub nom. Victor Broadcasting, Inc. v. FCC*, 722 F.2d 756 (D.C. Cir. 1983).

93. *Monroe Communications Corp. v. FCC*, 900 F.2d 351, 353 (D.C. Cir. 1990) (quoting

The Commission has expressed its unhappiness with the comparative process; evaluation of the incumbent's past service, it has pointed out, is once again subjective, uncertain, and content-sensitive.⁹⁴ It has attacked the comparative renewal process in two ways. First, it has urged that the law be changed more nearly to guarantee renewal.⁹⁵ Second, notwithstanding its statutory obligation to conduct a comparative hearing when an incumbent is challenged on renewal by a new applicant, the FCC has been reluctant *ever* to find that the "public interest" would be better served by the new applicant.⁹⁶ It gives the renewal expectancy "primary weight . . . *vis-à-vis* the other comparative criteria."⁹⁷ Indeed, it has sometimes been quite creative in its efforts to "balance" the various comparative factors and still come out with the largely preordained result.⁹⁸

Cowles Broadcasting, Inc., 86 F.C.C.2d at 1006, *aff'd sub nom.* Central Fla. Enters., Inc. v. FCC, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983)).

94. See Formation of Policies & Rules Relating to Broadcast Renewal Applicants, 4 F.C.C.R. 6363, 6363-64 (1989).

95. The Commission, for example, has proposed to grant *all* incumbent broadcasters a presumption of entitlement to renewal expectancy, and thus to renewal, upon compliance with FCC rules requiring each licensee to maintain certain files for public inspection. *Id.* at 6365.

96. The Commission did, in one notorious case, deny renewal to a Boston television station in favor of a new applicant. See WHDH, Inc., 16 F.C.C.2d 1 (1969), *aff'd sub nom.* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). The Commission had decided, because of the unique procedural history of the proceeding, to treat the incumbent as if it too were a new applicant. "To say that WHDH shocked the broadcast industry would be an understatement." GINSBURG ET AL., *supra* note 59, at 114; see also Simon Geller, 90 F.C.C.2d 250, 270 (1982) (treating a radio broadcaster as if it were a new applicant and denying renewal on that basis).

97. Formation of Policies & Rules Relating to Broadcast Renewal Applicants, 4 F.C.C.R. at 6363 (describing existing process).

98. In 1976, for example, Cowles Florida Broadcasting was the incumbent licensee of WESH-TV, Channel 2, in Daytona Beach, Florida, when a group calling itself Central Florida Enterprises sought to take the license away. Cowles had violated the law by relocating its main studio to the larger city of Orlando; further, its corporate parent had been involved in mail fraud. There was little question that Cowles' was the inferior application when it came to outside media interests, ownership participation in management, and minority ownership. Its record of public service, moreover, was hardly impressive to the unbiased eye. See Cowles Fla. Broadcasting, Inc., 60 F.C.C.2d 372, 441-42 (1976) (Robinson, Comm'r, dissenting). The Commission, however, after "weighing" all of these factors, nonetheless granted Cowles the license on the theory that Cowles' record of broadcast service in its three years as the incumbent licensee gave it a decisive edge. *Id.* at 417-22; see also *id.* at 439 (Robinson, Comm'r, dissenting) (comparative renewal proceedings are "not a real contest between two applicants, but a pretend game played between the Commission and the public. The outcome of the game is predetermined; the art (and the sport) is to maintain interest until the inevitable outcome is registered. . . . It rather resembles a professional wrestling match . . .").

The D.C. Circuit reversed. Central Fla. Enters., Inc. v. FCC, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979). On remand, the Commission found for Cowles again, setting out its rationale in a more self-consciously mechanical manner. This time, with some misgivings, the court of appeals affirmed:

[W]e are still troubled by the fact that the record remains that an incumbent television licensee has *never* been denied renewal in a comparative challenge. American television viewers will be reassured, although a trifle baffled, to learn that even the worst television stations—those which are, presumably, the ones picked out as vulnerable to a challenge—

As with initial licensing, the Commission has found conflict between its desire to reduce uncertainty and discretion in the license renewal process on the one hand, and the basic "public interest" structure of the underlying law on the other.⁹⁹ In one recent case, for example, the Commission first granted, but then, after a judicial rebuke, was forced to deny renewal to a UHF licensee that had converted to a pay-TV scrambled movie service. The licensee had shut down its local studios and was running conventional programming only between 6:00 and 7:00 in the morning.¹⁰⁰ The Commission, in comparing this licensee to a competing applicant, could hardly give it public-interest credit based on its news, its public affairs programming, or its attention to community affairs—none were in evidence.¹⁰¹ It ultimately denied the licensee any renewal expectancy, and consequently denied it renewal. The licensee, it held, had engaged in a "wholesale abandonment of public service programming."¹⁰²

One might respond to this story by challenging the legal premise underlying the court's and the Commission's actions: why should news and public-affairs programming be the primary touchstone of the public interest? Aren't movies in the public interest as well? Is it not "the theory of our Constitution"¹⁰³ that *all* speech is in the public interest?

The problem is that the Communications Act is generally understood to require the Commission, when choosing among broadcast appli-

are so good that they never need replacing. We suspect that somewhere, sometime, somehow, some television licensee *should* fail in a comparative renewal challenge, but the FCC has never discovered such a licensee yet.

Central Fla. Enters., Inc. v. FCC, 683 F.2d 503, 510 (D.C. Cir. 1982) (footnotes omitted), *cert. denied*, 460 U.S. 1084 (1983).

99. The Commission's unhappiness with the comparative process, on the other hand, has not been motivated entirely—or even primarily—by the arcana of legal theory. See *infra* notes 404-05 and accompanying text.

100. See Video 44, 4 F.C.C.R. 1209 (1989), *rev'd sub nom.* Monroe Communications Corp. v. FCC, 900 F.2d 351, 354, 356 (D.C. Cir.), *on remand*, 5 F.C.C.R. 6383 (1990).

101. The Commission initially granted renewal anyway, in part by giving the licensee credit for news and public affairs programming it had run *before* converting its format. The agency reasoned further that the licensee had made *some* minimal effort to run nonentertainment programming even after converting, and that subscription TV's commercially risky and uncertain nature excused the station's initial failings. *Id.* at 1211-12.

The D.C. Circuit reversed. The Commission, said the court, had lost sight of the public-interest determination. The point of the renewal expectancy, it prompted, was that a licensee's programming record, as reflected in its news, public affairs and nonentertainment programming, is generally probative of its future responsiveness to community needs. It was unlikely that Video 44's programming record before its drastic and apparently permanent format change would be probative of future behavior. *Monroe Communications Corp.*, 900 F.2d at 355-56. (Another issue in the case was presented by the sexually explicit nature of some of Video 44's programming, which included "adult" films. The Commission had declined to consider this factor in ruling on Video 44's renewal application, see *id.* at 356-59, but it is possible that the issue played an atmospheric role in the court of appeals' treatment of the renewal expectancy issue.)

102. Video 44, 5 F.C.C.R. 6383, 6385 (1990) (quoting Video 44, 102 F.C.C.2d 419, 462 (1985) (ALJ initial decision)).

103. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

cants and making renewal decisions, to make the choice that *best* serves the "public interest." If the Commission were to take the view that any and all speech is equally in the public interest, it could not find any applicant superior to any other. It is programming, after all, that is at the heart of the Communications Act's public-interest mandate. Broadcasters have no meaningful impact on our public life *except* through their programming; the government has no significant communications-law interest in regulating the identity of broadcast licensees except insofar as their identity affects the content of broadcast speech.¹⁰⁴

The Commission initially elevated news and public-affairs reporting precisely so that it could make the statute's "public interest" determination in a more tolerable, more objective, manner. Selecting broadcasters on the basis of their commitment to local public-affairs reporting wasn't necessarily the best course from the perspective of the "public interest" in its largest sense, but it gave the Commission some workable basis on which to make choices. In the case just mentioned, the Commission initially sought to eliminate unpredictability and subjectivity by simply ruling for the incumbent; the D.C. Circuit responded that to do so would be to subordinate the statutory directive that some speakers are more in the "public interest" than others, and that the FCC was to ensure that those *most* in the "public interest" had the licenses. It is unlikely, however, that any "public interest" standard the FCC can capably administer will end up having much to do with the public interest.

What about the renewal process when there is no competing applicant? In theory at least, even when nobody is opposing a license renewal, the broadcaster seeking renewal "must run on his record, and the focus of that record is whether his programming has served the public interest."¹⁰⁵ Before the Reagan administration, the FCC required even uncontested renewal applicants to submit extensive data concerning such matters as their nonentertainment and children's programming, the number of public service announcements they had broadcast, and their compliance with FCC requirements for ascertainment of community needs and interests.¹⁰⁶ In the agency's view, this was the only way it

104. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566-84 (1990) (FCC and Congress appropriately concluded that greater minority ownership of broadcast outlets would result in greater diversity of broadcast speech.).

105. *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411 (D.C. Cir. 1983) (quoting FCC brief), *cert. denied*, 467 U.S. 1255 (1984); see also *Monroe Communications Corp.*, 900 F.2d at 355 (observing that the question on renewal is whether the broadcaster, based on its past record, is likely to perform meritoriously in the future).

106. See *Black Citizens for a Fair Media*, 719 F.2d at 409. As early as 1927, radio stations applying for renewal were asked to set forth the average amount of time they devoted to "entertainment," "religious," "educational," "agricultural," and "fraternal" programs. See *Public Service Responsibility of Broadcast Licensees* (1946), reprinted in *DOCUMENTS OF AMERICAN BROADCASTING* 148, 150 (Frank J. Kahn ed., 4th ed. 1984).

could make the necessary "public interest" determination.¹⁰⁷

In the early 1980s, the FCC abandoned that approach. It stopped requiring that uncontested renewal applicants submit programming information, and it announced that it would no longer review programming in connection with such applications.¹⁰⁸ While in theory licensees are still required to provide nonentertainment programming responsive to issues of concern to the community, the Commission now makes the necessary public-interest finding in uncontested cases via a "presumption" that the applicant has complied with the statutory requirement.¹⁰⁹ This, of course, again avoids the concern that the "public-interest" determination will introduce ambiguity and subjectivity into the renewal process. Like the Commission's approach in comparative renewal cases, though, its cost is the agency's failure to look to the "public interest" in any individualized way.

107. The agency would grant uncontested renewal applications routinely, by staff action, if they appeared to satisfy certain quantitative guidelines relating to such matters as minutes of commercials per hour and overall percentages of local, informational, and nonentertainment programming. Applications that did not satisfy those guidelines were subjected to expensive processing delays.

After World War II, the Commission took an especially aggressive stance in this area: it set a number of renewal applications for hearing because of inadequate balance among program categories, insufficient unsponsored programming, insufficient local live programming, insufficient discussion of public issues, or excessive commercialization. See Eugene J. Roth, 12 F.C.C. 102 (1947); Howard W. Davis, 12 F.C.C. 91 (1947); Community Broadcasting Co., 12 F.C.C. 85 (1947). The Commission did not in fact deny any renewals on these grounds, and violent industry opposition, see, e.g., *Hearings on S. 1333 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 80th Cong., 1st Sess. (1947), caused the agency to adopt a more subdued approach.

Under guidelines adopted in 1961, FCC staff would check for compliance with quantitative guidelines in the areas of noncommercial programming, local live programming, nonnetwork programming, and "sustaining" (unsponsored) programming. They would check to see if commercialization limits were being exceeded, and would look for "adequate explanation" if programming were missing in any of the following categories: entertainment, religious, agricultural, educational, news, discussion (forum, panel, or roundtable), and talk. See *Revision of Programming & Commercialization Policies*, 98 F.C.C.2d 1076, 1078 n.3 (1984), *on reconsid.*, 4 F.C.C.2d 357 (1986), *rev'd in part sub nom.* *Action for Children's Television v. FCC*, 812 F.2d 741 (D.C. Cir. 1987); *Lee Roy McCourry*, 2 Rad. Reg. 2d (P & F) 895, 896 (1964) (setting UHF application for hearing because applicant had proposed 70% entertainment, 30% education, and no programming in the other categories). See generally KRASNOW ET AL., *supra* note 59, at 196-97.

In 1973, the agency published its processing rules for the first time, including commercialization limits and a requirement that stations program a minimum percentage of nonentertainment programming. Amendment to Delegations of Authority, 43 F.C.C.2d 638 (1973). The Commission revised those rules in 1976 to require scrutiny of local and informational programming as well. Amendment to Delegations of Authority, 59 F.C.C.2d 491 (1976).

108. See, e.g., *Revision of Programming & Commercialization Policies*, 98 F.C.C.2d 1076 (1984); *Deregulation of Radio*, 84 F.C.C.2d 968 (1981), *aff'd in part sub nom.* *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983); *Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees*, 49 Rad. Reg. 2d (P & F) 740 (1981), *aff'd sub nom.* *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983).

109. *Revision of Programming & Commercialization Policies*, 98 F.C.C.2d at 1093.

3. *Misconduct*

This brings us, finally, to the question of how the Commission treats those incumbent licensees who are accused of serious misconduct, such that renewal, it is argued, would disserve the public interest. How successful has the FCC been at locating the "public interest" in *this* arena? The FCC has denied broadcast renewal applications on a variety of grounds.¹¹⁰ In several cases, its decision not to renew a license was based at least in part on the content of the licensee's speech.¹¹¹

With regard to its content restrictions, the FCC once again has not

110. Grounds for nonrenewal have included misrepresentations to the Commission, unauthorized transfers of control, technical violations (e.g., being unable to stick to the assigned frequency), and "character" failings. See John D. Abel et al., *Station License Revocations and Denials of Renewal, 1934-69*, 14 J. BROADCASTING 411 (1970); Fredric A. Weiss et al., *Station License Revocations and Denials of Renewal, 1970-78*, 24 J. BROADCASTING 69 (1980). Commission case law in these areas too has been criticized as subjective. See Brian C. Murchison, *Misrepresentation and the FCC*, 37 FED. COMM. L.J. 403, 420 (1985) (characterizing FCC case law regarding nonrenewal as a sanction for the licensee's misrepresentations to the Commission as "drift[ing] on a sea of subjectivity"). Beginning in 1971, the FCC began a crackdown against fraudulent billing practices, and denied or revoked eleven licenses on that basis. Weiss et al., *supra* at 76. The initiative, however, was relatively short-lived; a later Commission eliminated the rules against fraudulent billing. See Elimination of Unnecessary Broadcast Regulation, 59 Rad. Reg. 2d (P & F) 1500 (1986).

The single most sweeping denial of renewal ever undertaken by the Commission was Alabama Educ. Television Comm'n, 50 F.C.C.2d 461 (1975), a single decision affecting eight licensees affiliated with the state-run Alabama public television system. The Commission denied renewal to those licensees because the system discriminated racially in programming and in employment; it allowed them, however, to apply for the vacated licenses in competition with other applicants.

111. See United Television Co., 55 F.C.C.2d 416, 423 (1975) (FCC denied renewal based on the licensee's broadcast of religious programming offering numbers game picks, "special money-drawing roots," and "spiritual baths" in return for monetary donations), *aff'd sub nom.* United Broadcasting Co. v. FCC, 565 F.2d 699 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1046 (1978); Star Stations of Ind., Inc., 51 F.C.C.2d 95, 107 (1975) (FCC denied renewal based in part on licensee's use of newscasts "as a vehicle to publicize [his] preferred candidate [in a political race]—not as an exercise of news judgment, but as a deception of the public"); Alabama Educ. Television Comm'n, 50 F.C.C.2d 461 (1975); Brandywine-Main Line Radio, Inc., 24 F.C.C.2d 18 (1970), *on reconsid.*, 27 F.C.C.2d 565 (1971) (FCC denied renewal application of station largely devoted to religious fundamentalism and the views of the political right wing on the ground that the licensee had violated the fairness doctrine, and had, when it acquired the station, deceived the Commission about its intention to broadcast certain religious and political programming), *aff'd on arguably narrower grounds*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); Palmetto Broadcasting Co., 33 F.C.C. 250 (1962) (FCC found that the station had broadcast coarse, vulgar, and suggestive material and had not met community needs; it found further that the licensee had exercised inadequate control over the station and had lied to Commission in claiming lack of knowledge of objectionable material), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964); see also Trustees of the University of Pennsylvania Radio Station WXPB (FM), 69 F.C.C.2d 1394 (1978) (listeners complained that college radio station broadcast indecent speech; FCC denied renewal on the ground that the licensee had inadequately supervised station operation); Hawaiian Paradise Park Corp., 22 F.C.C.2d 459 (1970) (setting renewal application for hearing on a variety of grounds including fairness doctrine, personal attack, and political broadcasting violations), *reconsid. denied*, 26 F.C.C.2d 329 (1970) (licensee withdrew application); Lamar Life Broadcasting Co., 38 F.C.C. 1143 (1965) (FCC granted short-term renewal to a station that had engaged in discriminatory and one-sided programming regarding racial issues), *rev'd sub nom.* United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (directing FCC to hold an evidentiary hearing on whether it

avoided subjectivity and vagueness. The agency, for example, has in greater or lesser degree regulated indecency on the air;¹¹² its efforts in that regard have surely exposed it to charges of subjectivity.¹¹³ Perhaps emblematic are Commissioner James Quello's comments on the annual "Bloomsday" broadcast of readings from James Joyce's *Ulysses* by a Pacifica radio station: Quello was quoted as saying that the readings should not be broadcast because their language was "stuff you deck someone over. I'm amazed it made it as a classic."¹¹⁴

The most well known of all of the FCC's essays at content regulation over the years, however, was the "fairness doctrine." Pursuant to the fairness doctrine,¹¹⁵ the Commission required each licensee not only to devote a reasonable percentage of time to covering "controversial issues of public importance" in its service area, but to cover those issues "fairly," by providing a "reasonable opportunity" for the presentation of opposing points of view.¹¹⁶

Fairness enforcement was subjective.¹¹⁷ In order to enforce the fair-

should deny renewal outright); *Pacifica Found.*, 36 F.C.C. 147 (1964) (FCC granted renewal after inquiring into sexually explicit programming and possible Communist affiliations).

112. The Commission regulates "indecent" broadcast speech under 18 U.S.C. § 1464. See, e.g., *Enforcement of Prohibitions Against Broadcast Indecency* in 18 U.S.C. § 1464, 5 F.C.C.2d 5297 (1990), *vacated sub nom. FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding FCC proscription of indecent language against a First Amendment challenge); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992).

113. See, e.g., *POWE*, *supra* note 8, at 162-90; *Lili Levi*, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49, 112-38 (1992-93).

114. See *Winer*, *supra* note 8, at 379 (quoting *(Bleep) (Bleep) (Bleep) (Bleep) And Yes I Said Yes I Will Yes*, WALL ST. J., May 26, 1987, at 35). The Commission has declined to rule on whether *Ulysses* is in fact indecent under ruling law. See *GINSBURG ET AL.*, *supra* note 59, at 547 (citing a letter from FCC Mass Media Bureau to William J. Byrnes, June 5, 1987).

115. The roots of the fairness doctrine can be traced back to *Great Lakes Broadcasting Co.*, 3 F.R.C. ANN. REP. 32, 33 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930); the Commission codified the doctrine in *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1948). Ten years later, Congress inserted into the Communications Act a reference to "the obligation imposed upon [broadcasters] under this chapter to . . . afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. § 315(a) (1988). The D.C. Circuit later ruled, though, that Congress had not adopted the fairness doctrine as a "binding statutory directive"; it had merely recognized the Commission's promulgation of the fairness doctrine as an existing "administrative construction." *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 517 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

116. See *Handling of Public Issues Under the Fairness Doctrine*, 48 F.C.C.2d 1, 10-17 (1974), *aff'd in part, rev'd in part sub nom. National Citizens Comm. for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

The doctrine was motivated by the fear that the few station owners lucky enough to receive broadcast licenses would have "unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed." Justice White articulated the concern: "There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392 (1969).

117. See generally *Krattenmaker & Powe*, *supra* note 7, at 169-76 (arguing that the fairness doctrine is inescapably incoherent). But see *BOLLINGER*, *supra* note 11, at 123 (arguing that the fairness doctrine is no more subjective than are other areas of First Amendment jurisprudence).

ness doctrine, the Commission needed some substantive vision of what ground a discussion had to cover in order to be fair; it needed some centerline from which to judge whether a given issue was "controversial" and whether coverage was "balanced." There is, however, no Platonic midpoint of the political spectrum. In one case before the FCC, thus, a conservative group argued that CBS news reporting relating to military and foreign affairs was slanted towards the view that the United States should decrease its national security efforts.¹¹⁸ One could not think about this claim, though, without first identifying an appropriate baseline: in order to decide whether CBS' views were unbalanced, one needed a standard for comparison. There was no reason why the "unbiased" view had to be that national security efforts remain exactly the same.

As a practical matter, the Commission made those fairness judgments by looking to its understanding of what was politically controversial in the America of the time.¹¹⁹ This approach was problematic in two ways. First, it meant that whether a licensee violated the fairness doctrine depended on the Commission's perhaps idiosyncratic perceptions of the current political debate. The FCC, for example, throughout the 1960s and 1970s, never considered the appropriateness of illegal drug use a "controversial" issue:¹²⁰ it was clear to the Commission that all responsible people considered illegal drug use to be degrading and wrong, and thus that there was no meaningful controversy. Large seg-

118. See *American Sec. Council Educ. Found. v. FCC*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). The Commission rejected the claim on the ground that "national security" was too broad an issue for fairness consideration. See *id.* at 448-51.

119. Thus, when an NBC documentary addressed the issue of "the overall performance of the private pension system and the need for governmental regulation of all private pension plans" in a manner the FCC deemed unbalanced, the Commission based its conclusion that pension reform was "controversial" on the fact that proposals then before Congress relating to pension reform "were opposed in whole or in part by 'various groups . . . including the National Association of Manufacturers, several labor unions, the Chamber of Commerce of the United States, and the Nixon administration.'" *Accuracy in Media*, 44 F.C.C.2d 1027, 1034 n.3, 1039 (1973) (quoting the Broadcast Bureau's decision below), *rev'd sub nom. NBC v. FCC*, 516 F.2d 1101, 1141 (D.C. Cir. 1974), *vacated as moot, id.* at 1180, *cert. denied*, 424 U.S. 910 (1976). NBC did not contest this point.

Actually, while the *details* of pension reform were widely disputed at the time, there was greater consensus regarding the *need* for some pension reform. Even those who argued that pension reform shouldn't "throw out the baby with the wash water" agreed that there were "loopholes that need[ed] closing." *NBC*, 516 F.2d at 1145 (quoting transcript of program). Whether one viewed support for pension-law reform as a "controversial" position thus depended in significant part on one's own position on the political spectrum, which in turn defined whose views one took seriously, and whose one relegated to the fringe.

120. See *Licensee Responsibility to Review Records Before Their Broadcast*, 28 F.C.C.2d 409, 415 (1971) (Johnson, Comm'r, dissenting) (describing the FCC as having "repeal[ed] the applicability of the fairness doctrine to this subject"), *aff'd*, *Yale Broadcasting Co. v. FCC*, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973).

ments of the American population, however, disagreed.¹²¹ More fundamentally, tying fairness to current political debate was inherently subjective. Under ordinary First Amendment philosophy, no one political view is more "fair" than any other. To identify the "fairness" centerline with the status quo was both arbitrary and politically loaded.

The Commission repealed the fairness doctrine in 1987.¹²² Any subjectivity introduced by that doctrine into broadcast law is now gone.¹²³ This raises an ultimate question: is subjectivity a necessary, inherent aspect of public-interest content regulation, or is it merely a chance

121. See, e.g., HUNTER S. THOMPSON, FEAR AND LOATHING IN LAS VEGAS (1971); *infra* notes 124-28 and accompanying text.

On another topic, see *Polish Am. Congress v. FCC*, 520 F.2d 1248, 1251 (7th Cir. 1975) ("Polish jokes" presented no issue under the fairness doctrine because petitioners did not establish "any controversy in this country concerning the intelligence or other qualities of Polish Americans") (quoting the Broadcast Bureau's decision below), *cert. denied*, 424 U.S. 927 (1976). Petitioners sought a fairness ruling, of course, precisely because they believed that a controversy *did* exist—that many Americans saw Poles as stupid, and that broadcasters should not be allowed to present only one side of that story.

122. See *Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

The Commission had concluded two years earlier that the doctrine "unnecessarily restrict[ed] the journalistic freedom of broadcasters" and "actually inhibit[ed] the presentation of controversial issues of public importance." *Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145, 147 (1985). Broadcasters, it had stated, were inhibited from presenting controversial material because they feared having to defend their "fairness" in expensive and burdensome FCC proceedings. *Id.* at 161-69. Fairness enforcement worked against the expression of controversial views because its principal targets were those presenting programming that complainants, themselves typically in the mainstream of society, "found to be abhorrent or extreme." *Id.* at 189. Fairness enforcement, the agency had said, involved the government in "evaluating the merits of particular viewpoints" and the "reasonableness of . . . selected program formats," *id.* at 189, 191; it created the opportunity for government intimidation of broadcasters on political grounds, *id.* at 193-94.

Relying on those conclusions, the Commission in 1987 declared that the fairness doctrine "violates the First Amendment and contravenes the public interest." *Syracuse Peace Council*, 2 F.C.C.R. at 5043. It was unconstitutional because it "reduce[d] . . . the public's access to viewpoint diversity," *id.* at 5052, and was unnecessary to achieve viewpoint diversity. The doctrine therefore constituted gratuitous government interference with speech. *Id.*

The D.C. Circuit affirmed. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). Judge Williams, joined by Judge Wald in relevant part, voted to affirm solely on the basis of the agency's "public interest determination . . . without reaching the constitutional issue"; he was "persuaded that the Commission would have found that the fairness doctrine did not serve the public interest even if it had foregone its ruminations on the constitutional issue." *Id.* at 656, 657. While he found no adequate basis for the Commission's insistence that the *net* effect of the fairness doctrine was to reduce the coverage of controversial issues, he nonetheless concluded that the Commission's decision was legitimate; it rested on the permissible factual finding that the fairness doctrine had substantial deterrent effects on the same scale as its expression-generating ones, and on the permissible normative policy judgment that governmentally deterred speech was a greater evil than governmentally coerced speech was a good. *Id.* at 665.

123. For now, anyway. Congress in 1987 passed a bill reinstating the fairness doctrine; President Reagan vetoed it. Veto of the Fairness in Broadcasting Act of 1987, 23 WEEKLY COMP. PRES. DOC. 715 (June 19, 1987). A similar bill is now pending in Congress. See *Fairness in Broadcasting Act of 1993*, H.R. 1985, 103d Cong., 1st Sess. (1993). Its proponents hope that President Clinton will be more supportive.

aspect of doctrines the Commission happens to have set in place? I believe that it is inherent; one more story may help explain why.

The Commission in the early 1970s received a Department of Defense briefing regarding what it characterized as "a subject of current and pressing concern": "lyrics of records played on broadcasting stations . . . tending to promote or glorify the use of illegal drugs as [sic] marijuana, LSD, 'speed,' etc."¹²⁴ The agency responded by issuing a public notice explaining that it would contravene licensee "responsibility" for a broadcaster to play a record without "a management level executive . . . knowing the content of the lyrics," making the judgment whether the record "promotes . . . illegal drug usage," and on that basis making a judgment whether playing the records would promote the public interest.¹²⁵ The FCC stressed that "when there is an epidemic of illegal drug use—when thousands of young lives are being destroyed . . . —the licensee should not be indifferent to the question of whether his facilities are being used to promote the illegal use of harmful drugs."¹²⁶ Such indifference, inconsistent with the broadcaster's duties as a "public trustee . . . who is fully responsible for . . . operation in the public interest," could "jeopardize" a broadcaster's license.¹²⁷ The D.C. Circuit

124. Licensee Responsibility to Review Records Before Their Broadcast, 28 F.C.C.2d at 409.

125. *Id.* Commissioner Robert E. Lee expressed the "hope that the action of the Commission . . . will discourage, if not eliminate the playing of records which tend to promote and/or glorify the use of illegal drugs. . . . Obviously . . . the licensee will exercise appropriate judgment in determining whether the broadcasting of such records is in the public interest." *Id.* at 410 (Robert E. Lee, Comm'r, concurring). Commissioner Houser expressly agreed. *Id.* at 411 (Houser, Comm'r, concurring). Commissioner Johnson dissented, although taking pains to state that he personally "happen[ed] to believe in getting high on life—the perpetual high without drugs." *Id.* at 415 (Johnson, Comm'r, dissenting).

The Commission's action was taken under the general public-interest standard; the agency never took any action regarding drug use under the fairness doctrine. *See supra* note 120 and accompanying text.

126. Licensee Responsibility to Review Records Before Their Broadcast, 31 F.C.C.2d 377, 378 (1971), *aff'd sub nom. Yale Broadcasting Co. v. FCC*, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973).

127. *Id.* at 379-80. Several weeks after its initial notice, Commission staff provided broadcasters with a list of 22 songs, supplied by the Department of the Army, "brought to the attention of the FCC in connection with the subject of so-called drug-oriented song lyrics." *Id.* at 379 n.5. Notwithstanding Commissioner Johnson's protest that "many of the song lyrics singled out . . . by the . . . Defense Department . . . have nothing whatsoever to do with drugs," Licensee Responsibility to Review Records Before Their Broadcast, 28 F.C.C.2d at 414-15 (Johnson, Comm'r, dissenting), broadcasters circulated the document as a "do not play" list; some apparently dropped the recordings of any artists thought to be pharmaceutically suspect. *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 603 (D.C. Cir.) (statement of Bazelon, J., on motion for rehearing *en banc*), *cert. denied*, 414 U.S. 914 (1973).

On reconsideration, the Commission repudiated the list, and emphasized that it was neither barring "a particular type of record" nor threatening to discipline licensees for the decision to play "a particular record." After all, licensees could reasonably reach differing judgments as to whether a particular song in fact promoted drug use, and the agency was not in a position to review such individual judgments. Licensee Responsibility to Review Records Before Their Broadcast, 31 F.C.C.2d at 378.

found no constitutional infirmity in the agency's not-so-veiled threat.¹²⁸

The FCC's public notice, and the D.C. Circuit's decision upholding it, were reviled by First Amendment commentators¹²⁹—and rightly so. Yet the Commission *is* charged with ensuring that broadcasters conduct themselves in the manner best designed to promote the public interest. Under that standard, it is long-settled law that broadcasters, as public trustees, "must assume responsibility for all material . . . broadcast through their facilities."¹³⁰ If the "public interest" requirement is to have meaning, it is only natural that broadcast licensees should have to "assume responsibility" as well for the possibility that certain programming might lead some benighted souls into addiction, or worse.¹³¹ It is true that this conflicts with traditional First Amendment philosophy, under which the government's ideas about whether certain speech promotes the public interest are almost always irrelevant.¹³² The Commission's grapplings with the counterculture, though, suggest that the source of that conflict is not individual FCC decisions, but the entire enterprise of "public interest" regulation of speech.

C. *Public-Interest Licensing and Free Speech Philosophy*

1. *The Essential Conflict*

It is easy to criticize our broadcast regulatory system. The whole licensee selection process is somewhat silly: whichever person the FCC selects for the license can sell out to a third party shortly afterwards, and the Commission may not block that transaction on the ground that the transferee seems less qualified than the applicants it had recently turned down.¹³³ In addition, television's organization around local licensees now seems quaint. Most citizens receive their TV news and entertainment programming primarily from *nationally*-based, unlicensed networks and cable programmers, largely without regard to the identity of local broadcast licensees. The identity of local broadcast licensees may

128. *Yale Broadcasting Co.*, 478 F.2d at 597-99.

129. *See, e.g.*, POWE, *supra* note 8, at 176-82.

130. Commission En Banc Programming Inquiry (1960), *reprinted in* DOCUMENTS OF AMERICAN BROADCASTING, *supra* note 106, at 191, 199.

131. Indeed, the D.C. Circuit concluded on review, "for the Commission to have been less insistent on licensees discharging their obligations would have verged on an evasion of the Commission's own responsibilities." *Yale Broadcasting Co.*, 478 F.2d at 599.

132. *See supra* notes 43-45 and accompanying text.

133. *See* 47 U.S.C. § 310(d) (1988) (forbidding the Commission, in considering an application for license transfer, to "consider whether the public interest, convenience, and necessity might be served by the transfer . . . of the . . . license to a person other than the proposed transferee"); *see also* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 405-06 (1965) (Lee, Comm'r, concurring) (arguing that a system in which the Commission's "tortuous and expensive hearing" can be followed by a sale to an entity to whom the FCC would not have awarded the license in the comparative proceeding is one "hell of a way to run a railroad"). *But see supra* text accompanying note 84 (setting out a Commission proposal to grant a preference to applicants who promise not to sell or transfer the station for at least three years).

well help determine the amount and nature of purely local news and public-affairs programming, but that programming seems almost peripheral to the larger world of TV broadcasting.¹³⁴

The characteristic of our broadcast regulatory system relevant to this Article, though, is more basic and should by now be fairly obvious: it is that the system conflicts in almost every respect, and gratuitously so, with conventional freedom-of-speech philosophy. When viewed against the backdrop set out earlier in this Article, the broadcast regulatory system seems nothing short of astonishing. Under ordinary First Amendment philosophy, the decision whether speakers or speech advance the "public interest" is not one for government; government is specifically disabled from making that choice. The government may not impose content restrictions simply to advance its own notions of the public interest, and it surely may not make licensing decisions based on content. Any licensing requirement that the government does impose must incorporate "narrow, objective, and definite standards."¹³⁵ Because any such scheme unacceptably threatens censorship and suppression of particular points of view, no licensing scheme can involve "appraisal of facts, the exercise of judgment, and the formation of an opinion . . . by the licensing authority."¹³⁶ Such criteria threaten "illegitimate abuse of censorial power,"¹³⁷ and encourage self-censorship. Most "threatening" are periodic licensing requirements, which ensure that speakers are "under no illusion regarding the effect of the 'licensed' speech on the ability to continue speaking in the future."¹³⁸

The FCC, by contrast, grants licenses, decides whether those licenses will be renewed, and decides what licensees will be permitted to say, on the basis of a vague "public interest" standard. The agency has not been successful at importing objective content into that criterion. Its licensing decisions are necessarily arbitrary; because they are neither consistent nor easily predictable, they present the opportunity for political bias and are not easily susceptible of useful review. The FCC has explicitly evaluated broadcasters and would-be broadcasters based on the content of their speech, proposed and past. This process has been unavoidable, given a statutory scheme in which the crux of the renewal decision is whether the licensee's programming has served the public

134. The approach may have made more sense in an earlier world in which the primary sources of television news and public affairs programming were local rather than national. It was not until the 1960s that the networks extended their flagship news shows from 15 to 30 minutes. Alfred C. Sikes, Remarks on Broadcast Journalism and the Public Interest at the Alfred I. DuPont-Columbia University Awards Ceremony (Jan. 16, 1990), in 1990 FCC LEXIS 388.

135. *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2401 (1992) (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969)).

136. *Id.* at 2401-02 (citation omitted) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940)).

137. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988).

138. *Id.* at 759-60.

interest.¹³⁹ That scrutiny too, though, has been subjective and highly discretionary.¹⁴⁰

The broadcast regulatory system, in short, violates all of the rules; it is in sharp conflict with ordinary First Amendment law. To give government the discretionary power to decide who can speak and who cannot, based on what the speakers have already said or propose to say, gives it wholly unacceptable influence over the thought processes of the community. To erect a body of mass communications law under which the government grants some persons, but not others, a "license" to speak, makes it a crime to speak without a license, adopts no neutral or objective standards to govern who will get a license and who will not, considers the content of proposed speech in making the licensing choice, reviews periodically whether it will take away the rights of current licensees, reserves the authority to consider licensees' past speech in making *that* choice, all in the name of encouraging that speech that best serves the "public interest," seems just about as far from the law demanded by conventional freedom-of-speech philosophy as it is possible to get.

2. *The Red Lion Rationale*

How can we possibly fit government licensing of broadcasters into the First Amendment model? The traditional explanation for our broadcast regulatory system, adopted by the Supreme Court without dissent in *Red Lion Broadcasting Co. v. FCC*,¹⁴¹ is that "there are substantially more individuals who want to broadcast than there are frequencies to allocate." In consequence,

it is idle to posit an unbridgeable First Amendment right to

139. See *supra* text accompanying notes 103-04.

140. Robert Post has suggested that because the FCC is making judgments based on community standards, its decisionmaking should not be dismissed as subjective; rather, it is intersubjective. The agency is making its determinations not as a matter of mere personal whim, but as a matter of community values. As a result, while those decisions may be controversial, they should not be classed as arbitrary. See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 624-26 (1990) (discussing *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)).

Ordinary First Amendment doctrine, however, typically has treated such decisionmaking as still too dangerous for speech regulation. *Hustler*, thus, exemplifies the Court's usual approach; the Court there found an "outrageousness" standard too uncertain to support the imposition of damages. 485 U.S. at 55. While the determination of obscenity under *Miller v. California*, 413 U.S. 15 (1973), is indeed dependent in part on community standards, that approach is the exception rather than the rule.

141. 395 U.S. 367 (1969). The Court in *Red Lion* was called upon to decide the validity of a Commission rule requiring broadcasters to offer "a reasonable opportunity to respond" when, "during the [broadcaster's] presentation of views on a controversial issue of public importance, an attack is made on the honesty, character, integrity or like personal qualities of an identified person or group." *Id.* at 373-74 (quoting the then-current version of 47 C.F.R. § 73). The Court upheld the constitutionality and statutory basis of the rule, its specific application in the case before the Court, and the larger "fairness doctrine" from which it had been derived. See *id.* at 375-401. Justice Douglas did not participate. See *id.* at 401.

broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airways.¹⁴²

The need to avoid interference on the airwaves thus calls for a government agency to limit the number of broadcast speakers, and to patrol them to make sure they stay on their assigned frequencies. Further, because the selected licensees have no right to their licenses, the government can require them to speak on behalf of the larger excluded community, acting as trustees or fiduciaries for the "public":

[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. . . . [T]he Government [may] requir[e] a licensee . . . 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 airwaves.¹⁴³

Any other result, the Court warned, might limit access to the means of broadcast communications to a few persons or corporations; that could lead to the "monopolization" of broadcast discourse by a few private licensees, ending any possibility of "an uninhibited marketplace of ideas in which truth will ultimately prevail."¹⁴⁴

The reasoning set out in *Red Lion*, unfortunately, does not resolve the conflict I have identified. The *Red Lion* rationale requires two logical steps. The first is that the physical fact of broadcast frequency interference necessitates administrative allocation of broadcast rights; the second is that that administrative allocation should take the form of public-interest licensing. Much attention has been given recently to attacks on the first step of this reasoning. As Ronald Coase argued more than forty years ago, the mere fact that 100 persons cannot, using a particular piece of frequency spectrum, all broadcast at power levels of their choosing, does not prove that we need an *administrative agency* to exclude some of them. We might instead use a property-rights system, under which the right to use spectrum is bought and sold like any other resource.¹⁴⁵

142. *Id.* at 388-89.

143. *Id.* at 389.

144. *Id.* at 390.

145. See Coase, *supra* note 16, at 25-35; see also BOLLINGER, *supra* note 11, at 87-90 (discussing and criticizing broadcast regulation in light of Coase's analysis); SPITZER, *supra* note 8, at 9-27 (same); Harry Kalven, Jr., *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON.

Government would enforce those property rights through the courts, and the system could work, after a fashion, without the need for any administrative mechanism.¹⁴⁶

I want to focus attention, though, on the *second* step of the traditional rationale: assuming that one concedes the value or usefulness of some form of administrative allocation of broadcast rights, it by no means follows that we therefore must adopt *public-interest licensing*.¹⁴⁷ Almost none of the conflict I have described between conventional First Amendment philosophy and our system of broadcast regulation derives from administrative allocation of broadcast rights as such; it derives, rather, from the peculiar nature of the licensing system we have adopted, which gives the government great discretion over the identity of licensees and the content of their speech.¹⁴⁸

That discretion is surely not inevitable. Nothing in the nature of administrative allocation requires that the government have the sort of control over the identity of broadcast speakers, and the content of their speech, that our current system gives it. Comparative issues could be resolved by lottery, auction, or other means; there is no need for the government to undertake intrusive inquiry once a license is awarded. From the perspective of conventional free-speech philosophy, the discretionary power that our current system gives the government over speech is simply gratuitous.¹⁴⁹

15, 30-32 (1967) (same); William W. Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C. L. REV. 539, 553-58 (1978) (same).

The interference problem is widely recognized as one of defining separate frequency "properties"; it is logically unconnected to the issue of who is to harvest those frequencies. To confuse the *definition* of spectrum rights with the *assignment* of spectrum rights is to believe that, to keep intruders out of (private) backyards, the government must own (or allocate) all the houses.

Hazlett, *supra* note 8, at 138.

146. *But see* Weinberg, *supra* note 17, at 1274-77 (expressing doubt whether a pure market-based system would function efficiently).

147. *See* Kalven, *supra* note 145, at 37-38; *see also* Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1058-59, 1062-66 (1989) (describing a broadcast regulation system in which an administrative body allocates broadcast rights but has no content regulatory role).

148. Take the town meeting which is often thought of as a model of free speech in operation. If the Chairman is keeping order he has problems somewhat like those of broadcasting. Not everyone can talk at once nor can they talk too long since time is scarce nor can they talk far off the point. *The speakers are in effect "licensed" by the chairman*, yet no one has ever said that this spoiled the game. What is understood by us all here is an implicit standard limiting the chairman to [viewpoint-neutral] regulation.

Kalven, *supra* note 145, at 47-48 (footnote omitted); *see also* Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941) (upholding as constitutional a state parade licensing scheme requiring the licensing board to limit itself to content-neutral "considerations of time, place and manner" relating to "the convenience of public use of the highways").

149. This is not to say that the government need not have *some* policy role; any administrative allocation plan will necessarily require the government to make public-policy choices. A regulatory agency must address such questions as where to place each service (such as FM radio, UHF television, and land mobile radio) on the frequency band; how wide a portion of the frequency band

I am not seeking here to argue that the United States should have adopted any particular allocation scheme for broadcasting, whether administrative or market-based.¹⁵⁰ My point, rather, is the philosophical incompatibility of public-interest licensing with the ordinary rules: given what I have described as the vagueness, unpredictability, subjectivity, and content control inherent in our public-interest licensing system, one cannot accept that system without suspending ordinary First Amendment thinking in favor of a different, and inconsistent, philosophy.¹⁵¹

Nor can public-interest licensing be reconciled with conventional free-speech philosophy on the basis of *Red Lion's* concern that public-interest licensing is necessary, in light of the scarcity of spectrum, to avoid an undesirably concentrated marketplace of ideas controlled by the wealthy. Allocating licenses through lotteries would serve that end at least as well; it is by no means clear why we should substitute a system involving profound government discretion over speech. (Indeed, it is doubtful that public-interest licensing *does* much serve the end of avoid-

to allocate to each service; how to distribute stations geographically; how much spectrum to allot to each station; and how much power and antenna height to allow each station. Weinberg, *supra* note 40, at 642 n.112.

AM radio allocation in this country, thus, was premised in part on the Federal Radio Commission's General Order 40, which structured the broadcast system by prescribing the power levels available to stations on each frequency, and hence the number of stations that could be accommodated on each frequency, and how far their signals would reach. See 1928 F.R.C. ANN. REP. 48 (as found in Supplemental Report for Period from July 1, 1928 to September 30, 1928); Weinberg, *supra* note 40, at 648. That allocation turned out to be flawed: the combination of General Order 40 with early allocation decisions favoring urban applicants and the first-come-first-served approach the FCC relied on after 1939, *see id.* at 653-54, ended up to some extent depriving rural areas of service. *See id.* at 654.

In licensing television stations, the FCC took a completely different tack, promulgating a Table of Assignments that filled up the frequency band by assigning at least one channel to each of 1,274 different communities. In so doing, the Commission again made policy judgments regarding where broadcast licenses should be located, whether to favor large or small communities, and so on. That plan was also flawed. It limited the number of signals available in the major markets because of the Commission's insistence on assigning many small communities their own television stations (which sometimes turned out not to be economically viable) rather than serving those communities through powerful metropolitan stations. *See id.* at 654-55 & 654 n.169; *see also* Robinson, *supra* note 76, at 259-61 (deploring the industry structure produced by the Commission's "misdirected and ineffectual" regulation). The crucial point, though, is that while the government in an administrative allocation scheme has the power to make important policy choices shaping the broadcast structure, it need have no discretionary power over the identity of particular licensees or the content of their speech.

150. For argument that any administrative allocation system would be inferior to a market-based plan, *see* Spitzer, *supra* note 147, at 1062-65.

151. *See* BOLLINGER, *supra* note 11, at 71-73; *see also* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416 (1986); Kalven, *supra* note 145, at 15-18; Van Alstyne, *supra* note 145, at 574. *But see* Omega Satellite Prod. Co. v. City of Indianapolis, 694 F.2d 119, 128-29 (7th Cir. 1982) (cable franchising procedures that were assertedly "political," "devoid of standards," and "create[d] the potential for denying a franchise on invidious grounds" could nonetheless be constitutional; "it is a fair question how far the courts should go in making municipalities rewrite their cable television ordinances to prevent dangers that may be largely hypothetical.").

ing domination by the wealthy, since licenses—once awarded—can be freely sold in the marketplace to the highest bidder.¹⁵²) In short, our broadcast regulatory scheme, emphasizing the government's broad discretion in protecting the citizenry from the media and from concentrations of private wealth, may well be justifiable on its own terms, but it cannot be reconciled with the ideology we apply in other free-speech contexts.¹⁵³

How—and why—did we come to adopt an approach so inconsistent with our ordinary philosophy? A variety of commentators have addressed this question;¹⁵⁴ I will not repeat all of their answers here.¹⁵⁵

152. See *Weinberg*, *supra* note 40, at 617 n.3; *supra* note 133 and accompanying text. Distributing the right to a commodity on an egalitarian basis but allowing that right to be freely transferred on the market is unlikely to produce an ultimate distribution much different from that which the market would have produced in the first instance. See James Tobin, *On Limiting the Domain of Inequality*, 13 J.L. & ECON. 263, 268 (1970). Congress could end the free marketplace in already-awarded licenses by repealing the last sentence of 47 U.S.C. § 310(d), but public-interest licensing would remain a gratuitously intrusive way of avoiding market distortions.

Moreover, if one accepts the notion that the ordinary First Amendment rules should be suspended for broadcasting, because too few persons can participate in broadcasting to generate a working marketplace of ideas, it is difficult to avoid reaching the same conclusion with regard to the print media. Print markets, like broadcast markets, are neither well-populated nor competitive. See BOLLINGER, *supra* note 11, at 94. The Supreme Court has declared those facts regarding print markets to be legally irrelevant. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254 (1974). There is no obvious reason why the scarcity analysis should not be the same for broadcast. Indeed, the argument can surely be made that print outlets are *more* scarce than broadcast outlets. While all but 4% of the public have access to five or more television stations, see *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5054 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990), remarkably few members of the public have access to more than one local daily newspaper, see *id.* (“[O]nly 125 cities have two or more local newspapers.”); C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2115 (1992) (reporting that in 1986, only 28 cities had separately owned and operated daily newspapers). *But see* Spitzer, *supra* note 147, at 1018 (arguing that neither print nor broadcast is inherently more scarce).

In any event, it is by no means apparent why broadcasting should be regarded as a “marketplace” of its own at all, separate from all other forms of speech, rather than as simply part of a larger marketplace of ideas also encompassing other forms of media. See *Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145, 198-202 (1985) (treating traditional broadcast services, new electronic media and print as all part of a larger information services marketplace); L.A. Powe, Jr., “*Or of the [Broadcast] Press*,” 55 TEX. L. REV. 39, 55-56 (1976).

153. Our regulation of cable television further demonstrates the conflict; the regulatory scheme is today finding itself vulnerable to attack on traditional freedom-of-speech grounds precisely to the extent that it has adopted features, such as monopoly franchising and access regulation, typical of public-interest licensing. See, e.g., *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1403-04 (9th Cir. 1985) (refusing to apply broadcast regulation precedents to justify regulation of cable), *aff'd on narrower grounds*, 476 U.S. 488 (1986); *Century Fed., Inc. v. City of Palo Alto*, 648 F. Supp. 1465, 1470-75 (N.D. Cal. 1986).

154. See, e.g., POOL, *supra* note 15, at 108-29, 136-38; see also Hazlett, *supra* note 8; Jora R. Minasian, *The Political Economy of Broadcasting in the 1920s*, 12 J.L. & ECON. 391 (1969) (discussing the history of broadcast regulation).

155. William Mayton has argued that Congress, in passing the Communications Act of 1934, never intended the FCC to have more than modest “traffic cop” powers relating to the assignment of wavelengths and power levels and the control of interference. See Mayton, *supra* note 8, at 728-39, 750-54. Professor Mayton's argument is useful but overstated. Congress, in setting out the public-interest standard for licensing in the Radio Act of 1927, may well have had the “traffic cop” role

The most important explanation begins from the fact that our early broadcast law was written *before* the development of contemporary freedom of speech law. The Radio Act was passed in 1927; the Communications Act in 1934. Modern First Amendment philosophy, well-established as it is now, did not begin to take shape until about the same time.¹⁵⁶ *Near v. Minnesota*,¹⁵⁷ one of the first cases in which the Supreme Court ruled in favor of a First Amendment claim,¹⁵⁸ was not decided until 1931, four years after the passage of the Radio Act. When the Radio and Communications Acts were enacted, what we now think of as ordinary First Amendment philosophy was still in embryonic form. The case that Lee Bollinger has termed “the fullest, richest articulation of the central image of freedom of the press”¹⁵⁹—*New York Times Co. v.*

primarily in mind. All influential parties agreed from the start, though, that choosing licensees would require more subjective attention to the public interest; Secretary Hoover referred to licensee selection as “a very large discretionary or a semi-judicial function.” See generally 1 HARRY P. WARNER, *RADIO AND TELEVISION LAW* § 92, at 770-71 (1949) (quoting Fourth National Radio Conference 8 (1926)).

As the Federal Radio Commission went about the business of broadcast regulation between 1927 and 1934, it asserted a variety of extensive powers well beyond the “traffic cop” model, basing decisions on the content of applicants’ speech. See, e.g., *Trinity Methodist Church v. Federal Radio Comm’n*, 62 F.2d 850 (D.C. Cir. 1932) (affirming FRC denial of license renewal to a broadcaster who attacked local government officials, the bar association, organized labor, and religious groups), *cert. denied*, 288 U.S. 599 (1933); *KFKB Broadcasting Ass’n v. FRC*, 47 F.2d 670 (D.C. Cir. 1931) (affirming FRC denial of license renewal to a broadcaster who used his station to prescribe medicines he sold). See generally POOL, *supra* note 15, at 122-29. Congress was aware of those facts in 1934, and yet carried over the Radio Act’s “public interest” language into the Communications Act. See Kalven, *supra* note 145, at 25.

In any event, Professor Mayton focuses his argument on FCC powers *outside* of the comparative arena. Congress in 1934, though, plainly intended the FCC to make a judgment somehow in comparative licensing cases, and one would be hard-pressed to argue, in light of contemporary administrative practice, that Congress saw the agency as making those judgments via lotteries or auctions. The congressional scheme thus called upon the FCC to make policy judgments in comparative cases of the sort ultimately codified in the Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965). And if Congress intended the FCC to deny licenses in comparative cases based on such extrastatutory considerations, it is not a powerful argument (nor was it the law under the Radio Act) that the agency should be disabled from making similar policy judgments in noncomparative contexts. Under such a regime, any broadcaster, initially unchallenged, not conforming to the FCC’s policies for comparative cases would simply lose its license at the first challenge.

156. See MARK A. GRABER, *TRANSFORMING FREE SPEECH* 4 (1991).

157. 283 U.S. 697 (1931).

158. In *Fiske v. Kansas*, 274 U.S. 380 (1927), a case with clear First Amendment shadings, the Court had reversed a conviction of an International Workers of the World organizer under the Kansas Criminal Syndicalism Act, on the ground that the sole evidence presented by the state—a copy of the IWW constitution—insufficiently demonstrated that the IWW advocated criminal syndicalism within the meaning of the statute. In *Stromberg v. California*, 283 U.S. 359, 361 (1931), the Court struck down as vague a state statute prohibiting the public display of a “red flag . . . or device of any color or form” as a “sign, symbol, or emblem of opposition to organized government.” The Court found the statute unclear as to whether it would preclude “peaceful and orderly opposition to government by legal means.” *Id.* at 369.

159. BOLLINGER, *supra* note 11, at 2.

*Sullivan*¹⁶⁰—would not be decided until 1964. That the drafters of those statutes were not sensitive to later constitutional developments should not be surprising.

On the other hand, it *is* surprising that we paid so little attention to the conflict in the years that followed. The most important First Amendment theorists of this century, including Alexander Meiklejohn and Thomas Emerson, supported public-interest licensing.¹⁶¹ The opinion in *Red Lion*, upholding public-interest licensing, was approved by all participating members of the Court, including First Amendment “absolutist”¹⁶² Justice Black.¹⁶³ Public-interest licensing is still the law of the land, sixty-four years after the Radio Act was enacted. The ACLU, whose very mission is the protection of constitutional rights, maintains its support for the fairness doctrine.¹⁶⁴ If the situation were merely that Congress innocently established in the 1920s and 1930s a system that later turned out to be problematic under contemporary constitutional law, one would think that we would have done something about it by now.

The problem, I believe, is a deeper one. My analysis so far has assumed the completeness and correctness of ordinary freedom-of-speech thinking. The continuing strength of public-interest licensing, however, derives from the fact that ordinary First Amendment philosophy is itself problematic. Broadcast law, I will argue, reflects concerns about the dangers posed by concentrations of private media power, and the degree to which private institutional and economic power can skew the reasoning process of the community. These concerns, which find no place in First Amendment philosophy, are nonetheless real and legitimate. To appreciate this point, it is useful to go back and look at freedom-of-speech law more generally.

II

THE FREE SPEECH TRADITION REEXAMINED

In this section of my discussion, I will examine American freedom-of-speech philosophy primarily by focusing on the central image of the “marketplace of ideas.” I will first make the argument that the marketplace image is indeed central: it is both historically and doctrinally at the heart of modern First Amendment philosophy. I will next argue that the metaphor is flawed and that those flaws matter. The marketplace meta-

160. 376 U.S. 254 (1964).

161. See sources cited in BOLLINGER, *supra* note 11, at 91.

162. See Edmond Cahn, *Justice Black and First Amendment “Absolutes”: A Public Interview*, 37 N.Y.U. L. REV. 549, 552-54 (1962).

163. There were, however, dissenting voices among prominent scholars: the losing briefs in *Red Lion* were signed by, among others, Harry Kalven, Herbert Wechsler, and Archibald Cox. See Fiss, *supra* note 151, at 1416 & n.28.

164. See Norman Dorsen, *Talking Liberties*, CIV. LIBERTIES, Winter 1990-91, at 16.

phor's instrumental vision is that free discussion can best be achieved when government plays no role in the marketplace of ideas (other than the enforcement of property rights in communications resources, and other common-law support for private ordering). Two descriptive premises are implicit in that vision. The first is that enough members of society, in the absence of an active government role, have a meaningful opportunity to speak and to convince others of their views. The second is that our discourse is essentially rational: that people process speech for the most part on a rational level, and choose to adopt one belief rather than another as a result of this reasoning process. Neither of these premises, though, seems true.

The image of the "marketplace of ideas" has played a crucial role in free-speech thinking.¹⁶⁵ Milton, as far back as the seventeenth century, supported his argument against government licensing of speech by invoking the image of truth and falsehood grappling in "free and open encounter." In such a conflict, he asked, "who ever knew Truth put to the wor[s]t?"¹⁶⁶ John Stuart Mill articulated the philosophy at length two centuries later.¹⁶⁷ Still later, Justice Holmes conjured up the vision in classic words:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.¹⁶⁸

The metaphor began to play a major role in American thought after our 1930s rejection of *Lochner*¹⁶⁹ and acceptance of a new judicial phi-

165. See BAKER, *supra* note 33, at 12 (marketplace theory "dominates [First Amendment thinking] both rhetorically and conceptually"); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15 (1982) (the argument that free speech is valuable because it leads to the discovery of truth is "the predominant and most persevering" of all arguments historically employed to justify the free speech principle).

166. JOHN MILTON, *AREOPAGITICA* (1644), reprinted in *IV THE WORKS OF JOHN MILTON* 293, 347 (Frank A. Patterson et al. eds., 1931).

167. See MILL, *supra* note 26, at 19-67.

168. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). American courts, indeed, have invoked that theme regardless of whether they were upholding or rejecting the free speech claim. See, e.g., *Dennis v. United States*, 341 U.S. 494, 503 (1951) (stating that "speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest government policies," yet upholding convictions of Communist Party leaders); *id.* at 550 (Frankfurter, J., concurring) ("The history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths.").

169. *Lochner v. New York*, 198 U.S. 45 (1905), overruled by *Day-Bright Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

osophy hostile to the idea of natural, inherent individual rights.¹⁷⁰ Under progressive views of the judicial role in the early-twentieth century, individual "rights" had value only to the extent that they advanced societal goals in a particular historical context; the legislature was to decide the degree to which recognizing a particular individual claim would benefit society as a whole.¹⁷¹ This presented a problem for those who would grant judicial protection for free speech rights. On what theory could the courts overrule a legislative determination that the value of punishing certain speech exceeded the value of protecting it?

The solution, advanced by Zechariah Chafee (among others), was that judges should protect speech because of its role as the basis of democratic society, rather than as a discredited natural right.¹⁷² Free speech not only promoted the societal interest in "the attainment and spread of truth . . . as the basis of political and social progress,"¹⁷³ but also supported the democratic process, whose results the judges were bound to

170. Courts in the late-nineteenth and early-twentieth centuries had commonly seen free speech claims as presenting no issues substantially different from those posed by economic regulation. *See, e.g., In re Garrabad*, 54 N.W. 1104, 1107 (Wis. 1893) (describing the issue raised by a parade permit ordinance as substantially identical to that posed by *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), because both cases concerned arbitrary executive control over the exercise of a protected right—in the one case parading in the streets and in the other engaging in the laundry business); *see also Rich v. City of Naperville*, 42 Ill. App. 222, 223-24 (1891) (parade permit); *Frazee's Case*, 403, 30 N.W. 72, 74 (Mich. 1886) (same). Prior to the *Lochner* era, thus, state courts commonly rejected speech claims on the ground that free speech was a "condition[] of civil liberty" subject to regulation under the police power like any other. *State v. McKee*, 46 A. 409, 413-14 (Conn. 1900); *see, e.g., Commonwealth v. Abrahams*, 30 N.E. 79, 79 (Mass. 1892) (upholding regulation of public speech, relying in part on *Quincy v. Kennard*, 24 N.E. 860 (Mass. 1890), a case upholding the city's power to regulate the raising of swine).

The *Lochner* era offered free speech claimants an avenue to expanded legal protection. The petitioner in *Gitlow v. New York*, 268 U.S. 652 (1925), thus, emphasized that he was not merely raising a free speech claim; he invoked the spirit of *Lochner* by arguing that the legislature had abridged a liberty interest protected by the due process clause. *See* Jonathan Weinberg, *Gitlow v. New York* and "The Fundamental Personal Rights and 'Liberties' Protected by the Due Process Clause of the Fourteenth Amendment" 17-18 (April 1983) (unpublished manuscript, on file with author). The Supreme Court accepted that characterization of the issue. *Gitlow*, 268 U.S. at 664. In *Whitney v. California*, 274 U.S. 357, 372 (1927), the Court framed the free speech question before it in terms of whether the state statute was "an unreasonable or arbitrary exercise of the police power of the State." Justice Brandeis, arguing in favor of expansive free speech protection in that case, at one point found himself relying on five cases nullifying economic regulation in which he had dissented:

Prohibitory legislation has repeatedly been held invalid . . . where the denial of liberty involved was that of engaging in a particular business. The power of the courts to strike down an offending law is no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly.

Id. at 374 (Brandeis, J., concurring) (footnote omitted). After the demise of *Lochner*, this argument was no longer available.

171. *See generally* GRABER, *supra* note 156, at 69-74 (describing Roscoe Pound's "sociological jurisprudence").

172. *See id.* at 122-59 (chronicling Chafee's contributions to constitutional free speech doctrine).

173. ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 137 (1941).

respect.¹⁷⁴ The idea that free speech would guarantee a working democratic process made acceptable the courts' withdrawal from the task of protecting individual economic rights.¹⁷⁵ The marketplace metaphor underlay this vision of free speech as valuable because of its role in promoting both the attainment of truth and democratic self-government.

Since that time, the marketplace metaphor has served as the basis for essential First Amendment doctrine.¹⁷⁶ Its faith in the ultimate functioning of the communicative process, for example, is at the heart of Justice Brandeis' injunction that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the [proper response to subversive advocacy] is more speech, not enforced silence."¹⁷⁷ The marketplace metaphor is pivotal in our thought.¹⁷⁸ It is not the only vision that has played a role in modern free speech protection; modern First Amendment philosophers have constructed impressive and well-accepted arguments that free speech should be protected because it advances goals connected to individual autonomy, self-realization, and human dignity.¹⁷⁹ These arguments too, how-

174. See *id.* at 361.

175. See *id.*; J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 390-92.

176. The exact phrase did not appear in a Supreme Court opinion until *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). For a survey of the development of the metaphor, see David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 875-904 (1986).

The selection of the "marketplace" as the ruling metaphor here is in one respect curious: it is used to support government withdrawal from the "market for ideas" notwithstanding our nearly complete acceptance of vigorous government involvement in the "market for goods." One commentator has called this incongruity "really quite extraordinary." R.H. Coase, *The Market for Goods and the Market for Ideas*, PAPERS & PROCS. OF THE 86TH ANN. MEETING OF THE AM. ECON. ASS'N 384, 386 (1974); see also Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1 (1964).

177. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Language can be found in Justice Brandeis' brilliant concurrence supporting just about every modern theory of the First Amendment. Advocates of the First Amendment as a path to individual self-fulfillment, thus, can note Brandeis' approving statement that "[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties"; they "valued liberty both as an end and as a means." *Id.* at 375. Advocates of a "safety valve" theory of the First Amendment can cite Brandeis' exhortation that the Framers knew "that order cannot be secured merely through fear . . . ; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies." *Id.* The basic idea that free speech promotes truth and provides its own inoculation against "noxious doctrine," *id.*, however, seems to me particularly central to the opinion.

178. See generally BAKER, *supra* note 33, at 7-12 (discussing the central role of marketplace theory in the Court's development of First Amendment law).

179. See, e.g., *id.*; Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879-81 (1963) (discussing "self-fulfillment"); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that the "true value" of free speech is "individual self-realization"). See generally Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989) (categorizing consequentialist and nonconsequentialist justifications for a free-speech principle). In addition, while free speech justifications that focus on the role of speech in a

ever, often rely on the core premises of the marketplace metaphor.¹⁸⁰

The idea that the value of free speech lies in its advancement of such goals as the discovery of truth and democratic self-government is sufficiently at the core of our First Amendment philosophy that it would be troubling to find it seriously flawed.¹⁸¹ Nonetheless, it is flawed. Others have made this argument before,¹⁸² but the point is usually treated as of little practical relevance. Proof of the weakness of the marketplace metaphor is seen as "an insight more fundamental than we can use."¹⁸³ I think, though, that the flaws in the marketplace metaphor are both real and important. In order to examine them, I will discuss the metaphor more closely.

The marketplace metaphor is central to a wide range of First Amendment philosophies. Scholars see the marketplace as important because it yields truth, which is in turn seen as intrinsically or instrumentally valuable.¹⁸⁴ They see it as important because it yields information and ideas useful to the process of democratic self-government;¹⁸⁵ they see it as itself a part of self-government.¹⁸⁶ All of these approaches, though,

political democracy in large part present special cases of the truth discovery argument, see Greenawalt, *supra* at 145-46, some of those arguments seem independent of the marketplace metaphor. See BAKER, *supra* note 33, at 28-30; SCHAUER, *supra* note 165, at 35-46. In particular, Robert Post's focus on public discourse as a necessary constituent of self-determination, and thus democracy, does not require the marketplace metaphor. See Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993); Post, *supra* note 35, at 279-83. For Post, an empirical challenge to the factual basis of the marketplace metaphor is almost always irrelevant. The concept of individual autonomy must remain central to First Amendment law in any event, "as a moral ascription that marks the boundaries of our commitment to democratic self-government." 64 U. COLO. L. REV. at 1132.

180. See *infra* note 209.

181. It is standard wisdom that the rich variety of First Amendment theories protects First Amendment doctrine from attack. Even where one theory is insufficient standing alone, the "synergy" between the various theories provides additional strength. See L.A. Powe, Jr., *Scholarship and Markets*, 56 GEO. WASH. L. REV. 172, 182 (1987). This does not mean, though, that we should simply ignore the flaws in the marketplace metaphor. The inadequacy of the leading philosophical justification supporting one of the most celebrated provisions of American constitutional law is at best odd. At worst, it is a signal that something somewhere is very wrong.

182. See, e.g., C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1; MacKinnon, *supra* note 27.

183. Kalven, *supra* note 145, at 30 (describing Coase's proof that broadcast licenses could be allocated through the market).

184. See, first and foremost, MILL, *supra* note 26. For a somewhat skeptical perspective, see Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699, 706 (1991) ("So what? Why is it good for a society to have more truth?").

185. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22-27 (1948).

186. Under such a theory, some see the creation of socially accepted truth in the marketplace as part of the process through which the community, as a community, constructs its world. This view adds the trappings of democracy to the skeptical position, often attributed to Justice Holmes, that we should *define* truth by reference to whatever emerges from the process of open discussion. This approach has appeal as a response to modern claims that truth is inherently subjective, and thus

share a common theme. The desired value—whether truth or democracy—is seen as best emerging from total competition among conflicting ideas and viewpoints. When First Amendment philosophers seek truth, they reason that truth is most likely to emerge when we expand the marketplace, and the scope of ideas expressed, and sweep away all impediments to free discussion.¹⁸⁷ Democracy, similarly, can be most nearly attained only when all can participate in the open process of debate.¹⁸⁸

How is this full competition among conflicting ideas to be achieved? According to the instrumental vision central to the metaphor, free discussion can best take place when government plays no role in the competition of ideas.¹⁸⁹ Governmental involvement is seen as likely to constrict vital interchange; the ideal model of full and complete exchange of views thus is that of discussion in the “private” sphere.

Two descriptive premises are implicit in this instrumental vision. The first premise is that enough members of society, in the absence of an intrusive government role, have meaningful opportunity to speak and to convince others of their views. If too few members of society had that opportunity, we could not count on a large and diverse population offering “the multitude of ideas that are the fuel of the engine for advancing knowledge.”¹⁹⁰ Marketplace theory supposes that powerless sectors of that population are in a meaningful position to offer ideas. It supposes that ideas can be meaningfully evaluated without regard to the level of political, economic, and social resources available to their proponents. Otherwise, there is little reason to believe that the marketplace would yield either truth or democratic self-determination.

The second premise is that our discourse is essentially rational: that people process speech on a rational level, and choose to adopt one belief rather than another as a result of this reasoning process. This, as Kent Greenawalt has noted, seems especially vital to the force of the marketplace metaphor:

[P]erhaps on deeper questions, people do not make reasoned judgments about competing positions but merely acquire reinforcement of views that conform with social conventions or serve their particular interests or unconscious desires. In that event, the

hardly “discoverable” through a Millian marketplace of ideas. It seems particularly vulnerable, though, to the question of why democracy “commits us to the results of a marketplace of ideas rather than, say, the results of democratically determined suppression.” Greenawalt, *supra* note 179, at 154.

187. See, e.g., SCHAUER, *supra* note 165, at 16.

188. *Id.*

189. In fact, adherents of the marketplace metaphor do not contemplate that the government will play *no* role in regulating speech; they expect the government to enforce property rights in communications resources, and otherwise to provide common-law-based support for private ordering. Marketplace ideology, though, does not treat this as “real” government regulation. See generally *infra* Part III.

190. SCHAUER, *supra* note 165, at 27.

“marketplace of ideas” . . . gives little promise of yielding truth even in the long run, particularly if the disproportionate influence of a few centers of private power over what gets communicated is likely to be exercised in favor of dominant and comforting views.¹⁹¹

The problem is that neither of these premises seems true. Scholars have attacked them as problematic, indeed wholly unjustified.¹⁹² Before I evaluate the strength of these premises, though, I want to take a moment to consider whether their accuracy is as vital to the success of the metaphor as I have assumed. Some scholars argue that marketplace theory is well-founded even though the marketplace does not perfectly promote truth. Even if economic, political, and social inequality distort the marketplace, they argue, and even if the irrationality of discourse cripples it further, the marketplace is a success, and marketplace theory is worth preserving, because it leads us towards truth better than do other approaches.¹⁹³ This conclusion is especially secure, they argue, because free speech protects goals such as self-realization that are not usually associated with the marketplace metaphor at all.¹⁹⁴

A. *Do the Premises of Marketplace Theory Matter?*

I believe that the flaws of marketplace theory are important. Marketplace philosophy disables the government even from addressing serious distortions of the marketplace resulting from imbalances of private power.¹⁹⁵ It is hardly obvious that truth will always be better served without government intervention than with.

This defense of marketplace theory, moreover, slights the costs that marketplace theory imposes. A philosophy shunning any government involvement in the “open and unregulated market for the trade in

191. Greenawalt, *supra* note 179, at 135. Professor Greenawalt continues, though, that “[t]he critical question is . . . how well [truth] will advance in conditions of freedom *as compared with* some alternative set of conditions.” *Id.* (emphasis added).

192. See, e.g., sources cited *supra* note 182.

193. See, e.g., BAKER, *supra* note 33, at 17-22 (evaluating the argument).

194. See *supra* note 179 and accompanying text; see also L.A. Powe, Jr., *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243, 281 (arguing that we cling to conventional First Amendment philosophy not because of “a naive belief that truth is knowable or that the electorate will rationally choose it,” but because of “the simple recognition that no theory requiring people to stop speaking (or stop listening) better fits with our traditions than the one we have adopted”).

195. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (rejecting an argument, in support of campaign finance law, based on an asserted government interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections”: “the concept that government may restrict the speech of some . . . in order to enhance the relative voice of others is wholly foreign to the First Amendment”). In the words of Owen Fiss, marketplace theory seeks to protect individuals’ speech autonomy by placing a “zone of noninterference . . . around each individual,” and prohibiting “the state (and the state alone) . . . from crossing the boundary.” Fiss, *supra* note 27, at 785.

ideas"¹⁹⁶ has significant disadvantages. Speech, after all, can do harm;¹⁹⁷ marketplace theory leaves the government largely powerless to protect individuals from such harm. First Amendment theory and doctrine respond to that concern by de-emphasizing the link between speakers and the harms speech can cause.¹⁹⁸ For example, speakers are not held responsible, unless tremendously stringent tests are met, for entirely foreseeable criminal actions they inspire third parties to take; those third parties are seen as independent moral agents, whom the state ought to address directly.¹⁹⁹ This stands in sharp contrast, for example, to product liability cases, in which we hold manufacturers responsible for injuries they should have foreseen and could have prevented, even if those injuries would not have occurred but for someone else's subsequent negligence or criminality.²⁰⁰

Similarly, First Amendment doctrine often emphasizes the responsibility of *victims* to avoid or ameliorate any harm that befalls them.²⁰¹ Public-figure targets of defamation are expected to exploit their own access to the news media and thus lessen the damage to their reputations.²⁰² Persons subjected to indecent language in public are admon-

196. SCHAUER, *supra* note 165, at 16.

197. "[V]irtually everyone writing today in the first amendment area understands, as their academic elders seemed not to, that speech hurts." L.A. Powe, Jr., *Mass Communications and the First Amendment: An Overview*, 55 LAW & CONTEMP. PROBS. 53, 54 (1992); see Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 ETHICS 635 (1993). The Court recently confronted such harm in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2549 (1992) (striking down an ordinance addressed to speech that, in the words of the Court, injured "the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish").

198. See J.M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 254-61 (1990); cf. *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1318 (1992) (stating that courts use causation concepts as "judicial tools" to limit and assign responsibility).

199. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that the state may not prohibit advocacy of violence or criminal acts except where that advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"). The Supreme Court used parallel reasoning some 30 years earlier in holding that a local government may not restrict handbill distribution in order to reduce littering: "There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." *Schneider v. State*, 308 U.S. 147, 162 (1939). See Balkin, *supra* note 198, at 258-59 (discussing *Schneider*).

200. See Balkin, *supra* note 198, at 259-60 (discussing *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), which deals with an automobile manufacturer's responsibility to provide a "crashworthy" vehicle); Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1345 n.76 (1992) (discussing intervening fault by plaintiffs).

201. See Schauer, *supra* note 197, at 647-48.

202. Indeed, the law presumes that "public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). *Lee Bollinger* has characterized this statement as "an unfair ploy by the Court, an avoidance maneuver by which it tries to minimize the degree to which we should care about the pain inflicted under our rules. . . . [I]t simply is wrong to suppose that the pain inflicted by defamatory statements about public officials and figures is not our responsibility or concern." BOLLINGER, *supra* note 11, at 25.

ished to "avoid further bombardment of their sensibilities . . . by averting their eyes."²⁰³ We are reluctant to find that the targets of speech need government protection; we typically stress their ability to look after their own interests. First Amendment theory is thus hostile to the feminist argument that women are unable adequately to defend themselves against the effects of pornography because they are victims of a sex-based system of subordination and repression smothering their voices.²⁰⁴ In the employment realm, by contrast, we take for granted that employees may not have complete freedom of action in defending themselves from workplace demands contrary to public policy; we recognize that employees may have economic power that substantially constrains their employees' choices.²⁰⁵ In product liability cases, similarly, we tend to hold manufacturers responsible for consumers' predicaments; we assume that consumers may lack the information, alternatives, or expertise they need to avoid the danger presented by defective products.²⁰⁶ Yet the same plaintiff judged "helpless in consumer transactions" is treated as an independent, uncoerced moral actor, "adept and competent," able to look after her own interests in the marketplace of ideas.²⁰⁷

203. *Cohen v. California*, 403 U.S. 15, 21 (1971). The government, similarly, is told to ameliorate the harm presented by subversive speech by responding with "more speech." *See, e.g., Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

204. *See Balkin, supra* note 198, at 260-61. *See generally* Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985); MacKinnon, *supra* note 27.

205. This recognition lies at the heart of much of our employment law, reflected in rules ranging from maximum hours regulation, to workplace safety rules, to the incorporation of a sexual harassment proscription into Title VII.

206. This approach is sufficiently pervasive as to control even "failure to warn" cases, where the manufacturer is held liable for consumer misuse flowing from the manufacturer's failure to supply adequate instructions. *See, e.g., Burch v. Amsterdam Corp.*, 366 A.2d 1079 (D.C. 1976). One might argue that the manufacturer here is being punished for the content of its speech; yet we can find the defendant responsible because we categorize the case as relating to product-liability law rather than to expression.

207. *Balkin, supra* note 198, at 260; *see also* Coase, *supra* note 176, at 384-85; Post, *supra* note 179, at 1130-32 (describing the difference in approach as essential to democracy).

First Amendment doctrine concedes that in particular circumstances individuals may be powerless to avoid the harms of certain speech. The most obvious example is private-figure defamation; while positing that "[t]he first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974), the Supreme Court has recognized that private individuals do not enjoy meaningful "access to the channels of effective communication," and thus may have no "realistic opportunity to counteract false statements." *Id.* On the other hand, this solicitude for the victims of defamation is limited to cases in which the harmful speech was narrowly focused to target a particular individual victim. *See Collin v. Smith*, 578 F.2d 1197 (7th Cir.) (striking down an ordinance designed to prevent a Nazi demonstration notwithstanding arguments that the demonstration would amount to group libel and intentional infliction of emotional distress), *cert. denied*, 439 U.S. 916 (1978). The idea that individuals may be powerless to avoid the harms caused by speech similarly underlies the "captive audience" rationale for upholding speech restrictions. *See, e.g., Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (holding that a city may limit access to advertising space on public transit in order to protect "the right of the commuters to be free from forced intrusions on their privacy"); *see also* *FCC v. Pacifica Found.*, 438

This vision of society helps justify the costs that a libertarian speech theory imposes.²⁰⁸ Any evil done by speech is laid at the doorstep of those who have failed to disseminate the appropriate counter-speech. The assumptions implicit in this vision, however, amount to a repackaging of the two earlier premises of equality and rationality in the marketplace of ideas. The marketplace of ideas is thought to work, notwithstanding distorting influences, because the individuals participating in it are free and uncoerced, readily able to distribute their own competing messages, which will be considered in the marketplace in accord with their merits. The premises underlying the marketplace metaphor, thus, are even more important than they seem at first glance; we cannot avoid examining them by relying on an escape mechanism that takes them for granted.²⁰⁹

Were we to reject the premise that individuals can participate effectively in the marketplace, we would have to give much more serious consideration to the desirability of government involvement in the marketplace designed to counterbalance the distorting influence of private power and wealth.²¹⁰ We would have to think hard about the mag-

U.S. 726, 748-49 (1978) ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."). In the First Amendment tradition, however, such cases tend to be treated as part of a limited, sharply demarcated exception to the otherwise universal reality of autonomy. There is little reliance, as there is in the economic sphere, on the idea that imbalances of power or information routinely limit individuals' ability to avoid or mitigate the harm that speech can do.

208. FRANKLYN S. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 425-29 (1981) provides a good illustration; for a criticism of that book on essentially this ground, see Frederick Schauer, *Free Speech and the Assumption of Rationality*, 36 VAND. L. REV. 199, 205-09 (1983) (book review).

209. Indeed, because this escape mechanism tends to be implicit even in *non*-marketplace-based theories of free speech, those theories too rest on marketplace premises. Some free speech theorists suggest that speech should be given unique protection from government intrusion because of its role in individual self-development and self-realization, or its connection to individual dignity and equal respect. See, e.g., Redish, *supra* note 179; David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974). Those theorists, however, must reconcile special protection for speech with the fact that *conduct* serving the same values is easily regulable. They tend to fall back on the view that the harms caused by speech are not as problematic as those caused by conduct. See Schauer, *supra* note 197, at 640-41; HAIMAN, *supra* note 208, at 20-21. That assumption, however, often reaches back to the vision I have just described; it is because the marketplace can "correct" the damage done by speech that we need not take that damage seriously.

210. This is something we almost never do. The Court in *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), rejected the argument that the "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" justified a statutory limit on independent political campaign expenditures; it declared that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."

There are isolated exceptions to this rule. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), may provide one; the Court there upheld a state statute barring political contributions in candidate elections from corporate treasury funds. The Court found legitimate the state's desire to prevent the "distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the

nitude of the effects of inequality in the marketplace, the extent to which government action could minimize those effects, and the dangers of such government intervention.²¹¹ We ultimately might conclude that the danger posed by self-interested bureaucrats meddling with public discourse is so great that we are better off with a rule of strict government noninvolvement even in a decidedly unfree marketplace of ideas.²¹² But we could not blandly rely on the metaphor of the free and unfettered marketplace, and we would have to question whether such a biased discourse really has the salutary effects that are said to justify highly protective free speech doctrine.

Were we to abandon the premise of rationality, we still might feel that government control of public discourse is so pernicious as to make desirable a rule that speech should be unrestrained by government. But we would have to reevaluate whether the marketplace's limited contribution to the discovery of ultimate Truth justifies our toleration of the harms that unrestrained speech can do and that speech-restrictive laws are often intended to prevent. We would have to question whether we should maintain our current commitment to free speech nearly across the board, or whether—at least in certain contexts—restricting speech might do more good than it is likely to do harm.²¹³

B. *Are the Premises of Marketplace Theory Correct?*

Modern First Amendment philosophy depends heavily on the assumptions of equality and rationality. And yet those assumptions—part of what Jerome Barron referred to as the “romantic view of the first

corporation's political ideas.” *Id.* at 660. *Red Lion* provides another. See *infra* notes 329-31 and accompanying text.

211. Government action to remedy such inequality would present difficulties. I have already discussed the problems inherent in one attempt—the fairness doctrine—to remedy the inequality of resources available to present different viewpoints. See *supra* notes 115-22 and accompanying text. A wholehearted attempt to ensure all individuals' complete equality of opportunity to advance ideas would require a radical transformation of our media system, effected through “state intervention of tremendous scope.” BAKER, *supra* note 33, at 46; see also SCHMIDT, *supra* note 10, at 18-22 (contemplating modes of expanded access); Stanley Ingber, *The First Amendment in Modern Garb: Retaining System Legitimacy*, 56 GEO. WASH. L. REV. 187, 216-19 (1987) (book review) (warning of the dangers of extensive government involvement in a system of expanded access). The difficulty of finding solutions, though, ought not to cause us to deny the existence of the problem.

212. See generally Blasi, *supra* note 37.

213. These questions ultimately relate to a more general attack on marketplace theory (or on any consequentialist justification for a free speech principle): the argument that an unrestrained marketplace of ideas will best lead us to Truth proves, at best, that free speech has important benefits. It does not provide any way to balance the benefits against the harms of free speech; much less does it provide a blanket rule that, in that balancing, the free speech claim should (almost) always win. See SCHAUER, *supra* note 165, at 28-29.

amendment”²¹⁴—are more than problematic.²¹⁵ They form a myth structure that corresponds only faintly to reality.²¹⁶ I will first discuss the assumption that a genuinely wide range of diverse views compete in the marketplace of ideas, on an essentially even playing field, notwithstanding the differing economic, political and social resources available to the ideas’ proponents. I will next discuss the assumption that people rationally process new information and ideas that the marketplace makes available to them.

1. Equality

The first crack in the plaster of the romantic conception is simply this: effective mass communication requires access to communications technology. That technology is expensive; printing presses, teleprompters, broadcast engineers, and satellite transponders cost money. As a result, “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”²¹⁷ The fact that some have access to these resources, and that others do not, grotesquely skews the balance of effective communication. In the modern marketplace of ideas, those with extensive institutional or financial resources can speak more loudly than those without; the average person has little ability to speak in any but the softest of voices.²¹⁸ As A.J. Liebling put it, freedom of the press in this country is guaranteed only to

214. Barron, *supra* note 182, at 1642; *see also* JEROME A. BARRON, FREEDOM OF THE PRESS FOR WHOM? at xiv, 320-21 (1973). Professor Barron’s “romantic view” should not be confused with the First Amendment “romance” that Steven Shiffrin has championed. Professor Shiffrin argues that the point of the First Amendment is “to protect the romantics— . . . the dissenters, the unorthodox, the outcasts.” It is “affirmatively to sponsor the individualism, the rebelliousness, the antiauthoritarianism, the spirit of nonconformity within us all.” STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 5 (1990). This is a different notion of romance; Shiffrin’s profound and subtle views are far removed from the First Amendment orthodoxy I have been describing.

215. *See generally* BAKER, *supra* note 33, at 12, 15 (“At least within the academic world, the assumptions . . . are almost universally rejected”; the marketplace metaphor’s “power and popularity [are] quite curious” in light of the metaphor’s “obvious dependence on incorrect assumptions.”).

216. *See* Weinberg, *supra* note 17, at 1271.

217. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). *See generally* Balkin, *supra* note 175, at 407-10 (“To put it bluntly, the more property one has, the greater one’s ability to compete in the marketplace of ideas, just as in the ordinary marketplace. . . . [T]o the extent that one does not own the means of communication, one must bargain with others to obtain access.”); Stephen L. Carter, *Technology, Democracy, and the Manipulation of Consent*, 93 YALE L.J. 581, 581-82 (1984) (book review) (considering “the threat posed when access to information is controlled . . . by those private interests able to spend enough money to purchase access for their points of view”).

218. *See* Weinberg, *supra* note 17, at 1282-83; *see also* BARRON, *supra* note 214, at 325-26 (tracking the “inequality in capacity to communicate ideas”); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982) (criticizing the Court’s decisions in *Buckley* and *First Nat’l Bank v. Belotti*, 435 U.S. 765 (1978)). Professor Powe makes this point as well, *see* Powe, *supra* note 194, at 263, although he emphatically disagrees with Judge Wright as to its significance.

those who own one.²¹⁹

This problem flows from our application of marketplace of ideas theory to a society characterized by marked inequalities in economic, social and political power. Access to communications resources mirrors access to other sources of power and resources: those without communications resources have little opportunity to contribute to political or other debate.²²⁰ A rule directing government to enforce property rights but otherwise barring it from interfering with the speech flowing from that skewed distribution of societal resources does not yield substantive equality in ability to influence the public debate. Rather, it guarantees further inequality; debate carried out against that backdrop will be "dominated, and thus constrained, by the same forces that dominate social structure."²²¹

There is thus a pervasive skew in the "real world" marketplace of ideas—that is, debate involving words spoken by politicians, would-be politicians, grassroots activists, corporate spokespersons, and other people *not* employees of, or under contract to, media corporations.²²² It would surely be an oversimplification to identify wealth as the single force dominating that ideological marketplace, and it would be palpably incorrect to claim that the side with more money prevails in every public debate.²²³ But it would be equally untrue to claim that wealth is only

219. A.J. LIEBLING, *THE PRESS* 32 (1975). The issue of access to the press, in fact, is not quite so simple. A person might have greater control over or access to the means of communication because he owns a press (or a television station, or any other mass communication resource); because he is associated with an institution that owns one; because he is associated with an institution that is otherwise involved, directly or indirectly, with the mass communications industry; or because he has access to specialized nonprofit publishers (such as law reviews). Nonetheless, the number of Americans so blessed is relatively small. The ordinary citizen fits in none of these categories, and when it comes to mass communication, that citizen is out of luck.

220. For a mainstream affirmation of this principle, see BOLLINGER, *supra* note 11, at 137; for a more radical one, see Herbert Marcuse, *Repressive Tolerance [Postscript 1968]*, in ROBERT P. WOLFF ET AL., *A CRITIQUE OF PURE TOLERANCE* 81, 118-19 (1969):

The chance of influencing [public opinion], in any effective way, . . . is at a price, in dollars, totally out of reach of the radical opposition. . . . [F]ree competition and exchange of ideas have become a farce. The Left has no equal voice, no equal access to the mass media and their public facilities—not because a conspiracy excludes it, but because, in good old capitalist fashion, it does not have the required purchasing power.

221. Fiss, *supra* note 27, at 786; see also Fiss, *supra* note 151, at 1412-13; Baker, *supra* note 182, at 980 (noting that the marketplace "reinforces currently dominant views").

The general principle here is the familiar clash between formal and substantive equality; formally equal treatment of people who are differently situated may perpetuate substantive inequality, at least in the short term.

222. That I characterize these speakers, including such modern celebrities as David Duke, as all operating in the real world is perhaps just an example of the absurdity of the modern era.

223. See Fiss, *supra* note 151, at 1412. Indeed, not all parts of society reflect the same political influences; it is often charged today that "politically correct" views predominate on college campuses. At least one commentator with conservative leanings, though, does not find this too upsetting, noting that "*the rest of us have them right where we want them.*" JOE QUEENAN, *IMPERIAL CADDY* 132 (1992).

Leftist intellectuals with hare-brained Marxist ideas get to control Stanford, MIT, Yale,

one of many factors exerting power in that marketplace, with an insignificant effect on the overall representation of views. Access to wealth and institutional resources regularly plays an important distorting role in the political marketplace.²²⁴ More fundamentally, economic, social, and political power help define the general boundaries of the mainstream within which an idea must fall in order to be taken seriously, rather than merely ignored.²²⁵

The world I have discussed so far, on the other hand, is only part of the modern marketplace. To a huge degree, effective communication in our society is left in the hands of a specialized set of entities I have not so far discussed—large, for-profit media corporations, with unmatched command of communications resources. These corporations are not obviously and inherently biased, nor are they politically monolithic. On the contrary, precisely because they are profit-oriented, they often put considerable power in the hands of artists and commentators who may be of varying political persuasions.²²⁶ The contribution made by these voices to the marketplace of ideas is large. It includes the voices of the network news, and other major, mass-oriented, advertiser-supported news media; it includes more narrowly tailored political commentary, often found in books and magazines; and it includes entertainment, where the politics may be either implicit or overt.²²⁷

and the American Studies department at the University of Vermont. In return, the right gets IBM, DEC, Honeywell, Disney World, and the New York Stock Exchange. Leftist academics get to try out their stupid ideas on impressionable youths between seventeen and twenty-one who don't have any money or power. The right gets to try out its ideas on North America, South America, Europe, Asia, Australia and parts of Africa, most of which take MasterCard. The left gets Harvard, Oberlin, Twyla Tharp's dance company, and Madison, Wisconsin. The right gets NASDAQ, Boeing, General Motors, Apple, McDonnell Douglas, Washington, D.C., Citicorp, Texas, Coca-Cola, General Electric, Japan, and outer space.

This seems like a fair arrangement.

Id. at 132-33.

224. For one study, see Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505 (1982) ("one-sided" corporate spending generally effective in defeating voter-initiated referenda). For a particularly colorful example of the use of wealth and communications resources in the political process, see GREG MITCHELL, *THE CAMPAIGN OF THE CENTURY: UPTON SINCLAIR'S RACE FOR GOVERNOR OF CALIFORNIA AND THE BIRTH OF MEDIA POLITICS* (1992).

225. See LINDBLOM, *supra* note 27, at 210 (Dissident views are constrained by the "myth of 'balance' in public debate. . . . The 'balance' of views thus presented to the citizen . . . [does] not much challenge the fundamentals of politico-economic organization in market-oriented systems."); *infra* text accompanying notes 292-93. It is unlikely that Ross Perot would have made such a large political splash for his own theories and views absent his unique access to wealth.

226. CNN, thus, offers its podium both to Jesse Jackson and to John Sununu.

227. Some argue that the role of the mass media simply amplifies the role of wealth in society, since media corporations are themselves large concentrations of capital, owned and controlled by the wealthy, and sharing common interests with other major corporations, banks, and government. See, e.g., HERMAN & CHOMSKY, *supra* note 28, at 3-14. This analysis without more, though, is insufficient; it "ignores the observable fact that reporters often initiate stories of their own, that editors rarely meet with publishers, and that most working journalists have no idea who sits on the board of directors of the institutions they work for." Michael Schudson, *The Sociology of News*

One can paint a picture in which, even though all do not participate equally in the marketplace of ideas, the media give us a second-best solution. One might argue that a sufficient diversity of views is relayed by these media corporations to simulate such a market; that numerous and diverse ideas are transmitted by authors and artists through the mass media; and that those ideas compete in the marketplace without substantial skew based on the resources available to their proponents.²²⁸ This argument has surface appeal. The first question one might ask, though, is *why* we should expect the ideas transmitted in this manner to be numerous and diverse. Media professionals themselves, after all, are not particularly numerous²²⁹ or heterogeneous.²³⁰ National journalists tend to be white and “[b]y all the conventional indicators, . . . solidly upper-middle-class”;²³¹ they have been said to operate largely on the basis of a shared matrix of values.²³²

The spectrum of views expressed through the media may seem broad only because it is all we are used to.²³³ It may seem broad only to those of us whose opinions are in the same ballpark. Some black scholars, by contrast, argue that mass media images reflect “the racial misconceptions and fantasies of the dominant white culture.”²³⁴ A gay legal scholar writes that “[o]ur culture . . . ignores or actively represses information about gay issues.”²³⁵ A colleague recently pointed out to me that she has seen her own radical feminist politics reflected in the mass media

Production, 11 MEDIA, CULTURE & SOC'Y 263, 267 (1989). In a variety of ways, the media do at least sometimes oppose entrenched power holders. By any stretch of the imagination, President Nixon during Watergate was such a power holder, and American corporations in recent memory have found themselves “aghast” at media coverage of a variety of public issues. *Id.* at 268.

228. Chief Justice Burger seems to have had this in mind when he stated that if the law required broadcasters to accept editorial advertisements, then “the marketplace of ‘ideas and experiences’ would . . . be . . . heavily weighted in favor of the financially affluent [Thus,] the views of the affluent could well prevail over those of others.” *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 123 (1973). His apparent belief was that the mass media currently are unaffected by wealth, and that that insulation saves the marketplace from a wealth-based bias.

229. *Cf.* BOLLINGER, *supra* note 11, at 27 (“As the number of those who control the gateway to public discussion decreases,” natural marketplace correctives to bias are lost.)

230. *See* S. ROBERT LICHTER ET AL., *THE MEDIA ELITE* 20-53 (1986) (surveying the backgrounds and attitudes of journalists at major media organizations). Lichter concludes that “the media elite’s perspective is predominantly cosmopolitan and liberal.” *Id.* at 32.

231. HERBERT J. GANS, *DECIDING WHAT’S NEWS* 209 (Vintage Books 1980) (1979).

232. *See infra* text accompanying notes 260-63.

233. *See* Baker, *supra* note 152, at 2242 (“In our understanding of the events of the day, we are largely the products of our press. It is awfully easy to adopt the Whiggish view [that ‘it ain’t broken, so don’t fix it’] precisely because ‘it’ is largely ‘us.’”).

234. Jannette L. Dates & William Barlow, *Conclusion: Split Images and Double Binds*, in *SPLIT IMAGE: AFRICAN AMERICANS IN THE MASS MEDIA* 455 (Jannette L. Dates & William Barlow eds., 1990).

235. Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 584 (1992); *see also id.* at 650-51.

not at all.²³⁶

One might argue that the ideas and views relayed through the media gatekeepers will in general be numerous and diverse, reflecting the ideas that otherwise would be offered by the population at large, and reflecting the reception that the population at large would give those ideas, precisely because the media must respond to the market. Because the media are profit-oriented, the argument runs, they necessarily will articulate those ideas that members of the speech-consuming public wish to buy; the operation of the economic marketplace will thus assure the operation of the marketplace of ideas.²³⁷

I believe that this argument is flawed. Media speakers²³⁸ are subject to several important biases.²³⁹ The first and most obvious is a wealth-based bias. Any medium dependent on advertising takes as its relevant audience not the citizenry as a whole, but rather that population skewed on demographic and class lines in order to maximize buying power. Newspapers and broadcasters make their money by selling audiences to advertisers, and affluent audiences with the "right" demographics are much more attractive in that marketplace.²⁴⁰ Advertising pressures thus favor content preferred by audiences with buying power; it is for this reason, perhaps, that newsmagazines "tend . . . to universalize upper-middle-class practices as if they were shared by all Americans."²⁴¹ The "marketplace of ideas" the mass media create, in short, is as biased on

236. See also LINDBLOM, *supra* note 27, at 205 (finding no serious challenge to belief in "private enterprise [and] a high degree of corporate autonomy"); *Political Notes*, DETROIT FREE PRESS, Oct. 12, 1992, at 5A (noting exclusion of Libertarian Party candidates from presidential and vice-presidential debates notwithstanding their being on the ballot in all 50 states).

237. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 546-48 (2d ed. 1977) (arguing that broadcasters wishing to "maximize . . . income will provide the mixture and diversity of ideas deemed optimum by [their] customers").

238. In this context as well, all participants in the marketplace are not equal; those with greater resources have greater ability to serve as gatekeepers screening others who wish to speak. To a profound extent, a top tier of large media entities supplies the news, and, in so doing, helps define the nation's news agenda. In the context of getting a book into the larger public debate, Time Warner has far more influence than Tweedlebottom Press. It is the largest media entities, those most fully integrated into the market, that play the most important role.

239. In using the word "bias," I do not mean to suggest that media speakers are engaged in any sort of conscious conspiracy, worked out in dark basements by men with large cigars and alligator shoes. Media professionals, in my experience, are decent and honorable folk. I *do* mean to suggest that the range of ideas and views presented by the mass communications media is strongly shaped by factors relating primarily to the structure of the media marketplace and the nature of the newsgathering process.

240. See Baker, *supra* note 152, at 2126-27, 2164-68. The left-wing British *Daily Herald*, for example, folded notwithstanding a loyal readership of 4.7 million people—"nearly twice as many as the readership of *The Times*, *Financial Times* and *Guardian* added together"—because its readers, while numerous, did not have enough disposable income to constitute a valuable advertising market. *Id.* at 2110-11 (quoting James Curran, *Capitalism and Control of the Press, 1800-1975*, in *MASS COMMUNICATION AND SOCIETY* 195, 225 (James Curran et al. eds., 1979)); see also GINSBURG ET AL., *supra* note 59, at 593-94 (commenting on television shows canceled while still mass hits because they attracted demographically "wrong" audiences).

241. GANS, *supra* note 231, at 27.

economic lines as is the economic marketplace. It is as democratic as a political voting system weighted by income.²⁴²

Another important tilt, in the area of news and public affairs reporting, relates to the source of that news:

[R]eporters get the largest share of their news from official government agencies. . . .

One study after another comes up with essentially the same observation, and it matters not whether the study is at the national, state, or local level—the story of journalism, on a day-to-day basis, is the story of the interaction of reporters and officials.²⁴³

This results in part from what Mark Fishman called the “principle of bureaucratic affinity”: given the media’s need for a steady, reliable flow of news information, collected in a cost-effective manner, “only other bureaucracies can satisfy the input needs of a news bureaucracy.”²⁴⁴ Observers have characterized this reliance on leading public officials and other comparably authoritative and efficient sources for news information as the most significant of all the factors helping to determine the

242. See HERMAN & CHOMSKY, *supra* note 28, at 16. This is not to say that speech attractive to the poor and largely anathema to the wealthy is wholly excluded from the marketplace. Time Warner makes money selling the music of Ice-T, whose views are condemned by political, economic, and media leaders; one song it distributed described the fictional narrator’s intention to kill police officers. That song, however, was withdrawn after extensive protest from law-enforcement groups and political figures. Sheila Rule, “Cop Killer” To Be Cut From Ice-T Album, N.Y. TIMES, July 29, 1992, at C15. Indeed, a variety of record companies are now demanding deletion or rerecording of controversial songs. Sheila Rule, *After Ice-T*, N.Y. TIMES, Oct. 7, 1992, at C19. My point, more generally, is that a marketplace in which ideas are exchanged through economic transactions against the backdrop of the existing distribution of wealth and entitlements is fundamentally different from the idealized marketplace of ideas, in which that distribution plays no significant role.

243. Schudson, *supra* note 227, at 271; see also Baker, *supra* note 152, at 2137 & n.134. See generally GANS, *supra* note 231, at 116-45.

244. MARK FISHMAN, MANUFACTURING THE NEWS 143 (1980) (endnote omitted). Large news agencies need news information on a steady basis, and must concentrate their reporters and cameras where important news often takes place, where rumors and leaks are common, and where regular press conferences are held. See HERMAN & CHOMSKY, *supra* note 28, at 18-19. To satisfy this need for news, government agencies often establish huge public-affairs operations. See MARK YUDOF, WHEN GOVERNMENT SPEAKS 6-8 (1983). The Air Force alone, in a single year not too long ago, issued 45,000 headquarters and unit news releases and 615,000 hometown news releases, arranged 6600 interviews with news media, and held 50 meetings with editorial boards. See HERMAN & CHOMSKY, *supra* note 28, at 20. In military contexts in particular, the government has unusual opportunities to manage the information made available to the news media. See, e.g., JOHN R. MACARTHUR, SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE GULF WAR 146 (1992); John Barry & Roger Charles, *Sea of Lies*, NEWSWEEK, July 13, 1992, at 28, 38-39. The views of experts supplied by government agencies are taken as authoritative even by the “liberal” media. During a recently surveyed year, for example, a majority of the guests on the McNeil-Lehrer News Hour (excluding other journalists) were present or former government officials. HERMAN & CHOMSKY, *supra* note 28, at 24-25. Large business bureaucracies make it their business to be similarly helpful. Mobil Oil, for example, had a public-relations budget in 1980 of \$21 million and a public-relations staff of 73, engaged in part in the production of video press releases for television news. *Id.* at 341 n.72.

content of mass media news.²⁴⁵ Government officials are “the most easily and quickly available, as well as most reliable and productive, source of news”; they can exert pressure against major media organizations if those organizations fail to treat them as routine and presumptively credible sources.²⁴⁶ These factors make it more likely that the view of the world that pervades the news is consistent with that of the government and other sources who provide its raw material.²⁴⁷

Other forces push the media towards the conventional and mainstream. To the extent that media entities are dependent on advertising, they edit out the “heterodox or the controversial”²⁴⁸ in order to maximize their advertising reach and to ensure that they do not unsettle advertisers.²⁴⁹ Broadcast television provides the most obvious example. As Todd Gitlin has explained, advertisers in the aggregate “functionally set the outer limits of permissible television.”²⁵⁰ The point is not that advertisers retaliate or impose pressure in particular cases,²⁵¹ rather, because “[n]etwork executives internalize the desires of advertisers as a whole,”²⁵² they, “without even troubling to think about it, . . . are likely to rule out any show likely to offend a critical mass of advertisers.”²⁵³

Controversy itself is seen as inconsistent with creating a proper environment for advertising, a “buying mood.”²⁵⁴ At least one network limited its coverage of the Persian Gulf War because advertisers did not

245. See GANS, *supra* note 231, at 281-82.

246. *Id.* at 282; see also *id.* at 144-45.

247. See GANS, *supra* note 231, at 145. See generally YUDOF, *supra* note 244. The fact that the government controls so much of the raw material of the news introduces a further source of skew: only mainstream publications are given access to that raw material by being credentialed, for example, for presidential press conferences, or for access to the theatre of war. See FREDERICK SCHAUER, *PARSING THE PENTAGON PAPERS 6-7* (Joan Shorenstein Barone Center on the Press, Politics and Public Policy Research Paper R-3, 1991).

248. Barron, *supra* note 182, at 1646.

249. See Baker, *supra* note 152, at 2127-28, 2130-31, 2156-57. As Justice Brennan put it, “[I]n light of the strong interest of broadcasters in maximizing their audience, and therefore their profits, it seems almost naive to expect the majority of broadcasters to produce the variety and controversiality of material necessary to reflect a full spectrum of viewpoints.” *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 187 (1973) (Brennan, J., dissenting). The dynamics of an advertising-driven industry also make broadcasters uniquely vulnerable to pressure-group boycotts, whose “net effect is systematically to reduce offerings, not to expand them.” Baker, *supra* note 152, at 2163; see *id.* at 2158-63.

250. GITLIN, *supra* note 28, at 252.

251. Although there are numerous examples, in the history of American mass media, of advertisers doing exactly that. See Baker, *supra* note 152, at 2146-52 (discussing pressures imposed by tobacco, patent medicine, fruit, cosmetics, coffee, auto, and other advertisers); see also Bruce Horowitz, *Advertisers Influence Media More, Report Says*, L.A. TIMES, Mar. 12, 1992, at D2 (discussing a study by Ronald K.L. Collins and the Center for the Study of Commercialism).

252. GITLIN, *supra* note 28, at 253.

253. *Id.* at 254; see also Baker, *supra* note 152, at 2142 (reporting that “advertisers’ concerns result in extensive media ‘self-censorship’”).

254. See Baker, *supra* note 152, at 2153-56; see also GITLIN, *supra* note 28, at 189 (quoting an advertising agency executive who describes the TV movie *Playing for Time* as “honest and frightening as hell, but I just can’t see a client who has a selling job to do placing his spots after

consider that programming sufficiently "upbeat" to provide a suitable advertising environment. The network unsuccessfully offered to tailor war coverage so that commercials would run after segments "specially produced with upbeat images or messages about the war, like patriotic views from the home front."²⁵⁵

Nor is it merely advertisers who help ensure blandness in television. Network executives also feel a need to keep audiences comfortable, and not to "jar the expectations of the regular TV audience, which they take to be uneducated, distracted, and easily bewildered."²⁵⁶ Both cable and broadcast television are deeply committed to the familiar and the comfortable, in part because audiences seem to want it that way.²⁵⁷ Thus, author Bill McKibben describes the 150-channel Fairfax, Virginia cable television system as "like a pleasant tract housing development of the mind: tastefully different colors on some of the houses, and every fourth one with a pair of gabled windows. But no yurts. No caves. No treehouses."²⁵⁸

None of this is to say that there are not many persons active in the news and entertainment sectors of the mass media who desire change in the status quo, nor is it to say that those desires are never reflected in their programming. Indeed, my position is consistent with the argument of those who assert that the national news media take politically liberal positions.²⁵⁹ The media system can favor liberal over conservative views,

scenes that consistently end on such a remarkably low point"); HERMAN & CHOMSKY, *supra* note 28, at 17-18.

255. Baker, *supra* note 152, at 2156 (quoting Bill Carter, *Few Sponsors for TV War News*, N.Y. TIMES, Feb. 7, 1991, at D1, D20).

256. GITLIN, *supra* note 28, at 187.

257. Bill McKibben, *TV: Why Even the New Seems Like Déjà Vu*, N.Y. TIMES, Apr. 5, 1992, § 2, at 1. The pressures toward conformity can come from a variety of directions, depending on where the fear of controversy is greatest. Some years ago, ABC required the writers of a movie sympathetically portraying a homosexual father to add lines in which the character suggested that his sexual orientation was a "sickness." GITLIN, *supra* note 28, at 260. A few years later writers complained that it had become politically impossible to write scripts that would "upset the gay-liberation lobby." *Id.* at 260-61 (quoting Earnest Kinoy).

Consistent with their fear of genuine controversy (as opposed to sanitized "issue-of-the-week" programming) the broadcast networks will not run political advocacy advertisements at all. See Jan Hoffman, *Picture is Jumbled on Which Abortion Messages Can Get on TV*, N.Y. TIMES, June 11, 1992, at A18. Broadcast policies against running such advertisements, on the other hand, to some extent grew out of fears that running the ads would trigger fairness doctrine obligations. For a discussion of political advocacy advertising, see *infra* note 407.

258. McKibben, *supra* note 257, at 1. See generally BILL MCKIBBEN, *THE AGE OF MISSING INFORMATION* (1992) (ruminating on the author's viewing of one cable system's entire, 93-channel daily programming).

259. The media, and media professionals, have been variously attacked as both irredeemably liberal and incorrigibly conservative. Compare LICHTER ET AL., *supra* note 230, at 294 ("[L]eading journalists are politically liberal and alienated from traditional norms and institutions.") and L. Brent Bozell III, *Annoy the Media, Elect Bush*, WALL ST. J., Nov. 2, 1992, at A14 ("The liberal bias of the mainstream press almost goes without saying.") with HERMAN & CHOMSKY, *supra* note 28, at 298 (The media "inculcate and defend" conservative principles and the status quo.). This incongruity can be explained in part, perhaps, by the "hostile media phenomenon" identified in

within the sphere of acceptable discourse, at the same time as it supports the existing political and economic status quo by shutting out more radical arguments for change. Herbert Gans, in his classic study, wrote that the national news media act within a context of values including "ethnocentrism, altruistic democracy, responsible capitalism, small-town pastoralism, individualism, moderatism, social order, and national leadership",²⁶⁰ these are among the "unquestioned and generally unnoticed background assumptions" within which their message is framed.²⁶¹ The news, according to Gans, reflects an implicit belief that unprincipled or self-serving actions taken by public officials and other powerful individuals create "moral disorder" that must be exposed and condemned, together with an implicit belief in the desirability of controlling and containing "social disorder," viewed from a white, upper-middle-class perspective.²⁶² Mass media news thus validates our basic social, economic and political structures. It also validates the authority of the elite holders of political and economic power, but only so long as those individuals do not transgress the media's own moderate-reform-oriented norms.²⁶³

One can argue that these are good and healthy values for the news to reflect; one can surely argue to the contrary. One can argue that Gans has misperceived the situation. But whatever the merits of the values he describes, or of the media system they appear to inform, if we are looking for a freewheeling and wide-open marketplace of ideas, this is not it. There is no reason to believe that the media, either in news or in entertainment, meaningfully present a genuinely wide or diverse spectrum of ideas and information to remedy the failings of the marketplace.

Is all lost? One can take hope from the fact that some ideas and views *are* communicated in the existing marketplace, if perhaps only within a narrow sphere. One might consider the situation tolerable so long as one believed that in the everyday operation of the marketplace those ideas were given the sort of serious, "rational" consideration that the marketplace metaphor seems to contemplate. That assumption too, however, seems doubtful.

2. Rationality

It is appropriate to take statements in the legal literature about cognitive psychology with a grain of salt. Legal scholars engaging in forays

Robert P. Vallone et al., *The Hostile Media Phenomenon: Biased Perception and Perceptions of Media Bias in Coverage of the Beirut Massacre*, 49 J. PERSONALITY & SOC. PSYCHOL. 577 (1985) (finding that both pro-Israel and pro-Arab partisans, after viewing identical samples of network television programming covering the Beirut massacre, saw the news segments as biased in favor of the other side).

260. GANS, *supra* note 231, at 42.

261. Schudson, *supra* note 227, at 279.

262. GANS, *supra* note 231, at 52-62.

263. *Id.* at 60-62.

into that field are venturing far from their area of expertise; it is reasonable to suspect either that they do not know what they are talking about, or that they are engaging in selective and out-of-context citation of only that literature helpful to their arguments.²⁶⁴ Notwithstanding that caution, it is useful here to include at least a nod to relevant social-science literature, in particular that literature addressing the ways in which people process new information. In that area, the approach that has attracted the largest following is a cognitive processing model commonly known as schema theory; that approach has important consequences for our current inquiry.²⁶⁵

The gist of the cognitive psychology learning, for our purposes, is that in order to handle the endless flow of communication sweeping over them, people necessarily react to each new bit of information by seeking to fit it into a set of preexisting cognitive structures that provide "simplified mental models" of the world.²⁶⁶ This reliance is well known to trial

264. Legal academics' citation of social science literature may have a lot in common with lawyers' citation of legislative history; legislative history research, I was told as a newly minted law clerk, is a matter of "walking into a crowded room and looking around for your friends." *But see* Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989) (encyclopedic discussion of copyright-law legislative history); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987) (same).

265. *See* SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 96-179 (2d ed. 1991); DORIS A. GRABER, *PROCESSING THE NEWS: HOW PEOPLE TAME THE INFORMATION TIDE* 31 (2d ed. 1988); Robert P. Abelson, *Psychological Status of the Script Concept*, 36 AM. PSYCHOLOGIST 715 (1981); Robert Axelrod, *Schema Theory: An Information Processing Model of Perception and Cognition*, 67 AM. POL. SCI. REV. 1248 (1973). A variety of studies that do not use the "schema" terminology nonetheless rely on information-processing models that appear to take essentially similar approaches. *See, e.g.*, ROGER C. SCHANK & ROBERT P. ABELSON, *SCRIPTS, PLANS, GOALS, AND UNDERSTANDINGS: AN INQUIRY INTO HUMAN KNOWLEDGE STRUCTURES* 36-68 (1977) ("scripts"); *STRUCTURE OF DECISION: THE COGNITIVE MAPS OF POLITICAL ELITES* (Robert Axelrod ed., 1976) ("cognitive maps"); W. Lance Bennett, *Perception and Cognition: An Information-Processing Framework for Politics*, in 1 *THE HANDBOOK OF POLITICAL BEHAVIOR* 69, 163-72 (Samuel L. Long ed., 1981) ("preliminary cognitive representations"); Nancy Cantor, *A Cognitive-Social Approach to Personality*, in *PERSONALITY, COGNITION, AND SOCIAL INTERACTION* 23 (Nancy Cantor & John F. Kihlstrom eds., 1981) ("cognitive structure"); David L. Swanson, *A Constructivist Approach*, in *HANDBOOK OF POLITICAL COMMUNICATION* 169, 176-80 (Dan D. Nimmo & Keith R. Sanders eds., 1981) ("constructs"); *see also* PAUL CHEVIGNY, *MORE SPEECH: DIALOGUE RIGHTS AND MODERN LIBERTY* 59-66 (1988); Paul Chevigny, *Pornography and Cognition: A Reply to Cass Sunstein*, 1989 DUKE L.J. 420, 425; Fajer, *supra* note 235, at 524-27 ("pre-understanding").

The schema concept has not gained universal acceptance in the world of social psychology; some scholars argue that it does not provide a valuable theoretical structure for research. *See generally* Susan T. Fiske & Patricia W. Linville, *What Does the Schema Concept Buy Us?*, 6 *PERSONALITY & SOC. PSYCHOL. BULL.* 543 (1980) (concluding that the schema approach is useful and important). I emphasize schema theory in the pages that follow, but could make most of my crucial points without it: even scholars who reject schema theory agree that people's penchant for processing information in a way consistent with their own beliefs tends to defeat "rational" information processing. *See, e.g.*, Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 *J. PERSONALITY & SOC. PSYCHOL.* 2098 (1979).

266. GRABER, *supra* note 265, at 29.

lawyers. It is reflected, for example, in the results of a study in which people were shown a film about a car accident, questioned about it, and asked, a week later, whether they had seen any broken glass in the film. There was none, but because schemas²⁶⁷ of car accidents usually involve breakage, a substantial number of the subjects reported seeing it anyway.²⁶⁸

The approach of processing new ideas and information by fitting them into existing schemas causes problems when people encounter information that they cannot easily deal with in that manner. People commonly reject information that challenges the accuracy of their schemas. They will not always do so; sometimes they may revise a schema to take into account the new information. But they strongly resist such revisions, and undertake them only reluctantly. They are likely instead to deny the validity of the new information, to attempt to reinterpret it so that it conforms to the schema after all, or to process it as an isolated exception to the general rule.²⁶⁹ To provide a commonplace example, a man who believes women to be submissive and stupid, and meets a woman obviously contradicting the stereotype, is likely to simply develop a new stereotype such as "castrating female" or "career woman," keeping his original stereotype for most women and considering his new stereotype to be a kind of exception to the rule. Eventually, as his experience increases, the number of stereotypes he has available also increases—mother, princess, bitch, castrating female, showgirl—and any behavior a female

267. Psychology and political science academics generally use "schemata" as the plural of "schema," but I suspect that law professors use more than enough Latin already.

268. The subjects were divided into two groups. The first was asked, shortly after seeing the film, how fast the cars were going when they "smashed into" each other; the second, how fast they were going when they "hit" each other. Thirty-two percent of the first group, and 14% of the second, reported broken glass a week later. ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 77-78 (1979); see also Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3-20 (Daniel Kahneman et al. eds., 1982) (discussing studies in which the subjects' schema-driven reasoning led them to biased or irrational conclusions).

In an earlier and scarier study, researchers showed white subjects a picture of a subway scene including a white man carrying a straight razor and confronting a black man. Subjects were then told to describe the picture to each other, as in the game of "telephone." By the sixth retelling, in the majority of cases, the final description placed the razor in the hands of the black man, and several times he was reported as "brandishing it wildly" or "threatening" the white man with it. See Gordon W. Allport & Leo J. Postman, *The Basic Psychology of Rumor* (Nov. 19, 1945), in 8 *TRANSACTIONS OF THE NEW YORK ACADEMY OF SCIENCES* 61, 66, 78-79 (2d ser., 1946). But see Molly Treadway & Michael McCloskey, *Cite Unseen: Distortions of the Allport and Postman Rumor Study in the Eyewitness Testimony Literature*, 11 *LAW & HUM. BEHAV.* 19, 22 n.1 (1987) (noting that the Allport and Postman study used no control group, and concluding that the errors could reflect simple memory failure rather than racial bias).

269. See GRABER, *supra* note 265, at 174-77, 199; see also William J. McGuire, *Attitudes and Attitude Change*, in 2 *HANDBOOK OF SOCIAL PSYCHOLOGY* 233, 275-76 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985); Mark Peffley et al., *Economic Conditions and Party Competence: Processes of Belief Revision*, 49 *J. POLITICS* 100, 101 (1987).

performs can fit within at least one of these stereotypic conceptions without disconfirming the overarching stereotype.²⁷⁰

Because people interpret ambiguous reality in accordance with their schemas, those schemas are self-reinforcing; they become more powerful as they are repeatedly "tested" but never disconfirmed.²⁷¹

This helps explain the oft-noted point that the mass media are more effective in reinforcing people's existing attitudes than in changing them.²⁷² People have some tendency to ignore information not relevant to their existing schemas.²⁷³ Once they have made up their minds and "reached closure" on a particular issue, they are more likely to reject any new information, whether supportive of or undermining their views.²⁷⁴ Indeed, because people seek out and resonate to information consistent with their schemas,²⁷⁵ they will support programming that reinforces their biases. Economic pressures thus lead broadcasters to create such programming, further reinforcing the status quo. What Walter Lippmann called "the pictures in our heads" crowd out the outside world.²⁷⁶

Culturally supplied schemas provide perspectives from which people view social problems. They provide a "metaphysics, an ethics, an epistemology, and a value scheme" that provide context and explanation into which people can seek to fit new information and ideas.²⁷⁷ They "bear the imprint of the particular culture in which learning takes place."²⁷⁸ To a great extent, they are internalized early in life through socialization in home, at school, by religious institutions, and through the media.²⁷⁹

270. Shelley E. Taylor & Jennifer Crocker, *Schematic Bases of Social Information Processing*, in 1 SOCIAL COGNITION: THE ONTARIO SYMPOSIUM 89, 120 (E. Tory Higgins et al. eds., 1981).

271. See Daniel Goleman, *Your Unconscious Mind May Be Smarter Than You*, N.Y. TIMES, June 23, 1992, at C1, C11; see also Fajer, *supra* note 235, at 525. Fajer argues that "[t]his background set of 'knowledge'" powerfully and resiliently shapes the law. *Id.* at 513.

272. Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 769-70 (1972). This is not to say that the media are powerless in affecting attitudes: for the media selectively to reinforce some of a person's attitudes but not others may well lead to changes in the person's overall complex of beliefs.

273. GRABER, *supra* note 265, at 186.

274. See *id.* at 125-26, 130; David L. Protess et al., *Uncovering Rape: The Watchdog Press and the Limits of Agenda Setting*, 49 PUB. OPINION Q. 19, 31 (1985) (speculating that the media have more influence on subjects that have not "already reached a 'saturation' level in the public's mind").

275. See FISKE & TAYLOR, *supra* note 265, at 218-20.

276. WALTER LIPPMANN, PUBLIC OPINION 3 (1922).

277. ROBERT E. LANE, POLITICAL IDEOLOGY: WHY THE AMERICAN COMMON MAN BELIEVES WHAT HE DOES 418 (1962).

278. LIPPMANN, *supra* note 276, at 185; see also LANE, *supra* note 277, at 417-18 (stating that members of society interpret observations and experiences through cultural premises); Bennett, *supra* note 265, at 122-24.

279. See GRABER, *supra* note 265, at 184-86. The schools make an especially important contribution to the socialization process: attendance is compulsory; the audience is unsophisticated; and children's well-being and future success are made contingent on their learning and internalizing what is taught to them. See Ingber, *supra* note 182, at 28-30. Schools thus are successful at "promoting respect for authority and traditional values be they social, moral, or political." Board of

In the United States, these cognitive structures underlie the substantial political consensus—the shared generalized norms about market-based liberal democracy and the “American way”—that characterizes our heterogeneous society.²⁸⁰

This explanation provides grounding for a feminist critique of First Amendment law. Catharine MacKinnon and others have argued that pornography reinforces—indeed creates—scripts and schemas of women as wanting to be taken and used, to be subjected, violated, and possessed. Pornography “constructs what a woman is” by reference to men’s desires and fantasies.²⁸¹ Perhaps more fundamentally, it is argued, pornography reinforces a fundamental schema of sex itself as about dominance and submission; in that picture, “[s]ubjection itself with self-determination ecstatically relinquished is the content of women’s sexual desire and desirability.”²⁸² Pornography “tells men what sex means, what a real woman is, and codes them together in a way that is behaviorally reinforcing.”²⁸³

The results of the schematic coding, according to feminist theory, are profound. Because the schema objectifies women, it strips them of credibility in the eyes of those for whom the schema is powerful.²⁸⁴ When women complain of sexual assault and violence, a complaint at odds with a cognitive structure in which violence and domination are appropriate and welcome sexual interplay, their voices are not heard or believed.²⁸⁵ Men for whom that schema has been cued by pornography, according to some studies, are more likely to condone sexual assault, to predict that they would force sex on a woman if they knew they would not get caught, and to view rape victims as less seriously injured.²⁸⁶ To

Educ. v. Pico, 457 U.S. 853, 864 (1982) (plurality opinion) (quoting Brief for Petitioner); see also *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

Other socializing influences include mass media entertainment, which “inculcates the predominant cultural values and socializes individuals to execute certain roles,” reaffirming the “basic . . . stories that structure [our] experience.” OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, *CRITICAL CONNECTIONS: COMMUNICATION FOR THE FUTURE* 203 (1990). See generally CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 214-18 (1973) (cultural templates).

280. See GRABER, *supra* note 265, at 66, 210-11, 254; see also Carter, *supra* note 217, at 588.

281. MacKinnon, *supra* note 27, at 17.

282. *Id.*

283. *Id.* at 59.

284. Consider

the credibility problems Linda Marchiano encounters when she says that . . . in “Deep Throat” . . . she . . . did not feel or enjoy what the character she was forced to portray felt and enjoyed. . . . [B]efore “Linda Lovelace” was seen performing deep throat, no one had ever seen it being done in that way, largely because it cannot be done without hypnosis to repress the natural gag response. *Yet it was believed.* . . . Yet when Linda Marchiano now tells that it took kidnapping and death threats and hypnosis to put her there, that is found *difficult to believe.*

Id. at 35-36.

285. See *id.* at 14, 34-36, 63. See generally Dworkin, *supra* note 204, at 15-19.

286. See MacKinnon, *supra* note 27, at 52-55. *But cf.* Powe, *supra* note 12, at 64 & n.80.

the extent that such a cognitive structure pervades our society, socialized through entertainment and otherwise, it becomes more nearly imperceptible, part of the general cultural background.²⁸⁷

All this has distressing implications for marketplace theory. To the extent that our schemas constrain our reactions to new ideas and information, our thinking is not characterized by "reason," in the Cartesian sense. Hobbled by our adherence to long-established mental patterns, we can hardly create a collective marketplace of ideas that is a place of unfettered discourse and discovery.²⁸⁸ It is the packaging of an argument, not its content, that determines how it will be received:²⁸⁹ the manner in which an argument or news story is focused will influence listeners' unconscious choice as to which schema they will fit it into, and thus may drastically change their response.²⁹⁰ Because their schemas influence what new ideas and information they are willing to accept, "people's social location . . . control[s] the manner in which they perceive or understand the world."²⁹¹ To the extent that our most basic views and values are relatively immune to rational argument, the marketplace metaphor seems pointless.

When one considers the cumulative impact of the economic and psychological attacks on the marketplace metaphor, it seems almost willfully blind to excuse the costs that free-speech doctrine imposes by answering that government may not deny speech its fair opportunity to prevail in the marketplace. We do not seem to have a working "marketplace" outside a fairly narrowly bounded range of socially acceptable ideas and values. Debate seems to be possible only within a "community agenda of alternatives",²⁹² it withers outside those borders.²⁹³

Empirical studies such as these, unfortunately, are even more of a morass for the unwary and inexpert than is the theoretical material I set out earlier. On the difficulties in interpreting such empirical work, see, e.g., Weinberg, *supra* note 17, at 1290 n.64.

287. See MacKinnon, *supra* note 27, at 7-8, 20.

288. See Ingber, *supra* note 182, at 25-27, 34-36.

289. See Baker, *supra* note 182, at 976-77 (arguing that form and frequency of message presentation, as well as personal interests and experiences, determine how debate will affect individuals' understandings).

290. This phenomenon is clearest in the area of opinion surveys. See GRABER, *supra* note 265, at 158-60, 261; see also *supra* note 268. In one recent nationwide survey, 44% of those polled responded that we spend too much money on "welfare," and only 23% that we spend too little. Only 13%, though, answered that we spend too much on "assistance to the poor"; on the contrary, 64% told the pollsters that we should spend more. Robin Toner, *New Politics of Welfare Focuses on Its Flaws*, N.Y. TIMES, July 5, 1992, § 1, at 1.

291. Baker, *supra* note 182, at 967; see *id.* at 976. The differences in schemas caused by social location may be submerged to the extent that "[p]eople exposed to the same media sources are prone to tap into similar schemata in response to their shared media cues," GRABER, *supra* note 265, at 159, but that is hardly an improvement from the perspective of the marketplace metaphor.

292. NELSON W. POLSBY, *COMMUNITY POWER AND POLITICAL THEORY* 135 (2d ed. 1980); see also Ingber, *supra* note 182, at 73-74.

293. Political and policy ideas, thus, that are considered quite conventional in European countries (not to mention in countries whose political systems differ more radically from our own)

All of the criticisms of the marketplace model discussed here have been raised before,²⁹⁴ yet First Amendment doctrine rolls right along as if none of them posed a problem. First Amendment jurisprudence acknowledges their existence—and sometimes concedes their validity—only to hold that they must be deemed irrelevant to actual law.²⁹⁵ This is especially true when it comes to concerns about the nonrational effects of speech, which rarely bear fruit except in obscenity law.²⁹⁶ They are tolerated in that domain because of the notion that the speech in question isn't really "speech" at all.²⁹⁷ In the vast majority of contexts, we suppress even thinking about these issues.

Our inattention to these arguments seems even more odd when one

are not seriously debated in this country at all. This is not to say that people cannot come to accept ideas opposed by important socializing influences and by politically and economically powerful institutions. Recent events in the former Soviet Union and Eastern Europe demonstrate that they can. But the obstacles to that process seem sufficiently daunting as to make the marketplace quite doubtful as a model or a metaphor.

294. See, e.g., BARRON, *supra* note 214; Allan C. Hutchinson, *Talking the Good Life: From Free Speech to Democratic Dialogue*, 1 YALE J.L. & LIB. 17 (1989); MacKinnon, *supra* note 27.

295. Chief Justice Burger, writing for a unanimous Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), explained that even if one conceded that "the public has lost any ability to . . . contribute in a meaningful way to the debate on [public] issues," that "economic factors . . . have made entry into the marketplace of ideas . . . almost impossible," and that accordingly "the 'marketplace of ideas' is today a monopoly controlled by the owners of the market," those concerns were simply irrelevant to analysis of a state right-of-reply statute. The statute was unconstitutional, without more, because it "[c]ompell[ed] editors . . . to publish that which 'reason' tells them should not be published.'" *Id.* at 250, 251, 256.

Judge Easterbrook, similarly, writing in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986), agreed that "[e]ven the truth has little chance unless a statement fits within the framework of beliefs that may never have been subjected to rational study," for "[p]eople may be conditioned in subtle ways." *Id.* at 329, 330. Nevertheless, he stated, "the Constitution does not make the dominance of truth a necessary condition of freedom of speech"; that the marketplace metaphor fails should have no effect on established doctrine forbidding the creation of "an approved point of view." *Id.* at 330, 332.

Campaign finance jurisprudence, finally, has similarly rejected almost all statutory attacks on the use of private economic power to skew the marketplace of ideas. See *Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976); see also *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790-92 (1978). But see *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (upholding a statute designed to ameliorate "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas," by prohibiting corporate treasury expenditures in support of or opposition to candidates).

296. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973) (emphasizing the "corrupting and debasing" impact of obscene speech). Concerns about the nonrational effects of speech occasionally emerge in other contexts as well. See, e.g., *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring) (peaceful labor picketing invites "an automatic response to a signal, rather than a reasoned response to an idea"); Mark D. Schneider, Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469, 1490-93 (1982) (criticizing assertions that labor picketing invites "emotive" responses and therefore does not warrant First Amendment protection).

297. But see *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2543 (1992) (characterizing obscenity and fighting words as not "entirely invisible to the Constitution," and explaining that "the occasionally repeated shorthand characterizing obscenity as 'not being speech at all' is not 'literally true'").

notices that they are of the sort that we *accepted* in the economic context almost seventy-five years ago.²⁹⁸ They rest on the same foundations as did the arguments used by the legal realists in the 1920s and 1930s to attack *Lochner v. New York*.²⁹⁹ That a regime of formal freedom and equal rights may in fact be unfree and unequal because of gross preexisting inequality in economic or other power is not a new argument, and surely was not invented by Jerome Barron or Catharine MacKinnon. It was at the heart of our rejection of *Lochner*. We long ago accepted these arguments in the economic context, even while refusing to acknowledge them in the area of speech.³⁰⁰

Why have these claims gotten so little acceptance with respect to freedom of speech? Different authors have offered different explanations. Some suggest that we have been unwilling to accept Realist attacks on formalism in speech law, because doing so would require us to acknowledge the failure of the theory underlying *Carolene Products*³⁰¹ and our rejection of *Lochner*: that courts' enforcement of the value-neutral rules of the democratic process disposes of any need for them to second-guess substantive legislative choices.³⁰² Others argue that the socially dominant accept the marketplace metaphor because it validates their own socially dominant views.³⁰³ One might argue that legal decisionmakers are resistant to these arguments because they are wary of breaching the theoretical integrity of First Amendment philosophy, worried that the entire structure will be threatened; they are not so unhappy with the status quo as to be willing to think thoughts that might endanger or compromise the theoretical framework.³⁰⁴ All of these answers, though, seem to me still insufficient; in the remainder of this Article I shall attempt to provide yet another explanation.

III

PUTTING IT TOGETHER

We find ourselves faced with not one but two dilemmas. The first relates to the failure of broadcast regulation to conform to ordinary free-

298. See Balkin, *supra* note 175, at 379-82; Sunstein, *supra* note 8, at 264-66.

299. 198 U.S. 45 (1905).

300. See *supra* notes 205-07 and accompanying text.

301. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

302. See GRABER, *supra* note 156, at 160; Balkin, *supra* note 175, at 387-97.

303. See, e.g., BAKER, *supra* note 33, at 16; CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 206-13 (1987).

304. Cf. Frederick Schauer, *The Calculus of Distrust*, 77 VA. L. REV. 653, 666-67 (1991) (discussing constitutional theory generally).

Still others offer quite different reasons. Legal academics and legal decisionmakers, some point out, are intellectuals who traffic in ideas; "self-interest combines with self-esteem" to lead them to the view that others should be regulated while they should be exempt. Coase, *supra* note 176, at 386. Others offer different answers still. See, e.g., BOLLINGER, *supra* note 11, at 59-60; Ingber, *supra* note 182, at 71-85.

dom-of-speech philosophy; the second relates to the failure of ordinary freedom-of-speech philosophy to conform to the world we live in. I believe that these two problems are linked.

A key lesson of Part I is that broadcast regulation is inconsistent with conventional freedom-of-speech philosophy because broadcast law gratuitously gives government officials the job of restraining speech *not* on the basis of hard-edged, easy-to-apply, nondiscretionary bright-line rules, but on the basis of subjective and ambiguous standards. Government officials thus can exercise great discretion as to who can speak over the air and what those speakers can say. That problem, in large part, is one of *form*; the transgression of broadcast law is that it takes the form of vague directions to government officials to advance vague values. The key lesson of Part II, by contrast, is that First Amendment ideology seems incomplete along a *substantive* dimension; it is based on a substantively inaccurate picture of what the world looks like.

In order to bring these two lessons together, I have relied on some insights developed by authors associated with critical legal studies (CLS). I have not adopted the entire weave of CLS thinking,³⁰⁵ I have taken selected points that seem to me helpful in understanding the problems that this Article raises.³⁰⁶ I rely heavily on the technique, common in CLS writing, of "analysis of paired oppositions": that is, identifying opposed philosophical tendencies, or procedural forms, that seem pervasive in legal decisionmaking.³⁰⁷ CLS writers sometimes use the tech-

305. If any such thing as "CLS thinking" can be identified. Mark Tushnet, one of the movement's most prolific authors, writes:

As I read articles by and about critical legal studies, I not infrequently find myself puzzled. The authors of the articles provoking this reaction describe what they believe critical legal studies to be, and yet the descriptions do not resonate strongly with what I think about the law. . . . [I find] people whom I regard as co-participants in the enterprise of critical legal studies . . . taking as central to their understanding of cls propositions that I find extremely problematic, or dismissing as unimportant propositions that I find central

Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1516 (1991). Tushnet concludes that "the project of critical legal studies does not have any essential intellectual component" but is instead a "political location." *Id.*

306. My attitude towards those insights is somewhat tentative and ambiguous. With regard to some of them, I am uncertain whether the insight is completely right, or whether it is but "partial and incomplete truth," MILL, *supra* note 26, at 56: accurate in some contexts but not in others, perhaps, or illuminating only some facets of a complex reality. For the most part, I have not stopped to explore those concerns and doubts in the context of this Article. A key point of this Article, after all, is that a theory drawn from CLS insights *does work*—where other approaches do not—in explaining the particular puzzle of speech law. To spend too much time on the validity of the insights in areas unrelated to broadcasting would detract from that main point.

307. See Tushnet, *supra* note 305, at 1524. Examples include Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 980-84; Betty Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 759-64 (1981) (book review); see also

nique of identifying fundamental dichotomies to argue that the body of law being discussed is incapable of reasoned justification, and, indeed, incoherent.³⁰⁸ I will look to these oppositions, in my own analysis, first to consider the extent to which ordinary free speech philosophy and broadcast regulation can be understood as reflecting such opposing poles. I will later, in the next Part of this Article, consider the extent to which the oppositions reflected in our speech law are irreconcilable: is there a way to get the best of both worlds?

I will begin this Part by examining the opposition between the two procedural options for resolving legal issues known as “rules” and “standards.” Core free-speech philosophy maintains a strong commitment to rules; broadcast regulation relies heavily on standards. I will next examine the substantive opposition embodied in Part II of this Article. That dichotomy opposes a worldview focusing on the freedom and autonomy inherent in the “private” sphere, unregulated by government, to a worldview focusing on the pervasiveness of inequality and constraint throughout the world of private ordering. I will note Duncan Kennedy’s suggestion of a link between rules and the philosophy he refers to as individualism, and between standards and the philosophy he refers to as altruism. The opposition of individualism and altruism, I will suggest, is in turn linked to the opposition of autonomy and constraint. I will then note the opposition of value subjectivity and value objectivity, as well as paternalism and nonpaternalism. All of these, I will suggest, can be pulled together into two, more nearly comprehensive, opposing worldviews. The first links rules, individualism, a belief in overall private autonomy, a sharp public-private distinction, value subjectivity, and nonpaternalism; the other links standards, altruism, a belief in the pervasiveness of constraint, a denial of the public-private distinction, value objectivity (or a belief in the communal nature of values), and paternalism. I will suggest, finally, that in important ways the first of these worldviews is privileged in our law.

Balkin, *supra* note 198. Some authors have followed Derrida into deconstructionism, seeking to establish that the twin poles of such dichotomies are each dependent on the other—that while “rational” thought seeks hierarchically to privilege one pole, each in fact supplements and signifies the other. See, e.g., J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 746-61 (1987); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1007-08 (1985).

Nor need one be associated with CLS to undertake similar analysis. Some of the oppositions I find in this Article are reminiscent of the distinctions between “democracy” and “community” drawn in the work of Robert Post, who finds CLS unhelpful. Post rejects the notion that democracy and community are inherently irreconcilable; rather, they are “distinct and antagonistic but reciprocally interdependent.” Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in *DEMOCRATIC COMMUNITY: NOMOS XXXV* 163, 163 (John W. Chapman & Ian Shapiro eds., 1993).

308. Because there are legitimate opposing themes and techniques available to resolve any issue, no resolution has any special claim to correctness, and no resolution is consistent with all underlying themes.

With that background, the missing pieces of the speech law puzzle fall into place. Core freedom-of-speech thinking looks like a straightforward exposition of the privileged position; our system of broadcast regulation has much more in common with the nonprivileged pole. The distinction is not quite so neat as all that; we have reintroduced some privileged-position law into the broadcast regulatory structure. Still, the glaring inconsistency of the two bodies of law stems from their roots in the two opposing worldviews. I suggest, at the end of this Part, that the basic nature of speech law makes accommodation between the two competing visions much more problematic than in other doctrinal areas. Individualist free speech philosophy has no point other than protecting the private citizen from public tyranny. As a result, it raises the public-private distinction to a level of sacred inviolability. Free speech philosophy plays that role because of the privileged position's roots in mainstream liberal political philosophy. That philosophy is centrally about the problem of political despotism. A theory of free speech is in turn central to that concern. As a result, privileged-position thinking assumes its most severe form when we start talking about speech.

A. *An Initial Framework*

It has often been noted that legal issues can be resolved by using either (1) simple, hard-edged, black-letter rules, causing results to turn mechanically on a limited number of fairly easily ascertainable facts, or (2) more nearly ad hoc, informal, situationally sensitive application of general policy directives.³⁰⁹ I will adopt a terminology popularized by Duncan Kennedy, referring to the first approach as that of "rules" and the second as that of "standards."³¹⁰

The choice between rules and standards seems ubiquitous in legal

309. See Schlag, *supra* note 307, at 379-80, 383-98; Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58-59 (1992). Indeed, the argument has been made that *all* legal issues can be resolved in each of these two ways. One might object to this formulation on the ground that all legal solutions are not self-evidently in one or the other of the two categories; rather, one might argue, it is more appropriate to order legal solutions along a continuum with polar black-letter and situationally sensitive models at each end. Because ruleness and standardness exist only along a continuum, according to one commentator, "to claim that a law is [exclusively] either a rule or a standard is to deny its fundamental reality." David G. Carlson, *Contradiction and Critical Legal Studies*, 10 CARDOZO L. REV. 1833, 1838 (1989) (book review). For immediate purposes, though, my core argument is simply that it is meaningful and potentially useful to rely on the two polar models in discussing legal solutions. The fact that so many legal disputes can so easily be framed in terms of rules versus standards suggests that there is something to the distinction.

310. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685, 1687-89 (1976); see also ROBERTO M. UNGER, *KNOWLEDGE & POLITICS* 91 (1975) (approaching the same dichotomy using the terminology of "legal justice" and "substantive justice"). The terminology of rules and standards can be traced at least as far back as Roscoe Pound. See Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 482-86 (1933) (also discussing "principles," "conceptions," and "doctrines").

decisionmaking. In the area of contract law, for example, using a rule-like approach, we might seek to enforce *all* contracts supported by formal consideration, subject to sharply and clearly bounded exceptions for fraud, duress, and lack of capacity. On the other hand, we might take the view that an element of "fraud" or "duress" is present in greater or lesser degree in *every* case, and thus cannot form the basis for a sharply bounded exception. We therefore might use a standard-like approach to invalidate contracts if, based on a situationally sensitive analysis, the parties seem to have had markedly unequal bargaining power, or if the contracts simply seem too unfair.³¹¹ The rule-like approach promotes certainty and ease of application, but subordinates concerns about real-life inequalities in contracting.

In the area of criminal law, similarly, we can constrain the discretion of capital juries in the penalty phase by requiring legislatures sharply to define the circumstances calling for death in clear, rule-like, nondiscretionary terms.³¹² We can empower juries to exercise situationally sensitive judgment by requiring that they always be allowed to hear any conceivably mitigating evidence, and acquit if they so choose.³¹³ The Supreme Court, in fact, over the past fifteen years has sought to do both at once, yielding spectacularly incoherent results.³¹⁴

What are the consequences of relying on rules rather than standards, or vice versa? Because no rule exhibits a perfect "fit" with the

311. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 18-19 (1987).

312. See *Gregg v. Georgia*, 428 U.S. 153, 155, 188-95 (1976).

313. See *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976).

314. See generally *Walton v. Arizona*, 497 U.S. 639, 656-74 (1990) (Scalia, J., concurring); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

Other examples abound. In the administrative law realm, the Occupational Safety and Health Administration (OSHA) can on the one hand prescribe exactly how many feet wide scaffolding must be; it can on the other hand simply ban scaffolding that poses "unreasonable" danger. The former, rulelike approach may ignore a variety of relevant distinctions among work settings, and may be ill-suited to coping with industry changes. It may, however, be easier and surer of administration than the latter, standard-like approach, especially where workers have little power. See KELMAN, *supra* note 311, at 33-34. On rule-bounded legality versus situationally sensitive bargaining in administrative regulation, see generally Weinberg, *supra* note 40, at 623-40.

AFDC benefits law can focus on the "rights" of recipients to benefits based on certain verifiable factual predicates (rule), or it can grant extensive, situationally-sensitive power to the welfare caseworker based on her professional judgment (standard). See William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1223-24 (1983). Welfare law over the last 30 years has moved almost completely from the latter to the former vision. See *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). Neither system, however, has worked particularly well. See generally THEODORE R. MARMOR ET AL., *AMERICA'S MISUNDERSTOOD WELFARE STATE* (1990).

In the area of private conflict of laws, we can select the appropriate jurisdiction through clear, hard-edged rules emphasizing uniformity and certainty of result, such as the traditional rule of *lex loci delicti*, which refers all conflicts involving any substantive issue in a tort case to the law of the place of injury. We can, on the other hand, abandon the old rules and rely instead on a more standard-like, ad hoc, "interest analysis." See generally Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1623-25 (1985); Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 787-99 (1983); Willis L.M. Reese, *Choice of Law: Rules or*

policies underlying it, application of a rule will on some occasions lead to results contrary to those policies. Setting eighteen years as the age of majority for voting purposes excludes from the franchise some who are quite capable and mature, yet includes many who might be deemed, on a closer inspection, childish, inexperienced, and immature.³¹⁵ Standards, because they merely restate underlying policies, do not exhibit that problem. On the other hand, the great advantage of rules (as opposed to standards) in conventional thought is that rules are said to increase certainty, predictability, and ease of administration in law application, and decrease arbitrariness and the possibility of biased enforcement.³¹⁶ Few of us, after all, would welcome the creation of a government office charged with the task of examining each of us individually, regardless of age, and determining whether we were sufficiently experienced and mature to be allowed to vote.³¹⁷

The divergent choices we have made in our conventional free speech philosophy and in our system of broadcast regulation replicate the rules-standards opposition. Core free-speech philosophy manifests a strong commitment to rules; it emphasizes at every turn that the law should be expressed in hard-edged, nondiscretionary terms so as to minimize the possibility of government discretion, arbitrariness, and bias.³¹⁸ Situationally sensitive judgment by government officials is forbidden; government may not make legal results in this area turn on "appraisal of facts, the exercise of judgment, and the formation of an opinion."³¹⁹ The

Approach, 57 CORNELL L. REV. 315 (1972); Robert A. Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975 (1977).

For examples drawn from constitutional law, see Sullivan, *supra* note 309, at 76-95. For other examples of the choice between rules and standards in specific doctrinal areas, see Schlag, *supra* note 307, at 383 n.19.

315. The *point* of rules, indeed, is that they "screen[] off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account," Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988), and thus may require results ill-serving the reasons behind the rules. See *id.* at 534-37.

316. See Kennedy, *supra* note 310, at 1688; Sullivan, *supra* note 309, at 62-63.

317. For a careful defense of rules, see Schauer, *supra* note 315, at 538-44. For a recent judicial discussion of the value of rules in constitutional law, see *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1914-16 (1992); for an attack on the rule thus justified, see *id.* at 1921-22 (White, J., concurring in part and dissenting in part).

318. The reader should not confuse the rules-standards issue in regulating citizens' *primary conduct* (where First Amendment philosophy insists that speech regulation be cast in the form of rules), with the issue, one level up, whether rules or standards are most appropriate for determining *whether a regulation is constitutional*. One can adopt a rules (categorical or absolutist) or standards (balancing) approach for determining whether a regulation substantively goes too far in suppressing speech; one can adopt a rule-like or standard-like approach for determining what sort of speech is worthy of what level of protection. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 792-94 (2d ed. 1988); Schlag, *supra* note 307, at 394-98. Whatever the result of those determinations, though, the law on the books is supposed to consist solely of rules. See generally Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 14-15 (1989).

319. *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2401-02 (1992) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940)).

state may not enact vaguely worded restrictions on speech; those are deemed to inhibit expression by causing people, unsure how the restrictions will be applied, to "steer [wide] of the unlawful zone."³²⁰ Consistently with the ideology of rule-bounded legality, First Amendment law insists that only clear and hard-edged rules operate with sufficient predictability and adequately minimize the possibility of hidden arbitrariness or bias.

By contrast, our broadcast regulatory system foundationally relies on the situationally sensitive standard: the FCC is told only that it should take those steps that advance the "public interest, convenience, and necessity." This is the opposite of the hard-edged rule. The "vaguish, penumbral bounds expressed by the standard of the 'public interest'"³²¹ leave the administrator discretion to advance the legislator's values, and hold no promise of predictability or protection against bias. "The statutory standard . . . leaves wide discretion and calls for imaginative interpretation."³²² As originally enunciated and applied by the FCC, the Communications Act public-interest standard aspired to intuitive, sensitive judgment, largely unconstrained, and closely attuned to the dilemmas of each individual case.³²³ The agency was to "bring[] the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest."³²⁴

Standards are also prominent when it comes to regulating broadcast conduct. Indecency law calls upon the licensee to avoid "patently offensive" programming; the FCC has insisted that offensiveness can only be gauged through "judgment" and careful consideration of "the many variables that make up a work's 'context.'"³²⁵ The recently enacted Children's Television Act of 1990 calls upon the Commission in vague terms to "consider," in reviewing a television renewal application, "the extent to which the licensee . . . has served the educational and informational needs of children."³²⁶ The Commission has not promulgated regulations bounding that inquiry with hard-edged rules.³²⁷ The fairness

320. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 372 (1964)).

321. *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 91 (1953).

322. *Id.* at 90.

323. See Weinberg, *supra* note 40, at 655-56; *supra* notes 66-69 and accompanying text.

324. *RCA Communications*, 346 U.S. at 91. The FCC later departed from this glorification of unbounded discretion. See *infra* text accompanying notes 395-405.

325. *Infinity Broadcasting Corp.*, 3 F.C.C.R. 930, 932 (1987), *aff'd in relevant part sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

326. 47 U.S.C. § 303b (a) (Supp. II 1990).

327. In part because the Commission has not promulgated limiting rules, it has received extensive filings asserting that broadcasters have served "the educational and informational needs of children" through "GI Joe," "The Jetsons," "Super Mario Brothers," and similar programming. See Edmund L. Andrews, *Broadcasters, to Satisfy Law, Define Cartoons as Education*, N.Y. TIMES, Sept. 30, 1992, at A1; Joe Flint, *Study Slams Broadcasters' Kids Act Compliance*, BROADCASTING, Oct. 5, 1992, at 40. The Commission has since sought comment as to whether and in what manner it

doctrine, although repealed in the late 1980s, remained situationally sensitive to the last. Thus, the formal dichotomy embodied in Part I of this Article is procedural: ordinary free-speech philosophy is committed to rules, while broadcast regulation is built around the situationally sensitive standard.

In contrast, in Part II, the distinction is substantive; it relates to a vision of how the world operates. Conventional free-speech philosophy is characterized by its image of an atomistic "marketplace" of ideas akin to the economic marketplace, marked by individual autonomy, competition, and separateness.³²⁸ It assumes that individuals can participate meaningfully as individuals in the marketplace of ideas, autonomously able to speak and to convince others of their views, unaffected by the skewing or coercive effects of inequalities of wealth and power in the private sphere. It assumes that people react to speech in rational ways, choosing to adopt one belief rather than another as part of a willed, chosen reasoning process; it rejects the position that people's views are largely determined by their schemas, their socialization, their social position, or other factors irrelevant to "reason" in the Cartesian sense. The only meaningful source of constraint in the marketplace of ideas in this vision is government intervention. Government intervention forces silence where there would otherwise be speech, limiting the free play of ideas that would otherwise prevail.

I argued in Part II that the vision of ordinary free-speech philosophy is inaccurate, that its assumptions badly describe reality. Broadcast regulation reflects that critique. Broadcast regulation is rooted in the concern that inequality of private power and resources undermines citizens' free interaction. Absent administrative allocation, according to *Red Lion*, a few private licensees might "monopoliz[e]" broadcast discourse, making impossible "an uninhibited marketplace of ideas."³²⁹ If government does not enforce a fairness doctrine, in the world of *Red Lion*, private holders of media power will be able to exercise "unlimited private censorship."³³⁰ Broadcast regulation incorporates the concern that viewers' tastes and wants are themselves determined, shaped by general socioeconomic forces and by the mass media itself: that what viewers get from the mass media may help determine what they want.³³¹ It

might "exemplify and define the [statute's] programming requirements." Revision of Programming Policies for Television Broadcast Stations, 1993 FCC LEXIS 987 (March 2, 1993), at 8.

328. Cf. Post, *supra* note 35, at 284, 293-94 (not relying on the marketplace metaphor, but nonetheless describing individualism as central to First Amendment philosophy and the democratic project).

329. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); see also BOLLINGER, *supra* note 11, at 63.

330. *Red Lion Broadcasting Co.*, 395 U.S. at 392.

331. See Balkin, *supra* note 175, at 379; Sunstein, *supra* note 8, at 288 ("[P]rivate broadcasting selections are a product of preferences that are themselves a result of the broadcasting status quo, and not independent of it.").

therefore insists that government *not* simply leave broadcasting to the control of the marketplace; rather, government must supervise broadcasting in the "public interest." All this stems from a worldview in which the unregulated private sphere is marked not by freedom and autonomy, but—at least to some degree—by domination and constraint.

Just as the procedural differences between free-speech philosophy and broadcast law are mirrored in the larger legal context, this substantive conflict finds reflections in the larger world as well. A CLS-minded observer would point out that the interplay between a worldview focusing on the autonomy of actors in the "private sphere" and one emphasizing the ubiquity of dependence and constraint is not limited to the narrow confines of speech and broadcast law. Rather, it looks a lot like an opposition observable in the world of law at large.

Contract law, for example, faces the same choice between ideologies as does speech law. How ought contract law to approach the issues of duress and fraud? It might follow mainstream freedom of speech philosophy by treating private ordering in the marketplace as completely free and autonomous; it would limit its response to concerns of duress, fraud, and unconscionability by confining those concerns to exceptional, supplementary, sharply bounded doctrinal areas.³³²

Alternatively, contract law might seek to follow broadcast regulation, and the critique of mainstream free-speech philosophy, by developing a body of doctrine treating dependence, duress, and constraint as more nearly pervasive.³³³ This approach would not treat "private" contract as something presumptively to be left free from "public" intrusion. Rather, it would incorporate the view that the pervasiveness of unequal

332. This approach incorporates a strong opposition between private and public spheres. The private sphere is seen as the realm of intentionalism and free choice; the public sphere, by contrast, as the necessary-evil realm of collective coercion. Constitutional lawyers will recognize this in its most extreme form as the philosophy of *Lochner v. New York*, 198 U.S. 45 (1905). For a useful summary, see Olsen, *supra* note 307, at 1502-03.

The approach has its problems. All private contracts, after all, take place against a background of state-created and state-enforced rights and entitlements; every bargain is thus a function of a legal system that is not "natural" but political. See Mensch, *supra* note 307, at 764; see also Sunstein, *supra* note 8, at 264-65; Weinberg, *supra* note 17, at 1273-74. There is no sharp-edged way to distinguish between agreements entered into as a matter of uncoerced choice, and those that are a product of impermissible duress; as the Realists pointed out, all choices in this world are constrained. We make our arrangements only within the existing legal framework and the existing (significantly publicly determined) distribution of rights and privileges. See John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 287-88 (1947); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 605 (1943). On the attempt of the Second Restatement of Contracts to define "duress" and "unconscionability," see Dalton, *supra* note 307, at 1032-39. See generally Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 903-10 (1987) (discussing and criticizing the position that any understanding of government neutrality must depend on assumptions about the "natural" distribution of rights and entitlements).

333. This seems a better description of social reality. "[T]he whole economic structure quite obviously depend[s] on the law accepting as legitimate countless deals imposed by one party on another." Dalton, *supra* note 307, at 1027.

bargaining power calls for routine public involvement in so-called private activity. The very existence of that unequal bargaining power would be seen as resulting from entitlements conferred by law—which is to say, by government.³³⁴

I will refer to the substantive conflict reflected in ordinary free-speech philosophy and broadcast law, as well as other areas of the law, as the opposition of autonomy and constraint. The worldview oriented to autonomy, in which individuals are seen as acting freely and independently to advance their own values, treats human action as the product of free choice. The worldview oriented to constraint, by contrast, emphasizing that our choices are rarely either independent or free, treats human action as importantly determined by chains of earlier events.³³⁵

334. See Hale, *supra* note 332, at 627-28. See generally Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 102-10 (1984) (arguing that legal rules fundamentally constitute and define private relationships); Olsen, *supra* note 307, at 1508-09 (attacking the image of the state as a "noncoercive, neutral arbiter" in the market); Sunstein, *supra* note 8, at 264-65 (discussing New Deal reformers' view that government not only "acts" when it disturbs existing distributions, but is responsible for those distributions in the first instance). On the other hand, the approach is itself problematic: how can we develop a coherent body of contract doctrine that treats ordinary contracts as unfree?

335. The conflict of autonomy and constraint is in this sense found in the criminal law. See generally Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 959-60, 990-99 (1992). The concept of blame plays an important role in our criminal law. Most of us believe that it would be wrong to punish someone who was not blameworthy, even if that punishment in fact deterred the commission of crimes. This belief assumes that we can meaningfully describe some people as more blameworthy than others. It is obvious, though, that "circumstances clearly beyond the control of the actor have, at a minimum, a strong bearing on the possibility that he will commit wrongful acts." KELMAN, *supra* note 311, at 89. Drug-related violence, for example, is significantly more common among those living in an environment of urban poverty, unemployment, and educational deprivation than among those living in better conditions. Since we only sometimes recognize such circumstances in assessing blame, we tend to waver between approaches.

On the doctrinal level, this opposition can be seen in a variety of contexts. To what extent should we impose criminal liability for negligent behavior? A traditional view, now out of fashion, was that negligence was "natural" to some people, determined, and thus not an appropriate subject for criminal punishment. Is it appropriate to punish drug addicts for being addicted? Is drug addiction a "status offense," the punishment of which is unfair because the activity is involuntary? Or is punishing the addict a reasonable moral response to the initial decision to take the drugs that led to addiction? In what circumstances should we downgrade murder to manslaughter because the defendant was "provoked," that is, because his action was a partly determined response to external circumstances? See *id.* at 93-94, 95-96. A predisposition toward rules and the salvation of a refuge in "science" leads us to refuse to find at all blameworthy those who fall within the exceptional, purportedly hard-edged and sharply bounded category of "insanity." It seems questionable, though, whether legal insanity coincides with any genuine hard-science medical category. We tend to sweep under the rug murkier questions of the determinants of human action, in part because we simply have no good way of dealing with them within the criminal-justice system. See *id.* at 91, 277-78.

Nor is this conflict limited to the criminal law. In reforming a trust or interpreting a statute or constitutional provision (say, the Equal Protection Clause), to what extent should we consider the drafters' views (say, that segregated schools were permissible and appropriate) to be self-created, chosen, and worthy of respect, and to what extent should we consider them a mere product of their times, which the drafters would not reaffirm were they to revisit the matter today? The latter course allows us to disregard their views by treating them as merely socially determined. See *id.* at 99-101.

As a result, the concepts of autonomy and constraint are connected to the philosophical concepts of intentionalism and determinism.³³⁶

The opposition of autonomy and constraint is also linked to a conflict between political philosophies some have referred to as individualism and altruism. Individualism emphasizes separateness, autonomy, and self-reliance: one's own ends are viewed as normatively primary, entitling one to pursue them so long as one respects the basic rights of others. Altruism, by contrast, emphasizes sharing and sacrifice. Within the context provided by "the degree of communal involvement or solidarity or intimacy," one seeks to help others regardless of their "rights."³³⁷

Individualism assumes autonomy by presupposing that people interact freely as individuals, that they choose their contracts and relationships by consulting their own values and are responsible for the choices they make. It makes sense only with an intentionalist foundation: the idea that one is entitled to treat one's own ends as normatively primary presupposes that one's ends are in fact one's own, meaningfully and intentionally chosen. Its philosophical dilemma is the need to maximize liberty—individual freedom of action—while maintaining order.³³⁸ That task is incoherent unless it is possible to conceive of meaningful freedom of action. Similarly, altruism makes more sense in a world characterized by mutual dependence. It has as a premise that the responsibility for each of our individual situations is significantly communal, rather than individual. That premise is unmoored from its foundation if we in fact are free, individually, to make our own choices, to choose our own lives. It makes more sense if we live in a world where our lives and circumstances are the product of socially determined forces.

Duncan Kennedy suggested, some fifteen years ago, that rules are linked to individualism, and standards to altruism.³³⁹ The connection is surely not straightforward; law motivated by altruistic concerns may well be cast in rule-like form.³⁴⁰ Concerns about discretion and adminis-

336. See KELMAN, *supra* note 311, at 86-113. The terminology, however, is misleading. The determinist philosophy that human agents have *no* free will, and thus that all actions are *fully* causally determined, is not implicated here. See Phillip E. Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247, 263 n.53 (1984); John Stick, *Charting the Development of Critical Legal Studies*, 88 COLUM. L. REV. 407, 414 (1988) (book review).

337. Kennedy, *supra* note 310, at 1718; see *id.* at 1713-18. But see Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15-16 (1984) (recanting "the whole idea of individualism and altruism," explaining that "these things are absolutely classic examples of 'philosophical' abstractions which you can manipulate into little structures").

338. See UNGER, *supra* note 310, at 66-67; see also Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 783-84 (1983).

339. See Kennedy, *supra* note 310, at 1737-66.

340. Redistributive taxation provides an obvious example; labor and public benefits law provide others. 17 U.S.C. § 203, providing for the termination of certain transfers of copyright, plants a nearly impenetrable thicket of rules in order to protect authors and their beneficiaries from pervasive inequality in the marketplace.

trability may arise regardless of the lawmaker's individualistic or altruistic perspective.³⁴¹ Indeed, whether law seems individualistic or altruistic may depend entirely on the perspective from which one views it.³⁴²

The suggestion is important for purposes of this Article, though, because it implies a link between the procedural and the substantive elements of our competing approaches to speech regulation. Is there a link between mainstream free-speech philosophy's adherence to rules, and a worldview of individualism, autonomy and intentionalism? Between the broadcast regulatory system's reliance on standards, and a worldview of altruism, dependence and determinism?

Perhaps there is. Rules, according to Mark Kelman, are linked to "stereotypical individualism" because they are designed for "the person who lives by the rules," who "wants to know just what is expected of him: even if a lot is expected, he can do it, as long as there are no surprises, as long as he can plan his life anticipating and controlling all obligations that he will ultimately be asked to meet." He "does not beg for fairness or a second look at transactions when things go wrong; consequences are accepted, allowed to fall where they may so long as no one has explicitly cheated." He is confident of his abilities, going by the book, to take care of his interests or to live with his failure to do so.³⁴³

By contrast, Kelman contends, a legal regime emphasizing standards—and thus the need for fact-specific determinations in every case—rejects the easy assumption that we will all be okay so long as we follow the rules. It rejects the assurance that formal equality, in the face of substantive inequality, is the measure of justice. Rather, formal equality under the rules merely "forbids rich and poor alike to sleep under bridges."³⁴⁴ We cannot simply assume autonomy in the private sphere. The ubiquity of dependence and constraint requires the decisionmaker to look to the barriers to freedom that may be inherent in a specific situation. "[O]ne has to see whether one's trading partners can *actually* take care of themselves; one can't simply presume that their formal legal capacity is the same as actual capacity." This fact-specific inquiry calls for "sensitivity and awareness to others, even to others one hasn't voluntarily chosen to be sensitive to."³⁴⁵

341. See Schlag, *supra* note 307, at 420 (arguing that "[b]oth altruism and individualism can generate arguments for both rules and standards"); Sullivan, *supra* note 309, at 96-100.

342. Recognition of a tort cause of action, thus, can be seen as altruistic because it emphasizes the responsibility of the tortfeasor to look out for the interests of others; it can be seen as individualistic because it ignores any responsibility of the injured to subordinate his own interests so that others might benefit. Cf. Balkin, *supra* note 198, at 208-11 (any legal rule can be seen as either "individualist" or "communalist").

343. KELMAN, *supra* note 311, at 59-60.

344. ANATOLE FRANCE, *THE RED LILY* 75 (The Modern Library 1917) (1894).

345. KELMAN, *supra* note 311, at 60. "Rules," Kelman concludes, "respect strong, individually chosen distinctions in relations . . . Standards assert that simply living in a community establishes a relationship of some trust and care . . ." *Id.*

In sum, relying on Kelman's approach, we can draw a connection between the rule-boundedness of conventional First Amendment thinking and a philosophy of individualism, autonomy, and intentionalism; between broadcast regulation's reliance on standards and a philosophy of altruism, dependence, and determinism. Can we take this further?

Consider the opposition between value subjectivity and value objectivity. Mainstream Western political thought,³⁴⁶ beginning with Hobbes and Locke, has taken as foundational the belief that values—theories of the good—are individual, subjective, and arbitrary.³⁴⁷ While individuals' values and goals may happen for a time to coincide, that coincidence is temporary and precarious.³⁴⁸ The state is appropriately seen as "facilitative," seeking not "that particular good lives be led but simply allow[ing] persons to achieve their own vision of the good."³⁴⁹ That, though, is not the only way to imagine the world; alternatively, one can see values as objective or as communally determined.

Rules appeal to the aesthetics of precision, to the psychology of denial or skeptical pragmatism (or, alternatively, of blinding ourselves to imprecision and mistakes or believing it is girlishly utopian to hope for perfection); standards appeal to the aesthetics of romantic absolutism, to the psychology of painful involvement in each situation, to the pragmatism that rejects the need for highfalutin generalities.

Id. at 61.

Kelman's description of rules leads to his ultimate endorsement of an "antirights, antilegalist approach." "Rules," he concludes, "are the opiate of the masses." *Id.* at 63, 275. I have serious doubts whether a move from rules to standards, and from rights to empathy, would in fact advance freedom. It seems to me that such an approach would tend to suppress minorities of any stripe. While rule-bound legalism, like any legal system, privileges those already socially dominant, I worry that communitarian approaches, for dissidents or minorities, may be still worse. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 146-48 (1991) (observing that minority-group members can find formal legality empowering by using it to create a legally respected social self, even as financially comfortable white males can find it alienating and distancing); Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356-69, 1381-87 (1988) (arguing that CLS analysis fails to recognize the realities of the racially oppressed); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 303-07, 314-19 (1987); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 635 (1990) ("[C]ritical feminism's central objective should be not to delegitimize [rights-based] frameworks but rather to recast their content and recognize their constraints."); see also Rebecca L. Brown, *A Tribute to Justice Thurgood Marshall: Or: How I Learned to Stop Worrying and Love Formalism*, 1 TEMP. POL. & CIV. RTS. L. REV. 7, 16-17 (1992). In Frances Olsen's study of the family and the market, thus, the form of social ordering associated with the altruistic ethic is not community but hierarchy. See Olsen, *supra* note 307, at 1529-30.

I rely here on Kelman's approach, therefore, not for its normative content but for its descriptive and explanatory power.

346. I refer here to the body of thought commonly referred to as "liberal" thought, encompassing the work of such disparate thinkers as Hobbes, Locke, Hume, Kant, Bentham, Posner, Nozick, Tribe, and Rawls.

347. See UNGER, *supra* note 310, at 76; see generally BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980). The text is perhaps oversimplified; some modern liberal writers reject the position that the liberal state must be strictly neutral between conceptions of the good. See Stick, *supra* note 336, at 417.

348. See UNGER, *supra* note 310, at 81.

349. KELMAN, *supra* note 311, at 66.

Both rules and the philosophy of individualism can be seen as linked to the belief that values are individual, subjective and arbitrary; standards and altruism, to the belief that values are communal or objective.³⁵⁰ If we are to decide disputes by reference to standards of "reasonable" actions or "fair" dealing, after all, we must be able to reach some sort of shared conception of what it means to be "reasonable" or "fair."³⁵¹ Rules require no such moral dialogue for their application; they can be applied, as standards cannot, in a world in which values are individually, even randomly, chosen, shared only by chance.³⁵² Value subjectivity, in turn, is linked to individualism: where there exists no objective or meaningfully shared understanding of the Good, there is no justification for collective attempts to run individual lives.³⁵³ By contrast, altruism can see the state not as a means to facilitate the exogenous, pre-existing goals of its individual members, but as a means to the collective development of shared ends.³⁵⁴

Consider the opposition between a philosophy embracing paternalism and one rejecting it.³⁵⁵ Value subjectivity and individualism seem to forbid paternalism. If values are entirely subjective, there is no basis for any conclusion that an individual's choice is the "wrong" one for her; it may in fact accord with her own subjectively chosen preferences. Not to respect it is not to respect the boundaries between people that individualism demands.

Once again, though, it is possible to imagine an alternative philosophy. That philosophy might take one of two forms. First, it might attack the notion that people's choices in fact reflect their desires.³⁵⁶ The fact that all choices are constrained by circumstance causes people routinely to make choices they view as unsatisfying. The "choice" to take an unsafe job may maximize utility under the circumstances, but may have little to do with the chooser's desires in a more general sense. Moreover, on a psychological level our desires are marked by profound ambivalence. Mechanically identifying them with our choices oversimplifies

350. See UNGER, *supra* note 310, at 76-81; Kennedy, *supra* note 310, at 1766-71.

351. See KELMAN, *supra* note 311, at 61. The belief that we cannot, Kelman suggests, is crucial to the void-for-vagueness doctrine: "The law 'Don't do bad' is the paradigm of vagueness precisely because people's accounts of what is bad are unshared, subjective." *Id.* at 78; see also Schauer, *supra* note 315, at 512 n.8.

352. See Kennedy, *supra* note 310, at 1768-69.

353. See *id.* at 1770-71; KELMAN, *supra* note 311, at 61-62.

354. See Kennedy, *supra* note 310, at 1771-72.

355. See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 572-73 (1982); see also KELMAN, *supra* note 311, at 137-41.

356. More basically, it might attack the notion that people have independent, exogenous desires; an alternative view might stress that the "very structure of individual perception, belief and desire, and thus the terms of individual choice, are already shaped by culture and ideology even before the individual begins to choose." J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133, 1137 (1991) (book review).

them to the point of parody.³⁵⁷

Second, an alternative philosophy might challenge head-on the basic theme of nonpaternalism that government should be structured so as uncritically to facilitate the effectuation of people's desires. In ordinary life, Kennedy has argued, we often act to influence people's choices in order to cause them to do things we believe to be in their own interest. Paternalism in that sphere, he has suggested, reflects a moral imperative *not* simply and mindlessly to defer to others' decisions, but rather to help them make important judgments, difficult as that may be, because we care about them. We are responsible for them, because we share in a community.³⁵⁸

We can link up all of these oppositions into a comprehensive expression of two antagonistic worldviews. One worldview links rules, individualism, a belief in overall private autonomy, a sharp public-private distinction, value subjectivity, and nonpaternalism; the other links standards, altruism, determinism, a belief in the pervasiveness of constraint, value objectivity (or a belief in the communal nature of values), and paternalism.³⁵⁹

I have so far presented each of these oppositions as relating two evenly balanced positions. Is that appropriate, or are some poles more equal than others? I would argue that the opposing worldviews I have hypothesized do not occupy equal places in American law. Consider first the opposition of rules and standards. Rules have the decided advantage. The whole notion of the Rule of Law places at the center of our legal thinking the idea that judges should be applying hard-edged rules that leave little room for interpretation or discretion. In that way we have a government of "laws, not men."³⁶⁰ The fact that law application sometimes works best as a nuanced, nonrule-bound, discretionary process seems like a necessary evil, an exception to the way that legal reasoning—that is, rule application—is supposed to work. Standards give the judge or agency independent power that we then scurry about trying to figure out how to constrain. A well-stocked law library contains scores

357. See KELMAN, *supra* note 311, at 126-33; *cf.* Sunstein, *supra* note 8, at 287-88 (contrasting "democratic aspirations" and "consumption choices"). See generally FLANNERY O'CONNOR, *WISE BLOOD*, reprinted in *THREE BY FLANNERY O'CONNOR* 8 (2d ed. 1964) ("[F]ree will does not mean one will, but many wills conflicting in one man. Freedom cannot be conceived simply. It is a mystery . . .").

358. See Kennedy, *supra* note 355, at 631-49.

359. This vision is developed in KELMAN, *supra* note 311, at 15-150.

360. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 153 (1960) ("The conception of freedom under the law . . . rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free."); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("[O]urs is a government of laws, not of men, and . . . we submit ourselves to rulers only if under rules."); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (arguing that courts should, to the extent possible, announce clear rules and avoid situationally sensitive analysis).

of books about the "problem of discretion"; there are no books, however, about the "problem of rules."³⁶¹ Rules are what law is about. Standards, as a result, are what we use in the cases when it seems that rules won't work.

Consider next the question of individualism and altruism. It is hard even to think about altruism as part of a *legal* structure; the very word "altruism" suggests action beyond that which is legally required.³⁶² The structure of the law we know is Hohfeldian; its core is a nucleus of legal freedom equated with autonomy, rights, and obligations. It is therefore individualistic. Altruistic concerns enter only as a supplement, an "after-the-fact adjustment[]" to a pre-existing legal structure that has its own, individualist, logical coherence."³⁶³ Altruistic notions provide "a periphery of exceptions to the core doctrines."³⁶⁴

As one considers the remaining oppositions, though, things begin to seem more complicated. In the legal vision of the turn of the century, the individualistic autonomy of actors in the private sphere was paramount, both as a normative good—indeed, as the definition of freedom—and as the only legally cognizable reality.³⁶⁵ In this post-Realist age, though, the boundaries are muddier. *Lochner* is no longer good law. We premise much of the modern administrative state on the recognition that the economic sphere *is* in important degree marked by domination and constraint, that government refusal to intervene is not necessarily empowering. The government plays an unabashed public-law role in labor relations, the relation between manufacturer and consumer, and in a host of other formerly "private" interactions.³⁶⁶

In some respects the old approach still applies; the criminal law, for example, appears still to be built on what Meir Dan-Cohen calls the "free will paradigm."³⁶⁷ While the criminal law does not always adhere to the intentionalist position, affirming individual autonomy and moral responsibility in the sphere of private ordering, we tend to view departures

361. KELMAN, *supra* note 311, at 292.

362. See Kennedy, *supra* note 310, at 1717.

363. *Id.* at 1719.

364. *Id.* at 1737. In classical legal thought, thus, individualism was the ethic of the marketplace, which was in turn the domain of law. Altruism was the ethic of the family, which was "delegalized." See Olsen, *supra* note 307, at 1520-22.

365. See Kennedy, *supra* note 310, at 1728-31; Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW* 13, 23-26 (David Kairys ed., rev. ed. 1990). Mensch emphasizes that legal thinkers of the time did not deny the existence of inequality and coercion in the private economy; rather, they deemed those factors simply not cognizable within the logical structure of the law. (Even at the time, on the other hand, the law was not free from opposing concerns; consider, for example, the paternalistic motivations underlying the anti-lottery statute upheld in *Champion v. Ames*, 188 U.S. 321 (1903)).

366. This shift is manifest in private law as well as public. See, e.g., Balkin, *supra* note 198, at 259-60 (describing nonprivileged assumptions in modern product liability law).

367. Dan-Cohen, *supra* note 335, at 959.

“somewhat apologetically, as exceptions to the free will idea.”³⁶⁸ Once again, “the picture of responsibility is that of a core and a periphery.”³⁶⁹

Yet the ubiquity of paternalist concerns (for example, in government safety and health regulation) demonstrates the importance of such concerns in our law. Paternalism has a particularly bad image in our legal culture. We associate it both with Stalinist notions of how the “vanguard class” will teach the rest of us where our true interests lie, and with racist and sexist depictions of blacks and women as children, not really understanding their own interests or competent to protect them.³⁷⁰ Notwithstanding widespread condemnation, though, its role is undeniable.

Where does this leave us? Some scholars take the view that with respect to *all* of the paired visions I have discussed—rules vs. standards, individualism vs. altruism, value subjectivity vs. value objectivity, intentionalism vs. determinism, nonpaternalism vs. paternalism—mainstream legal thought still treats the former term as privileged, the latter as non-privileged.³⁷¹ Privileged legal discourse presents a vision of the world in which people presumptively are free, independent, “self-determined subjects,”³⁷² interacting in a world free of coercion or meaningful inequality, choosing their own values and their own destinies. The privileged term is assumed to provide the presumptively appropriate way to resolve disputes; the nonprivileged approach (although it may be frequently resorted to) is seen as extraordinary, in need of special justification, illegitimate except in the context of sharply bounded exceptions to the general rule. The privileged approach, moreover, is seen as accurately *describing* the world in all but exceptional cases.

As a result, while both privileged and nonprivileged attitudes are present in the law, it is the privileged position that shapes our thinking about the law, and about the world upon which the law acts. We tend to downplay the nonprivileged description of reality; we treat nonprivileged thinking as applicable only within exceptional, sharply bounded spheres. In part, we accept the privileged vision because of doubt that we could workably, consistently with freedom, structure the legal system to take into account the nonprivileged realities—say, that people’s actions are in

368. *Id.* at 960.

369. *Id.*

370. See KELMAN, *supra* note 311, at 138; Kennedy, *supra* note 355, at 588-90; see also *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141-42 (1873) (Bradley, J., concurring) (justifying exclusion of women from the bar in part on the ground that women should be “protected and defended” by men).

371. See KELMAN, *supra* note 311, at 290-95. All this is reminiscent of the deconstructionist position that any definition necessarily involves a hierarchical opposition. Deconstructive practice, though, calls for a demonstration that the hierarchy is false: that whenever *A* can be termed the rule and *B* the exception, the same sort of reasoning can be used to term *B* the rule and *A* the exception. See Balkin, *supra* note 307, at 747 (arguing that “[a]ny hierarchical opposition of ideas, no matter how trivial, can be deconstructed” to show that the privileged status is an illusion).

372. KELMAN, *supra* note 311, at 290.

important part not “chosen” but socially determined, or that people might sometimes be better off if they did not get what they choose—and we respond by denying that the nonprivileged realities are real at all.³⁷³

I will assume the validity of this position, by using the terms “privileged” and “nonprivileged,” throughout the rest of this discussion. I don’t think that in its strongest form it is crucial to my reasoning, though. Most of the analysis that follows relies only on my central argument that we can find two overarching worldviews reflected in the law, each incorporating normative and descriptive elements, and each incorporating one pole of the various paired oppositions I have discussed.

B. Explaining Speech Law

This background places free-speech philosophy and broadcast regulatory doctrine in a new light. Core First Amendment philosophy looks like a straightforward exposition of the “rules” position. As discussed earlier, it reflects the individualistic ideology of rule-bounded legality; it is fundamentally rationalist and intentionalist. It reflects an essential commitment to the view that we are each masters of our fate and captains of our soul, that the law need not concern itself with the determining effects of either social or psychological reality.

Core freedom-of-speech thinking seems grounded at its root in a thoroughgoing commitment to value subjectivity. Its guiding principle is that government cannot seek to suppress speech advocating disfavored values, for we cannot meaningfully say in this context that any values are wrong or should be disfavored. Under the Constitution “there is no such thing as a false idea.”³⁷⁴ Rather, “[i]f there is any fixed star in our constitutional constellation,” it is that we cannot use the mechanism of government to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”³⁷⁵ Indeed, this is the ideological root of the marketplace metaphor: it is *because* there is no way for us to fasten on objective truth or justice that we must let all ideas compete—that we can never say “enough,” that we know what the truth is, and that the good done by free competition of ideas in a given case is outweighed by the harm done through the propagation of a false idea.³⁷⁶

Core freedom-of-speech thinking rejects paternalism, the notion that

373. See *id.* at 275-79, 283-84 (arguing that we tend to deny the existence of problems for which there is no ready legal solution).

374. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

375. *Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

376. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 330-31 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986). The matter is not in fact quite so simple. A person who believes in the existence of objective truth may follow core freedom-of-speech thinking on the theory that free competition in ideas is the best way to arrive at that truth. I believe that theory to be problematic, as I explained *supra* Part II. More important, though, is the fact that such a person is constrained by the marketplace metaphor to behave *as if* truth were subjective.

the community can regulate speech because it fears that the choices citizens could make in response to speech might not be in their own interests.³⁷⁷ Such regulation is inconsistent with the individualism I have discussed; it is seen as denying each person's fundamental autonomy to decide what to believe and what to reject.³⁷⁸ Given the foundational assumptions that our choices in response to speech are free and rational, and that each of us has an equal right to select his or her own values, with no way to characterize any value as right or wrong, there is simply no room for government second-guessing of citizens' reactions to speech. Outside of the exceptional case, *all* beliefs, by hypothesis, are rational elaborations of valid (although arbitrary) values. There is no basis for government to make the judgment that people would be better off holding other views or making other choices.

Core freedom-of-speech thinking rests on a strong public-private distinction, coupled with a rejection of government regulation except in sharply bounded, exceptional cases.³⁷⁹ It does not wholly close its eyes to the possibility that private coercion could impermissibly threaten the marketplace of ideas, so that government should appropriately act to protect that marketplace; it recognizes, for example, that police must act to protect the speech of a speaker physically threatened by an angry mob.³⁸⁰ What is crucial, though, is that such challenges to the model are not seen as endemic; rather, they are recognized only as limited, confined

377. *But see* *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986) (upholding paternalistic regulation of truthful advertising for lawful casino gambling). *Posadas* fell within a "commercial speech" area in which conventional First Amendment thinking applies at best incompletely; Philip Kurland nonetheless characterized that opinion as reminiscent of *Alice in Wonderland* and Kafka's *The Castle*, in which "words take on new meanings and bureaucracy triumphs over the rule of law." Philip B. Kurland, *Posadas de Puerto Rico v. Tourism Company: " 'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful,"* 1986 SUP. CT. REV. 1, 2.

378. *See* Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213-14 (1972) (arguing that "harms to . . . individuals which consist in their coming to have false beliefs as a result of . . . expression" cannot justify legal restrictions on speech because such restrictions would be inconsistent with treating citizens as "equal, autonomous, rational agents"). *But cf.* T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 532-34 (1979) (noting that considerations of "justified paternalism" and of costs associated with unregulated expression militate against too-sweeping a condemnation of such regulation).

379. Indeed, First Amendment thinking can coherently reject government regulation precisely because it maintains a strong public-private distinction. It views the property-based market mechanism as essentially private, not "regulation" at all, and ignores the governmental hand necessary to make it go. *See* Weinberg, *supra* note 17, at 1273-74. Robert Post explains that the public-private distinction is essential to First Amendment thinking without regard to its empirical basis; even without such basis, he argues, the distinction is needed as a matter of "moral and political ascription" if we are to retain democratic self-determination. Post, *supra* note 179, at 1128.

380. This is the doctrine of the "heckler's veto." *See* Fiss, *supra* note 151, at 1416-17 (describing the doctrine as an "established part" of the free speech tradition). *But see* *Feiner v. New York*, 340 U.S. 315 (1951) (sustaining the conviction of a street corner speaker arrested after ignoring police orders to stop speaking because of the restlessness of the crowd).

exceptions to the overall rule of private ordering.³⁸¹

Broadcast law, by contrast, has much more in common with the opposing pole. It is built around the situationally sensitive standard, the procedural mode of the nonprivileged pole.³⁸² It reflects a profound fear that inequality of private power and resources undermines citizens' free interaction. It reflects a belief that viewers' tastes and wants are not endogenous, but are themselves shaped by outside forces. There is no room in the ideology of autonomy, after all, for a fear of "private censorship"; in that vision, all citizens can participate freely in the marketplace of ideas so long as government does not interfere. The fear of private censorship makes perfect sense, though, from the vantage point of the nonprivileged concern with substantive inequality in the marketplace.

Consistently with the nonprivileged position's fear of the distorting effects of economic inequality, broadcast law directs the government to regulate private broadcasters, through the "public interest" standard, with the goal that they speak *as if* they were freed from market pressures. Consistently with the nonprivileged position's rejection of the public-private distinction, FCC regulations relating to broadcast industry structure (as well as the now-defunct fairness doctrine) reflect the desire to create and reorient "private" institutional structures in the interest of promoting greater equality in the speech forum.³⁸³

Broadcast regulation incorporates the paternalist concern that what viewers choose through the marketplace ("American Gladiators," say, or "America's Funniest Home Videos") may not be what is best for them. Our broadcast regulatory system insists that stations carry public-affairs programming whether viewers want to watch it or not. We subsidize public broadcasting stations at least in part on the theory that viewers' tastes may be improved through exposure to more highbrow programming.

The broadcast-law requirement that the government scrutinize broadcast licensees for their service to the public interest is revealing in its identification of both problem and solution. As for the problem, the law reflects the nonprivileged (determinist, paternalistic) concern that

381. See *supra* note 207.

382. See *supra* notes 321-27 and accompanying text. But see *infra* notes 395-405 and accompanying text.

383. See, e.g., 47 C.F.R. § 73.3555 (1992). The FCC has put in place national multiple ownership rules, limiting the number of stations a licensee can own or control nationwide in a given service, *id.* § 73.3555 (d); rules limiting the number of broadcast stations a licensee can own or control in a single market, *id.* § 73.3555 (a), (b); and rules limiting joint ownership of a newspaper and broadcast station in a single community, *id.* § 73.3555 (c), (e). Other relevant regulation of industry structure includes the preference in licensing for applicants with smaller and less extensive holdings in other media outlets, see *supra* note 73 and accompanying text, and a variety of preferences given to minority license applicants and licensees, see generally *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (upholding FCC policies on minority ownership against equal protection challenge).

because the market is skewed and viewers' tastes are themselves shaped by the market, viewers are imperfect decisionmakers as to what is in their own interests. The solution offered is for the government to regulate programming in the "public interest": this reflects the nonprivileged (altruistic, not individualistic) worldview in assuming that there *is* such a thing as the "public interest," distinct from the mere sum of individual interests, which the government can be empowered to seek.³⁸⁴ It reflects the nonprivileged belief that government action can promote freedom, rather than restrain it.

Red Lion reflects the nonprivileged pole as well in its understanding of the role of broadcast licensees. Licensees are not classic, individualistic, First Amendment speakers; rather, they are formed in the altruistic mold. A broadcast licensee is a "proxy or fiduciary," with the function of "present[ing] those views and voices which are representative of his community."³⁸⁵ Much the same can be seen in *Red Lion's* description of First Amendment rights; there too, the Court seemed to diverge sharply from the individualist tradition, speaking of the "collective right" of the "people as a whole" to have the broadcast system function consistently with First Amendment values.³⁸⁶

In a variety of ways, broadcast law appears to depart from the pure nonprivileged model. First, it can be argued that a broadcast law hewing unreservedly to the nonprivileged pole would place greater emphasis on direct content regulation. The privileged-position model, emphasizing the autonomy of the private sphere, requires some "sufficiently close nexus"³⁸⁷ before the state can be held responsible for its mere failure to *prevent* private action. Thus, for example, there is no violation of the Equal Protection Clause if the government stands idly by while a person engages in racial discrimination in her private life or workplace. But the view of the state more nearly consistent with the nonprivileged pole rejects that distinction. It contends that governmental ordering is pervasive throughout the nominally private sphere, and that the government is

384. Cf. UNGER, *supra* note 310, at 81-82 (arguing that in individualist philosophy, groups have no values apart from the individual and subjective goals of their individual members). Laurence Winer thus invokes Ayn Rand in arguing that broadcasting ought to be regulated in accord with core First Amendment principles; he denies that there exists any "such thing as the 'public interest' (other than the sum of the individual interests of individual citizens)." Winer, *supra* note 8, at 379 (quoting AYN RAND, CAPITALISM: THE UNKNOWN IDEAL 123, 126 (1967)).

385. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969). For the Court's later apparent departure from that view, see *infra* notes 406-14 and accompanying text.

386. 395 U.S. at 390. As then-Commissioner Robinson pointed out, the apparent position of the *Red Lion* Court that "the *First Amendment* gives positive rights to listeners/viewers to dictate what speakers shall tell them" is incoherent as a statement of individualist Hohfeldian relations; understood in that manner, it "makes nonsense of the *First Amendment*; in fact, it stands it on its head." The Handling of Public Issues Under the Fairness Doctrine, 58 F.C.C.2d 691, 706-07 (1976) (Robinson, Comm'r, dissenting), *aff'd in part, rev'd in part sub nom.* National Citizens Comm. for Broadcasting v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

387. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

responsible for those actions it merely allows and facilitates as well as those it requires. Thus, "when the government grants access to racist groups to use streets and parks for racist speech, it is to that extent subsidizing racist speech. . . . [When it] declines to allow suits for intentional infliction of emotional distress or other forms of racial harassment, it is permitting racists to harm minorities."³⁸⁸ On that understanding, government bears responsibility for the effects of all speech it allows to be broadcast. A broadcast regulatory system truly adhering to the nonprivileged model might seek to use situationally sensitive means to ban private broadcast speech disserving equality in the world at large.

A Commission that took seriously these implications of its public interest mandate might see its own role as an activist one, directed at removing broadcasters whose speech was *less* in the public interest from the air, to be replaced by those whose programming would be *more* in the public interest. It might look harder at programming (and proposed programming) in ruling on license and transfer applications, taking a closer look at whether the broadcast of racial or religious invective, say, really furthered the public interest.³⁸⁹

The FCC has not played such a role. It has almost never denied renewal to a television licensee in a comparative challenge.³⁹⁰ While it has occasionally denied television license renewals in other contexts—

388. Balkin, *supra* note 175, at 377. While Professor Balkin was merely setting out the argument and not endorsing it, other scholars have argued along just these lines. See, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 444-49 (arguing that the state action rule exculpates private racism by "immuniz[ing] private discriminators from constitutional scrutiny"); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2374-80 (1989) (describing government's tolerance and protection of hate group activities as a form of state action that legitimates and supports racist speech); see also Sunstein, *supra* note 8, at 266-77.

389. *But cf.* Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169, 171 (D.C. Cir. 1968) (holding that "recurrent bigoted appeals to anti-Semitic prejudice" were not grounds for nonrenewal of broadcasting company's license where the company had offered free time for response (quotation omitted)), *cert. denied*, 394 U.S. 930 (1969).

This story may be less simple than it appears. Duncan Kennedy has indicated that even the altruist position encompasses "the necessity and desirability of a sphere of autonomy or liberty or freedom or privacy within which one is free to ignore both the plights of others and the consequences of one's own acts for their welfare." Kennedy, *supra* note 310, at 1718. I think the approach I take in text, though, is true to altruism as a "direction[] or orientation[] of policy argument." Balkin, *supra* note 356, at 1158.

390. The Commission in the notorious *WHDH* case denied renewal to a Boston television station in favor of a challenger. In that case, though, the unique procedural history of the proceeding had led the agency to treat the incumbent as if it were merely another applicant. See *WHDH, Inc.*, 16 F.C.C.2d 1 (1969), *aff'd sub nom.* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); see also *supra* note 96. The *Video 44* case is a more recent one in which the Commission denied renewal in a comparative proceeding. See *Video 44*, 5 F.C.C.R. 6383 (1990). The agency, however, refused to do so until prodded by the court of appeals. See *Video 44*, 4 F.C.C.R. 1209 (1989), *rev'd sub nom.* Monroe Communications Corp. v. FCC, 900 F.2d 351 (D.C. Cir. 1990); see also *supra* notes 100-02 and accompanying text. I am aware of no cases in which a conventional broadcast license genuinely was won by a challenger, rather than lost by the incumbent.

even, on very rare occasions, on grounds implicating broadcast content—it has not done so in any systematic way. Rather, its actions have been sporadic exceptions to a norm of unbroken renewal.³⁹¹ Similarly, even when the fairness doctrine was in force, the Commission found actual fairness doctrine violations only in the rarest of cases.³⁹² While the Commission issued a warning in the drug-oriented songs controversy,³⁹³ it took no further steps against offending licensees. Indeed, for the FCC to have actively imposed on private speakers an official government view of what speech was in the “public interest” would have been wholly unacceptable to the Commissioners, steeped in privileged-position law, and to the dominant legal culture. It would have made the contradiction between competing legal modes too stark and inescapable. Even in an area marked by nonprivileged concerns, ordinary First Amendment values—encapsulated in the Communication Act’s formal denial to the Commission of “the power of censorship”³⁹⁴—preclude so great a governmental assertion of power over speakers and speech.

There are other ways in which broadcast law arguably departs from the pure nonprivileged model. The FCC over the past thirty years has responded to pressures to abandon the procedural mode of situationally sensitive adjudication.³⁹⁵ The history of FCC control over market entry, for example, reflects a continual move *away* from situationally sensitive standards in search of more hard-edged rules. In the initial years of FCC decisionmaking, the agency decided whether to grant uncontested license applications in a quintessentially situationally sensitive, subjective, and ad hoc manner. Addressing whether there was “need” for the proposed new service, the Commission went so far as to consider whether a station provided relatively less valuable public service because its programming was already available to the public on phonograph records. Judicial hostility, however, eventually put a stop to the practice. The Commission

391. See *supra* notes 105-11 and accompanying text.

392. In one two-year period at the height of fairness enforcement, the FCC received 4280 fairness complaints; it made findings adverse to the licensee in nineteen (4/10 of 1%) and took tangible punitive action (a fine in each case) in eight of the nineteen. Seven of those eight, in turn, related to violations of a fairly hard-edged FCC rule requiring broadcasters to give political candidates an opportunity to respond to editorials opposing them or endorsing a competing candidate. The eighth related to a violation of the personal attack rule. See *The Handling of Public Issues Under the Fairness Doctrine*, 58 F.C.C.2d 691, 709, 710 n.17 (1976) (Robinson, Comm’r, dissenting), *aff’d in part, rev’d in part sub nom.* *National Citizens Comm. for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

393. See *supra* notes 124-32 and accompanying text.

394. 47 U.S.C. § 326 (1988) (“Nothing in this chapter shall be understood or construed to give the Commission the power of censorship . . . , and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech . . .”).

395. Some forms of FCC regulation remain situationally sensitive to this day. See *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 118 (1973) (“[T]he difficulty and delicacy of administering the Communications Act . . . call[] for flexibility and the capacity to adjust and readjust the regulatory mechanism . . .”); *supra* notes 321-27 and accompanying text.

ultimately moved to an approach giving it much less discretion in individual, noncomparative licensing decisions.³⁹⁶

The problem of selecting among competing would-be applicants saw a similar evolution. The Commission began with a discretionary, content-sensitive process.³⁹⁷ A number of events, however, including allegations that Commissioners had solicited and received bribes in licensing proceedings, contributed to the demise of that approach.³⁹⁸ The agency then shifted to the more nearly rule-bound approach of the 1965 *Policy Statement*,³⁹⁹ notwithstanding dissenters' protests that "the significance to be given in each decision to each . . . criterion must . . . necessarily be considered in context with the other facts of the individual cases."⁴⁰⁰ The history of the FCC comparative hearing process ever since has been one of attempts to move still further from standards to rules.⁴⁰¹ A large part of the silliness of the current process has resulted from that attempt to capture the "public interest" determination in hard-edged rules. The Commission has explained that in its continuing efforts to reform the comparative hearing process it seeks further to minimize "subjective and imprecise" criteria, in favor of "swifter, more certain choices."⁴⁰²

The Commission's approach to license renewal reinforces the same theme. The Commission has sought to reduce uncertainty by more nearly guaranteeing renewal for incumbent licensees. In connection with uncontested renewal applications, it went from a purely subjective "public interest" determination, to one informed by the applicant's compliance with quantitative, but informal "processing guidelines," to a rule under which all applications are granted virtually automatically.⁴⁰³ Once again, the nonprivileged approach of ad hoc, informal, situationally sensitive standards yielded, over time, in favor of an approach more nearly consonant with the larger legal regime.

396. See Weinberg, *supra* note 40, at 651-55.

397. See *supra* notes 66-69 and accompanying text.

398. See *supra* notes 70-71 and accompanying text.

399. 1 F.C.C.2d 393 (1965); see *supra* notes 72-80 and accompanying text.

400. 1 F.C.C.2d at 401 (Hyde, Comm'r, dissenting); see also *id.* at 404 (Bartley, Comm'r, dissenting) ("There are so many varying circumstances in each case that a factor in one may be more important than the same factor in another."). Commissioner Hyde complained:

The proposed fiat as to the weight which will be given to the various criteria—without sound predication of accepted data and when considered only in a vacuum and in the abstract—must necessarily result in . . . unfairness to some applicants and in the fashioning of an unnecessary straitjacket for the Commission in its decisional process. How can we decide in advance and in a vacuum that a specific broadcaster with a satisfactory record in one community will be less likely to serve the broadcasting needs of a second community than a specific long-time resident of that second community who doesn't have broadcast experience? How can we make this decision without knowing more about each applicant?

Id. at 402.

401. See *supra* notes 81-89 and accompanying text.

402. Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 F.C.C.R. 2664, 2664 (1992); see *supra* text accompanying note 87.

403. See *supra* notes 105-09 and accompanying text.

This point is an important one; broadcast regulation has been unable to survive as an inviolate, situationally sensitive island in a rule-bound legal sea. Some of the reasons for the shift, though, have only attenuated links to privileged-position ideology. At least when it comes to renewal, for example, the Commission's actions can be traced to the facts that broadcast licenses are worth large sums of money, and licensees invest large sums in their stations. Both Congress and the Commission have tended to respond favorably to the urgings of industry members that renewal be made more nearly certain in order to encourage and protect those investments.⁴⁰⁴ The Commission's partial shift from standards to rules thus reflects both the ideological pressures of a dominant legal culture elevating rule-bound decisionmaking as a procedural model, and the practical need to adopt predictable procedures so as more reliably to foster and protect agency clients.⁴⁰⁵

A final way in which FCC regulation can be said to incorporate elements of the preferred position relates to the role of licensees in the broadcast system. The Supreme Court in *CBS v. Democratic National Committee*⁴⁰⁶ moved significantly away from the philosophy of *Red Lion* to a more individualistic view of broadcast regulation, reinforcing the public-private distinction in broadcast law. *CBS* involved an attack on broadcasters' policies of refusing to run paid political advocacy advertisements.⁴⁰⁷ According to plaintiffs,⁴⁰⁸ such policies disserved the "public interest" by narrowing the spectrum of public debate, and thus violated the Communications Act.⁴⁰⁹ Moreover, the government's failure to insist that broadcasters run such advertisements undermined the market-

404. See, e.g., Formulation of Policy & Rules Relating to Broadcast Renewal Applicants, 4 F.C.C.R. 6363, 6365 (1989) (proposing to grant all incumbents a presumption of entitlement to renewal expectancy, and thus to renewal, upon compliance with FCC rules requiring each licensee to maintain certain files for public inspection); Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424, 425 (1970) (providing, in response to S. 2004, 91st Cong., 1st Sess. (1969), that a licensee that has provided "substantial service to the public" is entitled to renewal without regard to competing applicants' qualifications), *vacated sub nom.* Citizens Communications Ctr. v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).

405. These two sets of pressures, on the other hand, may not be wholly unrelated; Kennedy's insight is that such procedural and substantive concerns can be linked. See Kennedy, *supra* note 310.

406. 412 U.S. 94 (1973).

407. Political advocacy advertisements seek to promote a position on a political issue or issues, but do not relate to races for elective office. Because they do not relate to races for elective office, broadcasters are under no obligation to carry them; they do not fall within 47 U.S.C. § 312(a)(7), which requires broadcasters to carry advertisements by candidates for federal elective office on behalf of their candidacies. See generally *id.*; *CBS v. FCC*, 453 U.S. 367 (1981) (upholding an FCC ruling that the three major networks violated 47 U.S.C. § 312(a)(7) by refusing to provide time for a documentary on the record of presidential candidate Jimmy Carter).

408. Plaintiffs included an antiwar group called Business Executives' Move for Vietnam Peace, which had been rebuffed in its attempt to buy radio air time to espouse its views, and the Democratic National Committee, which anticipated similar difficulty in buying time. *CBS*, 412 U.S. at 97-99.

409. *Id.* at 98-101.

place of ideas, and thus violated the First Amendment.⁴¹⁰ The Supreme Court rejected both claims.

Chief Justice Burger's opinion in *CBS* is most notable for its view of the function of licensees in the broadcast system. Gone is the idea that broadcasters are mere "fiduciaries" for the community, vessels of a larger will; instead, a plurality of the Court emphasized that licensees were to play, to the extent "consistent with necessary regulation, a traditional journalistic role."⁴¹¹ Broadcasters were to be treated, to the extent possible, like ordinary First Amendment speakers, "journalistic 'free agent[s]';" that the government was simultaneously "an 'overseer' and ultimate arbiter and guardian of the public interest" called for a "delicate balancing" act.⁴¹² Far from being mere altruistic voices of a larger community, broadcasters were individualistic, autonomous speakers.⁴¹³ The plurality, moreover, rejected the claim that the government's failure to insist that broadcasters run advocacy advertisements amounted to "state action" implicating the First Amendment at all. Broadcasters were private entities, they insisted; the government had no responsibility for their policies.⁴¹⁴

It is thus an oversimplification to view our system of broadcast regulation as an unsullied and pure embodiment of nonprivileged thought. This point, on the other hand, should not be overplayed. FCC regulation by "raised eyebrow" is powerful. For the Commission even on rare occasions to condition its renewal of valuable licenses on content acceptability goes a long way towards ensuring that broadcasters will internalize the Commission's wishes in other cases. That our system of broadcast regulation gives the government the *authority* to regulate content (even if the government usually refrains from exercising that authority) unmistakably demonstrates the system's affinity with the nonprivileged position. The contrary shifts I have described in broadcast law amount to the construction of some privileged-position walls on an essentially nonprivileged foundation.

410. *Id.* Plaintiffs did not state their second argument in the clearest of terms. As Justice Brennan recapitulated the argument, though, "the public nature of the airwaves, the governmentally created preferred status of broadcasters, the extensive Government regulation of broadcast programming, and the specific governmental approval of the challenged policy" led him to conclude that the government had "so far insinuated itself into a position of participation in this policy" as to subject the policy to First Amendment constraints. *Id.* at 180-81 (Brennan, J., dissenting) (footnote omitted). He then concluded that the ban violated the First Amendment's guarantee of full and free discussion in the marketplace of ideas. *Id.* at 196.

411. *Id.* at 116. The opinion repeatedly uses language referring to broadcasters' "public trustee" role, but the Chief Justice appears to mean something different by those words than the vision embraced by *Red Lion*. In the context of *CBS*, a "public trustee" is simply a First Amendment speaker who happens to be subject to the fairness doctrine.

412. *Id.* at 117.

413. See Blasi, *supra* note 37, at 613-14.

414. See *CBS*, 412 U.S. at 117-21; see also *id.* at 148, 154 (Douglas, J., concurring in the judgment) (concluding that *Red Lion* was wrongly decided).

C. *A House Divided*

With this understanding of speech law, it is useful to revisit the criticisms of free-speech philosophy in Part II of this Article. The reality of speech is that economic inequality distorts the marketplace of ideas; cognitive structure undermines it; power relationships pervert it. In Part II, I described it as surprising that ordinary freedom-of-speech thinking represses those arguments.⁴¹⁵ With the background I have set out, though, repression begins to seem quite predictable and unexceptional; it is a simple reflection of the privileged-position assumption that the privileged arguments accurately describe the world outside of exceptional cases.

I explained earlier that while both privileged and nonprivileged attitudes are present in the law, it is the privileged position that shapes our thinking about the law, and about the world upon which the law acts. We tend to downplay the nonprivileged description of reality, and to treat nonprivileged thinking as applicable only within exceptional, sharply bounded spheres. In part, we accept the privileged vision because we doubt that we could build a workable legal system that takes into account the nonprivileged version of reality. We respond by ignoring the nonprivileged realities altogether.

We ignore the nonprivileged arguments about speech because they threaten the theoretical integrity of First Amendment philosophy, and we are afraid to tear that system down. We see no way to incorporate our concerns about the prevailing model into a workable legal structure.⁴¹⁶ Rather than recognizing the contradictions (while feeling incapable of doing anything about them), we ignore them. We first conclude that the marketplace model is preferable to a regime in which the government is wholly free to suppress speech (as if those were the only two choices), and then make law as if the model were unflawed.⁴¹⁷

At the same time, though, we believe in the nonprivileged concerns; we find them real and legitimate. We have built a system of broadcast regulation embodying them. That system adopts the procedural modes and the substantive values associated with that unprivileged side of our law. We are staggered when asked to explain that nonprivileged system of regulation in terms that make sense in a privileged-position world.

That, then, is the explanation that this discussion provides; everything seems very neat. There remains a mystery, though: why does the explanation work so well? Put another way, why has this area of law

415. See *supra* notes 294-300 and accompanying text.

416. Robert Post thus argues that, in constructing First Amendment law, we cannot take into account the extent to which public discourse is determined by economic and social factors, because treating citizens as less than fully autonomous in this respect is "deeply incompatible with the very premise of democratic self-government." Post, *supra* note 179, at 1130.

417. See *supra* note 295.

evolved in such a starkly dichotomized form? In private-law areas such as torts and contracts, we have managed to incorporate nonprivileged concerns into the law without needing to create two wholly separate bodies of law, one privileged and one nonprivileged. There are some who argue that all modern law is incoherent because privileged and nonprivileged concerns are contradictory and cannot meaningfully coexist in the same legal space.⁴¹⁸ I think, though, that even a vigorous proponent of that view would have to concede that contract and tort law are paragons of oneness and peace when compared with the open warfare between conventional free-speech philosophy and broadcast regulation. We have two starkly different—indeed, contradictory—bodies of law in ordinary free speech doctrine and broadcast regulation. Why have we not found even a muddled and incoherent middle ground?

I can think of two answers to this question.⁴¹⁹ The first looks to history.⁴²⁰ Nonprivileged regulation of broadcasting was already in place by the time we had fully adopted the privileged position for regulation of speech generally.⁴²¹ As we developed that First Amendment philosophy, it was by no means obvious that the new broadcast entertainment should be subject to the same sort of analysis as were older forms of speech.⁴²² Each area of regulation developed its own momentum, and each was able to rest on its historical credentials. Some of the momentum of the nonprivileged model may have derived from the “natural tendency to positive government of an administrative agency”;⁴²³ some, perhaps, from fear of the unique power, pervasiveness and influence of the electronic media.⁴²⁴ The electronic media, after all, help

418. See, e.g., Kennedy, *supra* note 310, at 1774-78.

419. The question, as I pose it, is a descriptive one: what historical or structural factors have led us to our current dual system? In Part IV, I discuss whether a dual system of regulations is desirable from a policy standpoint.

420. See generally BOLLINGER, *supra* note 11, at 17-26.

421. See *supra* notes 156-60 and accompanying text.

422. The Supreme Court did not hold that motion pictures, for example, were subject to First Amendment protection until 1952. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); cf. *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948) (indicating, in dictum, that “moving pictures . . . are included in the press whose freedom is guaranteed by the First Amendment”). Indeed, it is questionable whether movies to this day receive the same degree of protection as do books; consider, for example, *Freedman v. Maryland*, 380 U.S. 51 (1965) (upholding prior screening of movies by censors, subject to certain safeguards).

423. SCHMIDT, *supra* note 10, at 119-20; see also Mayton, *supra* note 8, at 739-47 (describing the FCC's development as reflecting an administrative tendency to “aggrandize power”). As Glen Robinson put it, “Regulation is, or quickly becomes, a life-style of the regulatory bureaucrat.” Robinson, *supra* note 76, at 192 n.55.

424. See Lee C. Bollinger, *Elitism, the Masses and the Idea of Self-Government: Ambivalence About the “Central Meaning of the First Amendment,”* in CONSTITUTIONAL GOVERNMENT IN AMERICA 99, 103-04 (Ronald K.L. Collins ed., 1980) (observing that “no other technology of communication has raised more concerns over the problem of manipulation than the electronic media”); see also SCHMIDT, *supra* note 10, at 120 (“Television . . . is the focus of late twentieth-century anxieties about the adequacy of an eighteenth-century First Amendment to govern the

define who we are as a society in a way that nothing else does. Once enshrined as an "exception" to ordinary First Amendment law,⁴²⁵ the broadcast regulatory system could live on without interference.

A second way of looking at this question, though, suggests that speech law is more glaringly schizoid than tort or contract law because the basic nature of speech law leaves less room for accommodation between the two visions. That speech law is painted in primary colors seems incontestable. Individualist free-speech philosophy does not merely treat rules as appropriate or preferable; it treats them as indispensable. Government intrusions on autonomy are not a necessary evil; they are unconstitutional. In contrast, say, to contract law, oriented to promoting economic exchange, individualist free speech philosophy has the primary and explicit goal of protecting the private citizen from public tyranny. As a result, the public-private distinction is raised to a level of sacred inviolability, to a degree little seen elsewhere. All of this means that the privileged position, in speech law, has no room for compromise, no leeway in which, even in an incoherent or muddled manner, one could try to incorporate opposing positions. The only way that nonprivileged positions can find legal recognition is in a full-blown world of their own.

This raises the question, though, why speech law should have these characteristics and goals. Scholars taking a more nearly altruistic approach might wonder why American constitutional law has treated the problem of governmental (as opposed to private) power as speech law's crucial organizing principle. They might wonder why we have erected the public-private dichotomy as the distinction around which all else in speech law revolves.

The ultimate answer may lie in the privileged position's roots in mainstream liberal political theory.⁴²⁶ The classic problem to which that political philosophy addresses itself is the dilemma of freedom and security: how can we achieve political order without risking governmental tyranny?⁴²⁷ The philosophy is thus fundamentally a response to the problem of political despotism. Speech plays a central role; free speech is tied to self-determination and the avoidance of governmental tyranny in a way that freedom from state control in the making of contracts, say, is

relationship between government and the media, not only because of its technical novelty, but also because its social force is vastly greater than that of any other communications medium in history.").

425. Other doctrinal "exceptions"—difficult to square with First Amendment philosophy on close analysis, and in consequence not subjected to such analysis—include copyright, see Jessica Litman, *Copyright and Information Policy*, 55 LAW & CONTEMP. PROBS. 185, 204-06 (1992) (arguing that copyright "received wisdom" conceals the damage that expansive copyright protection does to First Amendment values), and labor picketing, see Schneider, *supra* note 296, at 1469 (arguing that courts have removed picketing from First Amendment protection through a series of rationalizations designed to protect business property interests).

426. See *supra* note 346.

427. See UNGER, *supra* note 310, at 64-67 (describing order and freedom as the fundamental problems of politics).

not.⁴²⁸ The result is that when we start talking about speech, privileged-position thinking assumes its most severe form. Within the four corners of the individualist model, government can to some extent impose limited restrictions on contracting without the world coming to an end; we can tolerate a certain amount of compromise (or incoherence). We cannot, though, as easily countenance a challenge to the individualist model's vision of the autonomy of speakers in the private sphere and governmental restriction of that autonomy. That challenge strikes at the heart of the liberal political state.

IV

WHERE DO WE GO FROM HERE?

Our system of broadcast regulation works badly. The overlay of a rule-bound decisional calculus on the situationally sensitive, public-interest licensing determination has yielded incoherence. Indeed, the broadcast regulatory system can be described as "the worst of both worlds."⁴²⁹ The regulatory structure displays some of the least attractive characteristics of standard-driven systems: the Commission's indecency law, for example, is characterized by vagueness and arbitrariness.⁴³⁰ It displays some of the least attractive characteristics of rule-bound systems: would-be licensees file applications featuring "'strange and unnatural' business arrangements" designed to fit within the Commission's rules.⁴³¹

428. A would-be tyrant could, of course, seek to amass power through restrictions on private contracts. See generally BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 83 (1980) ("A free society cannot exist unless government is prohibited from confiscating private property. . . . As Hamilton stated, a power over a man's subsistence amounts to a power over his will."). I think, though, that the relationship of speech to the political realm is more direct.

429. STEVEN H. SHIFFRIN & JESSE H. CHOPER, *THE FIRST AMENDMENT* 477 (1991). The authors do not fully endorse that language; they present it as "hypothetical commentary."

430. The Commission has emphasized that indecency cannot be evaluated except with an eye to "the host of variables that ordinarily comprise [a work's] context." *Infinity Broadcasting Corp.*, 3 F.C.C.R. 930, 932 (1987), *aff'd in relevant part sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). This is a recipe for both vagueness and arbitrariness, since the agency has not given clear signals explaining which elements of context are relevant to prove what. In *Guy Gannett Publishing Co.*, 5 F.C.C.R. 7688 (1990), for example, the Commission imposed a forfeiture on a radio station for playing the feminist song "Penis Envy" by the folk group Uncle Bonsai. The singers, in clear soprano voices, begin with the words "If I had a penis, I'd wear it outside / In cafes and car lots, with pomp and with pride," and conclude, "If I had a penis, I'd still be a girl / But I'd make much more money and conquer the world." *Id.* at 7689-90.

Was the fact that the song was played on the crude and puerile Neil Rogers Show part of the "context" that led to liability? Or is someone at the Commission particularly sensitive about songs referring to penises? The letter opinion provides no useful answer. Cf. Suzanna Andrews, *She's Bare. He's Covered. Is There a Problem?*, N.Y. TIMES, Nov. 1, 1992, § 2, at 13 (observing that full frontal female nudity is common in movies while a film with a visible penis draws a near-automatic NC-17 rating).

431. *Bechtel v. FCC*, 957 F.2d 873, 880 (D.C. Cir.), *cert. denied*, 113 S. Ct. 57 (1992). Among the disadvantages of rules is that they encourage "walking the line," that is, tailoring one's conduct in order to take advantage of the imperfect fit, to fall within the letter but not the spirit of the law. See Kennedy, *supra* note 310, at 1695-96. The rules may then become more complex as courts

Is there a better way? The nonprivileged model, in general, seems to work badly in the speech context. We are not wholly comfortable with substituting public authority for private power over scarce speech resources, because as a practical matter that means giving government officials supervisory control over a segment of public debate. We have stepped back from giving government officials the sort of hidden censorial power that they can gain through the untrammelled use of situationally-sensitive standards in awarding and renewing "licenses" to speak. We are unwilling to abandon some form of value subjectivity as the foundation stone of our free-speech thinking. Rather, for many of us, the crucial *point* of free speech law is that we cannot, for purposes of suppressing speech, authoritatively declare some values "right" and others wrong. Even slavery and genocide must be treated as legitimate contenders in the marketplace of ideas. Our adherence to that value subjectivity, however, has made our commitment to the "public interest" as the touchstone of broadcast regulation increasingly incoherent.

To the extent that we are worried about self-interested government control of public debate—and we should be—the nonprivileged model's emphasis on the dangers posed by great concentrations of private media power has obvious flaws. In some circumstances, at least, the largest, most powerful private media organs are the ones best able to resist coercive state power. Drawing on the experience of the military-bureaucratic takeover of the Japanese press before World War II, Gregory Kasza concluded that "liberal resistance to state encroachment," where democracy is threatened by a government bent on radical mobilization, is best served by the "civil tyranny" of a few dominant, private speakers.⁴³² Smaller private speakers are less effective in resisting such governmental attack; quasi-public speakers are less effective still.⁴³³ A regulatory approach aimed at fostering small and medium-sized media outlets while reining in

develop exceptions in order to achieve the purposes of the drafters. They may be perceived as unfair, riddled with loopholes for the benefit of the legally sophisticated; and they may, as a result, attract less willing compliance. See KELMAN, *supra* note 311, at 44-45. In part for that reason, scholars have argued that the power of rules to minimize uncertainty and arbitrariness is overstated. As courts grapple with the task of applying an apparently simple and straightforward rule in a host of differing fact-situations, they have to promulgate new sub-rules to handle problematic variations (and, indeed, may have to choose among a variety of different potentially applicable rules). The law's former simplicity is lost, so that people can no longer easily predict legal results. To the extent that the courts seek to maximize predictability and minimize complexity and situationally sensitive discretion, the new sub-rules necessarily turn on what, at least some of the time, are meaningless factual distinctions, and thus yield arbitrary results. The fact that the decisionmaker applying these rules has only limited discretion and cannot import a different sort of arbitrariness into the process is of little consolation. See *id.* at 46-47.

The FCC's attempts to lay down rules to govern initial comparative broadcast hearings provide a perfect illustration of all of this.

432. GREGORY J. KASZA, *THE STATE AND THE MASS MEDIA IN JAPAN, 1918-1945*, at 268 (1988); see generally *id.* at 266-73.

433. See *id.* at 268-70.

huge concentrations of private media power, or establishing a strong quasi-public media voice in opposition to private Big Media, thus, is ill-suited to the creation of a media system that can resist state violation.

Even without regard to the dangers of government control, informal, situationally sensitive speech regulation seems problematic. Such regulation will likely privilege those already dominant in society, and thus suppress dissent. An informal broadcast regulation system, marked by an abhorrence of formal rules and formal processes and a near-total reliance on situationally sensitive standards, may assure that the greatest influence in the broadcast licensing process is exercised by the economically, politically, and socially dominant.⁴³⁴ Without a system of hard-edged rules, the regulatory body itself may be more susceptible to external political pressures.⁴³⁵ Without a structure of formal rights, would-be dissenters may have no entree into the regulatory process and may be unable to secure licenses to speak.⁴³⁶

Moreover, any vision of an active governmental role in supervising the speech marketplace founders on the significant likelihood that administrative planning will be incompetent, misguided, arbitrary, or political.⁴³⁷ FCC decisions have repeatedly revealed themselves in hindsight

434. Once again, Japan provides a useful example. The effect of that country's informal broadcast regulatory system "has been to place media power squarely within the establishment consensus of the socially and politically acceptable, and to diffuse it through shared authority within . . . power-structure groups." Weinberg, *supra* note 40, at 692.

435. *See id.* at 689-91 (describing susceptibility of Japanese regulatory scheme to political pressures); *see also* Mayton, *supra* note 8, at 760-61 (describing susceptibility of FCC to political pressures).

436. *See, e.g.,* Weinberg, *supra* note 40, at 661-92 (arguing that the restrictive Japanese licensing process "confine[s] media power almost completely within the structure of the socially acceptable and politically influential mainstream"). My point here is simply that informal, situationally-sensitive speech regulation is highly problematic. Is it *more* problematic (that is, more nearly controlled by the economically, politically, and socially dominant) than is marketplace regulation? In order to answer this question, one must consider whether control by the economically, politically, and socially dominant is likely to be more pervasive in the "captured" government agency or in the private sphere. Public choice theory suggests that such control will often be more pervasive in the agency context; interest groups seek statutes granting regulatory authority to agencies precisely because they think (or hope) that they will fare better under that regime than in the unregulated marketplace. *See generally* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 46-47 (1982).

437. Administrative allocation of broadcast rights is hampered by "the agency's lack of knowledge, inflexibility, and exposure to political pressure," all factors of less concern in connection with market allocation. Coase, *supra* note 16, at 18; *see also* Mayton, *supra* note 8, at 761-62. *See generally* Jonathan Weinberg, *Limiting Access to the Broadcast Marketplace*, 44 BULL. INST. JOURNALISM & COMM. STUD. 2 (1991) (University of Tokyo). This is not to deny that administrative decisionmaking can be economically superior in certain contexts. The FCC erred, for example, in leaving technical standards for AM stereo to the market rather than imposing them administratively. *See* AM Stereophonic Broadcasting, 64 Rad. Reg. 2d (P & F) 516 (1988) (perpetuating the error). The Commission has not made the same mistake in connection with high-definition TV. *See, e.g.,* Advanced Television Systems, 68 Rad. Reg. 2d (P & F) 167 (1990).

as bad policy.⁴³⁸ FCC "anti-siphoning" rules, for example, were designed to protect broadcasting from the perceived threat presented by early cable television but ended up stifling cable's development for no good reason.⁴³⁹ The FCC's comparative hearing process, intended to allow everyone a fair chance to secure a broadcast license on a level playing field,⁴⁴⁰ has in fact effectively excluded those without economic means. Only the wealthy can afford to pay large legal fees for the mere opportunity to *compete* for a license, in an essentially random process, without any assurance of success.⁴⁴¹ FCC decisionmaking has at times been overtly political.⁴⁴² None of this is encouraging to the proponents of greater involvement by the organs of popular government.

At the same time, we cannot simply conform our law to the privileged pole and ignore nonprivileged concerns. Those concerns are both legitimate and real. Our freedom-of-speech philosophy rests on assumptions about the functioning of the marketplace of ideas that are, ultimately, unsupportable. Their failure means more than that marketplace theory is intellectually unsatisfying. A speech regulatory system based wholly on classic free-speech philosophy underestimates the degree to which private institutional and economic power can skew the reasoning processes of the community. It underestimates the dangers posed by concentrations of private media power. It ignores the benefits potentially available from such public institutions as PBS or the BBC, and it facilitates and disregards socially dominant groups' influence over the public agenda and their ascendancy in public debate.

Can we mediate the two models, taking the best aspects of each?⁴⁴³ Some scholars have argued that it is impossible to bring together the privileged and nonprivileged approaches in that manner. The two

438. See Henry Geller, *Communications Law—A Half Century Later*, 37 FED. COMM. L.J. 73, 73-78 (1984) (listing FCC failures).

439. The rules prohibited cable systems from carrying certain movies and sports programming in order to ensure that attractive programming was not "siphoned" away from broadcast TV. See *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir.) (striking down the rules), *cert. denied*, 434 U.S. 829 (1977). See generally Weinberg, *supra* note 40, at 696-700 (describing the FCC's "anti-siphoning" rules as undercutting the FCC's earlier vision for cable).

440. See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945) (holding that the FCC must schedule mutually exclusive broadcast applications for a single comparative hearing, so as to give each applicant the full benefit of the "hearing . . . which Congress chose to give him").

441. See Robinson, *supra* note 76, at 242-43 (noting that the difficulties in raising the capital necessary to engage in the uncertain venture of applying and competing for a license effectively excludes the poor from the licensing system).

442. See Weinberg, *supra* note 40, at 690; *supra* note 71 and accompanying text. Thomas Hazlett has characterized the political nature of our broadcast regulatory structure as "inherent." It rests, he states, on an FCC-established "off-budget auction, in which the rents associated with licensure are appropriated to competitive constituencies as merited by the political pressure they effect." Hazlett, *supra* note 8, at 169.

443. For an eloquent—if controversial—appeal that we find that middle path, see Fiss, *supra* note 151, at 1415-21. But see Powe, *supra* note 181, at 180-86 (attacking Fiss); Hutchinson, *supra* note 294, at 19-23 (same).

approaches, they say, are not made up of “‘competing concerns’ [to be] artfully balanced until a wise equilibrium is reached”; rather, they are wholly contradictory, in fundamental, “irreducible, irremediable, irresolvable conflict.”⁴⁴⁴ This is a difficult issue: it is hard to think clearly about contradiction.⁴⁴⁵ Without regard to the accuracy of broad statements about contradiction elsewhere in the law, though, the two approaches do seem irreconcilable in the area of speech regulation.

How, for example, shall we define the scope of permissible government intervention in the speech marketplace? *Some* government involvement (beyond merely maintaining the property-rights system) seems appropriate under any analysis. Almost all of us agree, for example, that the government should enforce the antitrust laws in media markets: anticompetitive behavior and private concentrations of media power can injure the media marketplace.⁴⁴⁶ Monopoly-controlled markets, brought about through antitrust violations, injure that “widest possible dissemination of information from diverse and antagonistic sources [that] is essential to . . . a free society.”⁴⁴⁷

Yet having accepted the conclusion that *some* government restrictions on speech are legitimate, we are faced with the problem of identifying appropriate restrictions. The privileged position responds to that concern by deeming freedom the norm, and carving out a sharply defined, exceptional zone in which the government is allowed to intervene because the market is deemed no longer “free.” That approach is essential to the privileged position; without sharp lines to constrain governmental power, we lose the protection for individual autonomy that is the keystone of rule-bounded legality. The central and contradictory insight of the nonprivileged position, however, is that the failures of the marketplace of ideas are not narrowly confined, but are pervasive. They exist in greater or lesser degree throughout the system. No sharp lines between the realm of freedom and the realm of duress can be drawn; no

444. KELMAN, *supra* note 311, at 3; *see also* Kennedy, *supra* note 310, at 1774-78.

445. *See* J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669, 1674-75 (1990) (book review) (“A recurring problem in theoretical argument is the confusion of conceptual opposition with logical contradiction.”); *cf.* F. SCOTT FITZGERALD, *The Crack-up*, in *THE CRACK-UP* 69 (Edmund Wilson ed., 1945) (“[T]he test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function.”).

446. *See* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 795-96, 800 n.18 (1978) (stating that the FCC can and should apply antitrust considerations in regulating the electronic media). The desire for competitive markets, on the other hand, is not the only goal of our regulatory scheme. *See* FCC v. RCA Communications, Inc., 346 U.S. 86, 91-95 (1953) (holding that the public interest may require the FCC to deny a common-carrier authorization even though granting it would increase competition); *see also* Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804 (1988) (exempting joint newspaper operating arrangements from antitrust scrutiny); *National Citizens Comm. for Broadcasting*, 436 U.S. at 803-14 (affirming the Commission’s decision not to order sweeping divestiture of newspaper-broadcast combinations).

447. *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (rejecting First Amendment challenge to enforcement of the Sherman Act against the Associated Press).

easily applied, black-letter rules can identify the appropriate scope of government intervention; no reasoned justification can be given for drawing the lines in one place rather than another.⁴⁴⁸ I can imagine no way to integrate these two opposing positions.

Moreover, any meaningful attempt to remedy the flaws of the individualistic approach requires a substantive, rather than a process-oriented, set of goals. How can we set about to correct the flaws of the marketplace? How will we know a properly working marketplace when we see one? It obviously does no good to declare that we will know a properly working marketplace of ideas because it will lead citizens to adopt "correct" views. That approach would not mediate the two models, but rather would wholly reject traditional First Amendment thinking. Yet in the absence of such a test, how are we to know whether the success of some views and the failure of others in the marketplace are the result of inherent merit or of market flaws?⁴⁴⁹ At the very least, we would have to develop some vision of what community debate and discussion ideally ought to look like.⁴⁵⁰ Yet such a vision is inevitably substantive. It is impossible to identify "balanced" debate except with reference to a substantive baseline.⁴⁵¹

Indeed, it is central to the nonprivileged vision that it rejects the public-private distinction; that it sees the state as responsible for the consequences of "private" speech. Yet once we make that leap, all of our choices regarding the circumstances under which we will allow, say, racial hate speech, become political ones; we cannot decide them on the basis of neutral principles. Rather, we must look to our substantive

448. It is but a short step from classical antitrust remedies to current FCC restrictions on the nature and number of other media outlets that a broadcaster may own. It is but a short step from there to the position that we should limit political campaign spending in order to "remedy the systematic ways in which inequalities of wealth distort the political process." Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 *YALE L.J.* 1623, 1627 (1988); see also J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 *YALE L.J.* 1001, 1005 (1976). The Supreme Court has rejected that last stride. See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (striking down limits on political campaign expenditures). Yet each of these government actions directly restricts the autonomy of the speakers who are its target, in the interest of increasing freedom in the rest of the marketplace. Can we justify the particular line at which we stop opposing governmental to private power?

449. See MARK TUSHNET, *RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 283 (1988). The problem is reminiscent of the difficulty, in representation-reinforcement theory, of distinguishing between groups that are unfairly treated in the political process and those that, for good and legitimate reasons, simply lose their legislative battles. "[A] judge must have some *substantive* vision of what results the process should have yielded. Otherwise he has no way to know that the process was unfair." Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 *COLUM. L. REV.* 1087, 1091 (1982).

450. See Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 *CALIF. L. REV.* 1045, 1067-74 (1985) (arguing against the constitutionality of active campaign finance law on the grounds that any justification for such laws requires an arbitrary, unworkable image of the "ideally operating political system").

451. See *supra* notes 117-21 and accompanying text.

image of what constitutes the good society. This is impossible so long as we hold on to ordinary free-speech philosophy's insistence that it makes no substantive choices—that it defines no authoritative truth and treats all values and ideas as equally legitimate.⁴⁵² Once again, there appears to be no common ground on which the two models can meet and negotiate.

Lee Bollinger once suggested that we have in fact mediated our “opposing constitutional traditions regarding the press” simply by placing them side by side—by allowing one to govern print, and the other broadcast.⁴⁵³ Instead of a unified scheme of regulation, we have a system where “access”-based regulation of broadcasting is coupled with a hands-off approach to print. This allows our system to “capture[] the benefits of access regulation yet . . . minimize[] its potential excesses.”⁴⁵⁴

In the end, I think, Bollinger's attempted solution is insufficient.⁴⁵⁵ By attempting to take both privileged and nonprivileged concerns into account, our speech law has become both unstable and incoherent. As I have shown, the contradiction between the two poles has made our broadcast law incoherent even when viewed *in isolation*. We will not accept a wholly nonprivileged broadcast scheme, but we cannot combine privileged and nonprivileged elements in a broadcast regulatory system in a way that makes any sense.⁴⁵⁶ Nor, in practice, do the strengths and weaknesses of the two systems in fact complement each other. All we have is a mess.

Bollinger's approach, though, raises a more general question: can we build second-best solutions for speech regulation by creating nonprivileged enclaves within a larger privileged-position world? Ultimately, I believe, such solutions are unsatisfactory in important ways. An ideal nonprivileged approach would seek to disconnect speech from the pressures of the private sphere, so that the economic resources of the speaker or of potential individual listeners would play no role in the speech's success. Establishing a quasi-governmental institution to disseminate speech on the basis of its own view of the public interest might point in that direction; so might distributing speech through some publicly-sup-

452. For an illustration of the difficulty, see Sunstein, *supra* note 8, at 277, 290 (simultaneously attacking the concept of viewpoint neutrality as unacceptably contingent on “existing distributions of resources and opportunities as the baseline for decision” and arguing that constitutionally appropriate speech regulation must be viewpoint-neutral).

453. Bollinger, *supra* note 25, at 1.

454. *Id.* at 2.

455. See Lili Levi, *Challenging the Autonomous Press*, 78 CORNELL L. REV. 665, 685-90 (1993) (book review).

456. The structure of the print marketplace is nothing to write home about either. Cf. Paul Bator, *The First Amendment Applied to Broadcasting: A Few Misgivings*, 10 HARV. J.L. & PUB. POL'Y 75, 75 (1987) (asking the questions “Do I like the content of that regime? Should that regime be extended to another industry?” in response to “the proposal . . . that the First Amendment regime applicable to the press . . . simply be transferred to broadcasting,” and concluding that the answer is “no”).

ported mechanism available to all. The first of these approaches looks like the public broadcasting system; the second like some sort of common-carrier scheme. I will discuss each of them briefly.

The public broadcasting system is premised on the conviction that an "alternative telecommunications service[]," freed from the strictures of the economic marketplace, can provide "an expression of diversity and excellence" not available from commercially motivated speakers.⁴⁵⁷ Television freed from the constraints of the marketplace, we imagined in establishing the system, could "arouse our dreams, satisfy our hunger for beauty, take us on journeys, enable us to participate in events, present great drama and music, explore the sea and the sky and the woods and the hills." It was to be "our Lyceum, our Chautauqua, our Minsky's, and our Camelot."⁴⁵⁸

The public broadcasting concept relies to significant extent on the nonprivileged model. Under an individualist approach, one might legitimately ask whether the fact that the commercial marketplace fails to provide certain programming does not itself demonstrate that that programming is not worth providing. Public broadcasting takes the opposite approach, revealing a more paternalistic, value-objective, communitarian bent. In its purest form, it rests on the position of Lord Reith, first Director-General of the BBC, that it is misguided to seek to satisfy the desires of self-contained, atomistic consumers: "few [members of the listening public] know what they want, and very few what they need."⁴⁵⁹ Broadcasting can be used as an instrument of community: "to inculcate citizenship, to pay proper attention to public affairs, . . . to widen as far as possible the range of debate over the whole field of human interest" and "to raise standards."⁴⁶⁰

As a solution to our dilemma, though, public broadcasting is problematic. How should public broadcasters seek to fulfill their responsibility to the "public?" Commissioner Benjamin Hooks once characterized public broadcasting, as practiced by New York City's WNET, as "an electronic Harvard liberal arts course" focusing solely on "cultured,

457. 47 U.S.C. § 396(a)(5) (1988); see also H.R. REP. NO. 572, 90th Cong., 1st Sess. (1967), reprinted in 1967 U.S.C.C.A.N. 1772, 1801 (stating that only noncommercial stations can engage in widespread production and distribution of educational and cultural programs without mass audience appeal).

458. CARNEGIE COMM'N ON EDUC. TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION 13 (1967) (quoting E.B. White). The Carnegie Commission report was the "intellectual foundation" for the Public Broadcasting Act of 1967, which in turn established the Corporation for Public Broadcasting and our current system of noncommercial TV. BOLLINGER, *supra* note 11, at 107.

459. R.H. COASE, BRITISH BROADCASTING: A STUDY IN MONOPOLY 47 (1950) (quoting Lord Reith).

460. *Id.* at 175 (quoting Sir William Haley). To that end, public broadcasting should be run by those of "the highest quality of character and intellect," unaffected by political or commercial considerations. Michael Tracey, *Japan: Broadcasting in a New Democracy*, in THE POLITICS OF BROADCASTING 264, 265 (Raymond Kuhn ed., 1985) (quoting Sir Ian Jacob).

white cosmopolites”—“the caucasian intellectual’s home entertainment game.”⁴⁶¹ He lambasted it as disserving the needs of the poor and minorities. Part of the reason for public television’s focus on “British drama, German music, French cuisine, and Russian Ballet,”⁴⁶² of course, is that so-called “noncommercial” broadcasting is intimately tied into the commercial marketplace. It depends for its survival on corporate sponsors who enjoy being associated with classy programming.⁴⁶³ But merely loosening the link between public broadcasting and corporate sponsors would not answer Hooks’s complaint. The broader difficulty is that the publishers of public broadcasting are not themselves the “public.” Rather, they are a professional elite responding to their own values and institutional agenda.⁴⁶⁴ While speech in that enclave is not limited by the constraints of the economic marketplace, it is hardly “free” in the utopian sense. It is merely subject to a different set of institutional constraints.

An alternative, nonprivileged enclave for speech might grow out of new technology. Science fiction writers have imagined a world in which citizens could produce and electronically disseminate speech without regard to their fame or resources, to be retrieved by members of the public through some sort of index or search mechanism.⁴⁶⁵ In those visions, anyone can engage in mass speech. All one has to do is produce a work and upload it into the network, and the network takes care of transmission and distribution. Indeed, the beginnings of such systems are in place now. They range from the tens of thousands of small noncommercial computer bulletin boards to the huge but arcane Internet.⁴⁶⁶ Today’s systems fall short of the vision I have described, though, in two principal ways. First, current systems tend to be limited to small groups of technically sophisticated users with access to relatively expensive equipment.⁴⁶⁷

461. Puerto Rican Media Action & Educ. Council, Inc., 51 F.C.C.2d 1178, 1195, 1199 (1975) (Hooks, Comm’r, dissenting).

462. *Id.* at 1199.

463. Over the years, public broadcasting has moved ever further away from the noncommercial ideal. *See, e.g.*, Commission Policy Concerning the Noncommercial Nature of Educ. Broadcasting Stations, 97 F.C.C.2d 255 (1984) (stating that donor acknowledgements may include a description of the donor’s product line or service, its location, and its slogan, so long as the slogan merely identifies but does not promote).

464. Indeed, the courts have stressed that public broadcasters are autonomous, and must not be constrained, in making editorial and programming decisions, by the views or objections of members of the public. *Muir v. Alabama Educ. Television Comm’n*, 688 F.2d 1033, 1041, 1044 (5th Cir. 1982) (en banc), *cert. denied*, 460 U.S. 1023 (1983).

465. *See, e.g.*, KEVIN O’DONNELL, JR., ORA:CLE (1983).

466. *See generally* Mitchell Kapor, Building the Open Road: Policies for the National Public Network 2 (Apr. 29, 1991) (unpublished manuscript, on file with author).

467. While some mass-market commercial networks, such as Sears Prodigy, are designed and operated for the nontechnical user, I think it is fair to characterize the networks as a whole as requiring a level of technical sophistication beyond the grasp of the average U.S. citizen—certainly far beyond the grasp of the average noncomputer user. *See id.* at 15. While personal computer prices drop with each passing day, so that today one can buy an entry-level machine for \$1000 or

Second, it can be paralyzingly hard to get information out of the systems. The index and search mechanisms I airily referred to above have not been developed. Internet thus resembles "a gigantic library with no card catalog."⁴⁶⁸ Trying to "read" the Usenet, a decentralized conferencing system running over the Internet, "is like drinking from a firehose."⁴⁶⁹

Systems that carry the speech of all users on a common-carriage basis nonetheless might provide the foundation for a new approach.⁴⁷⁰ The key to a computer network-based strategy would be that the costs of transmitting and distributing a communication, whether in print or in video, would be quite low, and would not rise with the number of persons receiving the communication. Capacity, further, would be essentially unlimited. Through such an approach, some imagine, we could move toward a mass communication system in which it would be easy and cheap to become an information provider. Many could participate, both as speakers and as listeners.⁴⁷¹

That vision too, though, must be approached with caution. After all, we already have a pervasive, government-subsidized, common-carrier distribution system for speech. That system is second-class mail, which provides a subsidy for the distribution of most newspapers and periodicals.⁴⁷² Here too, the government has provided a transmission and distribution system for speech, subsidized by the taxpayers, on a common-carrier basis.⁴⁷³ The second-class postal subsidy has contributed greatly

less, that price still isn't chicken feed. Computers have a long way to go before they become as inexpensive as telephones or televisions.

468. *Id.* at 5.

469. Tom Maddox, *Reports from the Electronic Frontier*, LOCUS, Sept. 1992, at 11 (quoting Steve Steinberg, editor of *Intertek* magazine).

470. It would not be the first time we have tried a common-carrier approach to mass communications. AT&T made the first bid to do so back in 1922, on its WEAf radio station. In an experiment it called "toll broadcasting," it proposed to "provide no program of its own, but provide the channels through which anyone with whom it makes a contract can send out their own programs." ERIK BARNOUW, *TUBE OF PLENTY: THE EVOLUTION OF AMERICAN TELEVISION* 44 (rev. ed. 1982) (quoting AT&T announcement). The approach was ultimately a blazing success for AT&T: advertising agencies were glad to buy up its time for programs they sponsored. *Id.* at 44-48. AT&T itself later got out of the broadcasting business, selling WEAf for \$1,000,000 to the newly formed National Broadcasting Company, which in turn agreed to lease AT&T long-distance lines to connect its stations. WEAf was ultimately renamed WNBC. *Id.* at 52-53.

AT&T's "toll broadcasting" plan hardly could be said to have promoted the communitarian vision I have described. Its high tariff for broadcast time effectively precluded any noncommercial uses.

471. See Kapur, *supra* note 466, at 8-9, 13.

472. Fourth-class (book rate) mail is similarly subsidized. See Robert Posch, *Price Censorship is Real and Growing*, COMM. LAW., Fall 1990, at 15, 16-17.

473. The system differs in several crucial respects from the vision I have drawn of the computer networks. First, even with the subsidy, distribution charges are still substantial, and they rise with each additional recipient. Next, second-class mail status is available only to publications that distribute at least half of their circulated copies to paying subscribers or to people who have specifically requested that the periodical be sent to them. See Elizabeth Gorman, *The First Amendment and the Postal Service's Subscriber Requirement: Constitutional Problems with Denying Equal Access to the Postal System*, 21 U. RICH. L. REV. 541 (1987) (citing the U.S. Postal Service's

to the vibrancy and diversity of America's magazine market. In some ways, the system works remarkably well. Tens of thousands of periodicals are said to move through the mails, "the little magazines, the special magazines, the cranky magazines, . . . the serious magazines."⁴⁷⁴ Yet, even though all sorts of speech flourishes on the fringes of the magazine market, it is still the case that there are a few market leaders, in particular the weekly newsmagazines, exerting huge media power. The speakers exercising by far the greatest might in this marketplace are wealthy, mass-market, taste-creating media conglomerates, led by such pillars of the corporate community as Time Warner.⁴⁷⁵ These speakers can expend the greatest resources on production values and on marketing. Indeed, mass-circulation, second-class mailers that can afford segmentation or trucking techniques qualifying them for "work-sharing discounts" get a larger subsidy from the postal service. Those techniques are as a practical matter not available to fringe publishers.⁴⁷⁶ All is not joyful anarchy, thus, in the core of the magazine market.

In the computer networks of the future, similarly, all information providers will not be equal, no matter how user-friendly the network is. Wealth will play a role in publicizing the availability and merits of documents or programs. It will play a role in producing speech in an attractive form.⁴⁷⁷ The networks, thus, may not provide a nonprivileged enclave after all. They may simply provide a (kinder, gentler?) version of the ordinary marketplace.

Where, then, do we go from here? I present in this Article no policy

Domestic Mail Manual). Also, the would-be recipient of information has no way of getting access to information not specifically addressed to her. A speaker, therefore, cannot simply dispatch her communication, unaddressed, to the postal system, and without further thought rely on the distribution network to carry it to the world at large. She must first develop a subscription list, and limit her mailing within the confines of that list. Still, the conclusions we draw about the operation of second-class mail service may have some applicability to our thinking about computer networks.

474. POOL, *supra* note 15, at 150. According to one observer, "[s]ome 37,000 periodicals regularly move through the U.S. mails." EDWIN DIAMOND, *SIGN OFF: THE LAST DAYS OF TELEVISION* 229 (1982). A random sampling might include such periodicals as *Jason Underground's Notes From the Trash Compactor*, with a "unique Christian anarchist slant"; *Counter Culture*, devoted to "diner appreciation"; *Dendron News*, devoted to "people who have been through the psychiatric system (or who are still enmeshed in it) [and] try to find more humanitarian alternatives"; *Corpus Christi Mariner News*, "for Merchant Marine folks in the Corpus Christi area"; and *The Black Flame*, examining "the use of Satanism as a practical philosophy for surviving a cold, uncaring world." MIKE GUNDERLOY & CARI G. JANICE, *THE WORLD OF ZINES: A GUIDE TO THE INDEPENDENT MAGAZINE REVOLUTION* 31, 69, 93, 110, 122 (1992). [Editor's note: A random sampling of the "far outer shores of the special interest magazine world," POOL, *supra* note 15, at 150, might also, of course, include the *California Law Review*.]

475. In 1981, twenty corporations accounted for 50.7% of all U.S. magazine sales. BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 10-14 (1983).

476. Posch, *supra* note 472, at back page.

477. In this medium as in (almost) all others, a mass audience will not tune in unless production values are high enough. See Ingber, *supra* note 182, at 70-71 (finding something "bittersweet funny" in the attempts of cable public-access programming to compete with the professional presentations of commercial television). *But see* THE RAMONES, *ROCKET TO RUSSIA* (Sire Records 1977).

solution that will solve all of the problems of the broadcasting system. Rather, my ultimate argument in this Article is that no such policy solution can exist. There is nothing we *can* do in broadcast regulation that will not leave us grappling with further contradictions and unresolved issues. In considering how to revise broadcast law, we do badly to look for sweeping, ideologically pure, universal solutions. The better course may be to look for second-best solutions:

We must recognize that we want contradictory things. We want protection against government arbitrariness, bias, and "censorial power."⁴⁷⁸ We want protection against government control of (or influence over) the agenda of public debate. We want to be protected against government attempts to influence what we think and believe. We want to choose, ourselves, what we will say and what we will hear. Yet we want as well a First Amendment theory that reflects the real world, that recognizes the negative effects of real-life inequality and private economic power, and doesn't explain them away through unrealistic assumptions. In choosing what we will say and what we will hear, we want protection, too, against the distorting effects of private power and private censorship. We want, perhaps, programming that reflects something more than what the corporate shells have conditioned us to swallow.

There does not appear to be any way to get all of that. The doctrines and procedural forms that will help us towards one set of goals help us away from the other. As a result, it should not be surprising that our broadcast regulation law is blazingly inconsistent with the rest of our First Amendment philosophy. If we recast our broadcast law to eliminate that contradiction, we will ameliorate one set of doctrinal and practical problems, but we will not "solve" the problems of speech law. We will only rearrange them.

CONCLUSION

Our broadcast regulatory system centers on the "public interest" standard of the Communications Act. The FCC, in deciding whom it will allow to speak using broadcast media, is required to make the choices that will best serve the "public interest." It is the FCC's job, ultimately, to ensure that its licensed broadcasters serve the "public interest." This standard is vague. Notwithstanding the best of intentions, the FCC's application of the standard has been unpredictable and subjective, and its decisions have incorporated hidden content biases. To the extent that the Commission has been able to announce hard-edged, easy-to-apply rules in pursuance of the public interest standard, those rules have had little to do with individualized attention to the "public

478. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988).

interest." This is not the agency's fault: the standard, inherently vague and subjective, cannot be applied as if it were black-letter law.

This system conflicts, starkly and gratuitously, with conventional free-speech philosophy. Conventional free-speech philosophy rejects the content regulation that the Commission routinely engages in. It rejects the broad, subjective, situationally sensitive standards the Commission seeks to apply in ruling whether it will allow citizens to engage in speech. It rejects the whole notion that it is the job of government to decide what speech is and is not in the public interest. The idea of spectrum scarcity is not enough to reconcile this system with ordinary free-speech philosophy. Even if the unique characteristics of broadcasting justify administrative allocation of the broadcast spectrum, there is no way within the four corners of conventional free speech thinking to justify allocating that spectrum on the basis of a government agency's subjective conception of a vaguely defined public interest.

Ordinary free-speech philosophy, on the other hand, itself is flawed; it presents an inaccurate picture of reality. It is crucially based on the metaphor of the marketplace of ideas. That metaphor in turn relies on questionable assumptions about individual autonomy in the private sphere. It assumes that in a society where government enforces common-law ordering but otherwise plays no active role in regulating speech, individuals do indeed have meaningful opportunities to speak and convince others of their views. It assumes that people process speech for the most part on a rational level, and choose to adopt one belief rather than another as a result of this reasoning process. Neither of those assumptions seems well founded. Inequality in economic, social, and political power in our society leads to marked inequalities in the ability to communicate. The institutional mass media do not even the scales. Nor, in any event, do individuals tend to process new information in a "rational" manner; our thinking is significantly constrained by our existing mindset. It seems unlikely that we have a working marketplace of ideas outside of a narrowly bounded range of socially acceptable ideas and values.

The inconsistency of our broadcast regulatory system with ordinary free speech thinking, and the inconsistency of ordinary free speech thinking with reality, make sense if one imagines ordinary free speech thinking and broadcast regulatory thinking as reflecting two conflicting worldviews. The first worldview, more nearly predominant in our legal culture, links the procedural mode of black-letter rules, individualism, a belief in overall private autonomy, a sharp public-private distinction, value subjectivity, and nonpaternalism. The other links the procedural mode of situationally sensitive standards, altruism, determinism, a belief in the pervasiveness of constraint, value objectivity (or a belief in the communal nature of values), and paternalism. These philosophies, each

incomplete, can be seen as pervasive in our law. Each reflects legitimate and important impulses.

Conventional free-speech philosophy neatly reflects the former philosophy. It passionately relies on black-letter rules; it reflects individualistic ideology, fundamentally rationalist and intentionalist. It is grounded at its root in a thoroughgoing commitment to value subjectivity and a rejection of paternalism; it maintains a strong public-private distinction. Broadcast law, by contrast, more nearly reflects the latter. It is built around the situationally sensitive standard; it is concerned with substantive inequality, domination, and constraint. It significantly rejects individualistic thinking in favor of an approach more in the altruistic mold. In important respects, it is not a pure evocation of a single worldview. It is too significantly influenced by ordinary free speech values and by the rule-bound mores of the prevailing legal culture. It nonetheless stands as a somewhat muddled island of dissident thinking in the sea of free-speech philosophy.

The approach of our broadcast regulatory scheme works badly when it comes to regulating speech. It is insufficient, though, simply to ignore that approach, and to conform our law to ordinary free-speech philosophy. Free-speech philosophy systematically underestimates the degree to which private institutional and economic power can skew the reasoning processes of the community. It underestimates the dangers posed by concentrations of private power. The philosophy on which our broadcast law is based grows out of concerns that are both legitimate and real.

The two worldviews are not easily reconcilable. There does not seem to be any perfect solution that would mediate the two approaches, and take the best aspects of each. Ultimately, we can do no better than a second-best solution. We have, as a society, legitimate and contradictory goals in regulating speech. The doctrines that move us toward one set of goals move us away from the other. This means that recasting our broadcast regulation to conform to ordinary free-speech philosophy, as some suggest, will not solve our problems. We want things that no coherent philosophy can supply.

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