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# The First Amendment, The Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate

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THE FIRST AMENDMENT, THE PUBLIC-PRIVATE DISTINCTION, AND  
NONGOVERNMENTAL SUPPRESSION OF WARTIME POLITICAL  
DEBATE

BY GREGORY P. MAGARIAN<sup>1</sup>

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## INTRODUCTION

On a Monday evening in March 2003, as the nation wrestled with the painful questions whether and on what terms to go to war against Iraq, a 60 year-old man named Stephen Downs walked into a t-shirt shop in the busy Crossgates shopping mall near Albany, New York. He bought a custom made shirt with “Peace on Earth” written across the front and “Give Peace a Chance” across the back. He paid for the shirt, put it on, and walked to the mall’s food court to eat dinner. Two people noticed the shirt and complimented Downs, but no one else seemed to pay much attention. Shortly after he sat down to eat, a security guard approached, told Downs that he was causing a disturbance, and ordered him to remove the shirt or leave the mall. Downs politely refused. Mall security then called local police, who repeated the command that Downs remove the shirt or leave the mall. When Downs again refused, the police arrested him for trespass.<sup>2</sup>

Except for the restrained language of Downs’ shirt, his antiwar protest replicated Paul Cohen’s famous 1968 stroll through the Los Angeles County Courthouse with the legend “Fuck the Draft” emblazoned on his jacket. Both men sought to express opposition to a divisive, high-stakes military action. Both made their protests by wearing their messages in prominent hubs of community life. Cohen’s arrest for disturbing the peace led to perhaps the Supreme Court’s most eloquent affirmation of the value and sanctity of political protest under the First Amendment.<sup>3</sup> No competent attorney, however, would have cited the First Amendment in defense of Downs’ nearly identical action. Although both Cohen and Downs made their protests in public gathering places, Downs chose a site owned by a private entity. From the standpoint of constitutional doctrine, the awesome force of the First Amendment dissipates before any assault from a nongovernmental censor.

The terrorist attacks of September 11, 2001 and ensuing events have compelled the federal government to evaluate numerous complex policy questions. Not in at least the past three decades has the United States had to make such momentous decisions about whether and to what extent to use military force in pursuit of the national interest. These policy quandaries have spurred rich and intense political debate among the American people. Our discourse, however, has not gone unimpeded. The government itself has at times discouraged public debate, most

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<sup>2</sup>See Nicole F. Barr, *T-shirt Redux, Charge To Be Dropped: Food Court Frenzy Protests Arrests*, THE ENTERPRISE (Albany County, N.Y.), March 6, 2003, p. 1, 18. When the Downs arrest generated nationwide publicity, mall officials quietly dropped the charges, even as the mall became a magnet for antiwar protesters and civil libertarians. See *id.*; Melissa Hale Spencer, *Supporters’ Eat-in: Downs Tastes Victory*, THE ENTERPRISE, March 13, 2003, p. 1. The mall, however, continued to maintain that its private status allowed it to bar expressive activity. See Molly Belmont, *Free Speech! Bill Would Lift Mall Gag*, THE ENTERPRISE, April 3, 2003, p. 1, 21.

<sup>3</sup>See *Cohen v. California*, 403 U.S. 15 (1971).

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notoriously through Attorney General Ashcroft's declaration that criticism of the Bush Administrations antiterrorist policies "gives ammunition to America's enemies, and pause to America's friends"<sup>4</sup> and Presidential Press Secretary Ari Fleischer's citing negative reactions to a statement critical of the U.S. military as "reminders to all Americans that they need to watch what they say, watch what they do."<sup>5</sup>

Such government pressure against political debate should trouble us, but it can hardly surprise us. Our expectation that the government will try to suppress speech is manifest in our deeply ingrained understanding of the First Amendment's guarantee of expressive freedom. On that understanding, the Framers of the Constitution designed the First Amendment to shield individuals' decisions whether to speak and what to say against governmental censorship and punishment. The surprising feature of impediments to expression during the present national crisis is that suppression of important political debate has resulted far less often from official action than from nongovernmental behavior. Stephen Downs' arrest in the Crossgates Mall was just one manifestation of a wave of censorship of political debate that has included not only denials to protesters of access to property but also suppression of information by the news media and institutional retaliation against dissenters. During the Iraq war, for example, the major media refused to show wrenching images of Iraqi casualties and American prisoners of war.<sup>6</sup> National stock exchanges barred some business reporters from their trading floor as punishment for their networks' war reporting.<sup>7</sup> These and numerous similar nongovernmental actions have dramatically impeded public discourse since the September 11 attacks.

Political debate in times of war and national emergency lies at the core of First Amendment concern, because such crises make debate both especially vulnerable and especially valuable. Wartime debate is especially vulnerable to suppression because of war's most positive by-product – its unification of the nation behind a common purpose. With or without actual government censorship, broad support for government policy encourages the silencing of wartime dissidents. Wartime debate is especially valuable because of war's most awful consequences. Wars kill people, topple governments, and scar survivors and the ecosystems they

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<sup>4</sup> Neil A. Lewis, *A Nation Challenged: The Senate Hearing; Ashcroft Defends Antiterror Plan; Says Criticism May Aid U.S. Foes*, N. Y. TIMES, Dec. 7, 2001, p. A1. To leave no doubt about his attitude toward dissenters, the Attorney General added: "To those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists." *Id.*

<sup>5</sup> Press Briefing by Ari Fleischer (Sept. 26, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010926-5.html>.

Fleischer was commenting on television commentator Bill Maher's remark that flying an airplane into a building on a suicide mission took more courage than pushing a button to fire a missile. See *infra* note 153 and accompanying text.

<sup>6</sup> See *infra* notes 106-07 and accompanying text.

<sup>7</sup> See *infra* notes 151-52 and accompanying text.

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inhabit. In no other context can government error or malfeasance do greater harm. A democratic system entrusts the people with ultimate responsibility for ensuring that government acts wisely. Because wars and national emergencies require the government to act quickly and decisively, wartime political discourse must be informed, vigorous, and unimpeded. The conventional understanding of the First Amendment as applying only to government action, however, renders the Constitution powerless to protect wartime debate against nongovernmental suppression.

We can, and should, understand the First Amendment differently. This article contends that courts should invoke the First Amendment to enjoin behavior by nongovernmental institutions that undermines public debate on matters of national policy. The argument builds on an approach to the constitutional freedom of expression rooted in the democracy-centered First Amendment paradigm of Alexander Meiklejohn,<sup>8</sup> an approach I have called the public rights theory of expressive freedom.<sup>9</sup> Part I of this article establishes the special importance of protecting political debate in times of war and national emergency. The first section invokes familiar historical examples to establish the vulnerability of wartime debate to suppression by powerful nongovernmental entities. It then explains the necessity under the public rights theory of informed, active public debate for wise governmental action. The second section catalogues the many instances of nongovernmental censorship since the September 11 attacks, using contemporary circumstances to illustrate nongovernmental institutions' strong tendency to enforce government policy and majority will during times of war and national emergency.

Part II assesses the primary legal doctrine that blocks courts from enjoining private censorship: the public-private distinction in constitutional law. The first section of Part II maps the arguments and priorities that support the public-private distinction. The second section surveys critiques that have branded the distinction incoherent and ideologically driven. Despite the force of these critiques, the public-private distinction persists in our constitutional jurisprudence, indicating that it must harbor some essential truth. Accordingly, the final section of Part II seeks to accommodate the public-private distinction to a proper focus on the substance of constitutional rights. It concludes that the integrity of natural persons, rather than the abstract idea of "the private," should inform adjudication of rights controversies. The public-private

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<sup>8</sup> See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 19-21 (1948). For a discussion of Meiklejohn's First Amendment theory, see *infra* notes 50-63 and accompanying text.

<sup>9</sup> See Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 1972-90 (2003) (describing public rights theory).

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distinction, recast along these lines, serves normative theories of rights by guaranteeing individuals the degree of decisional autonomy they need in order to effectuate their rights.

Part III applies the foregoing insights about the public-private distinction to the First Amendment in the context of nongovernmental suppression of wartime political debate. The first section explains that the public rights theory of expressive freedom requires a zone of personal autonomy, insulated from constitutional oversight, to allow individuals to evaluate information and formulate political positions. That sort of private preserve, however, provides no constitutional safe harbor for institutional attacks on wartime debate. The second section contends that courts should invoke the First Amendment to enjoin many nongovernmental exclusions of political speakers from expressive opportunities and reprisals against wartime dissenters. The news media present special concerns under the public rights theory that justify insulating journalists' editorial decisions from judicial oversight, but courts can apply the First Amendment indirectly to media-generated constraints on democratic discourse by assertively reviewing regulations that facilitate concentrated control of media outlets. The final section responds to practical concerns about empowering federal courts to enjoin nongovernmental suppression of political debate.

This article advocates a bold departure from received First Amendment wisdom and fundamentally reconceives the distinction between public and private that sits at the heart of constitutional doctrine. My thesis swims against a strong current of opposition to constitutional limits on private behavior. That opposition, however, presumes that autonomy for nongovernmental institutions is necessary to protect freedom. It carries little force where, as in the circumstances I describe, those institutions compromise freedom.

## I. CONFRONTING NONGOVERNMENTAL CENSORSHIP OF POLITICAL DEBATE IN WARTIME

### A. *The Value and Vulnerability of Wartime Political Debate*

My thesis, that courts should apply the First Amendment to enjoin nongovernmental suppression of political debate in times of war and national emergency, depends on two premises. First, nongovernmental actions threaten political debate in a meaningful way. Second, during periods of war and national emergency – for which I will use the shorthand “wartime” – political debate is especially important for the common good. The first section of this part defends those premises. It demonstrates the prevalence of nongovernmental suppression of speech and invokes a few historical examples to illustrate nongovernmental institutions' propensity to suppress wartime political debate. It then

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employs First Amendment theory to establish the cost of muting political debate and to explain why that cost is especially great in wartime. The second section brings these observations into the present by cataloguing nongovernmental actors' many, varied, and damaging assaults on political debate since the September 11 terrorist attacks. The article proceeds, in Part II, to examine and critique the Constitution's supposed incapacity to address this problem and, in Part III, to propose a way of overcoming that incapacity.

*1. The Historical Vulnerability of Wartime Political  
Debate to Nongovernmental Suppression*

Governments have constant motives to suppress speech, because people routinely use their expressive freedom to criticize the government or its interests. As a consequence, received cultural and legal wisdom teach us to beware government interference with speech. Judicial responses to acts of government censorship fill the United States Reports and consume treatises on the First Amendment. In contrast, the Supreme Court rarely acknowledges nongovernmental authorities' capacity and enthusiasm for suppressing speech.<sup>10</sup> Our intuitive ground for fearing government censorship, however, reveals the risk of nongovernmental suppression of speech as well. In a society where formidable private entities exercise a great deal of influence over people's lives, individuals have grounds for questioning and criticizing nongovernmental as well as governmental conduct. For this reason, powerful nongovernmental entities frequently take legal action to silence expression that threatens their interests, notably through strategic lawsuits against public participation (SLAPP suits),<sup>11</sup> intellectual property claims,<sup>12</sup> and other

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<sup>10</sup> The most notable exceptions include *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding, based on capacity of corporations to convert economic wealth into expressive capital, state statute that limited corporations' political expenditures); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (holding FCC regulations that required broadcasters to provide equal time for opposing political positions constitutional and in the public interest); and *New York Times Co. v. Sullivan*, 376 U.S. 967 (1964) (invoking First Amendment to limit liability for alleged defamation of public officials).

<sup>11</sup> SLAPP suits are devices by which land developers and other powerful interests use tort claims to silence opponents of their economic activities. See generally Alice Glover & Marcus Jimison, *SLAPP Suits: A First Amendment Issue and Beyond*, 21 N.C. CENT. L.J. 122 (1995) (describing phenomenon of SLAPP suits as a threat to expressive freedom and discussing legislative solutions).

<sup>12</sup> Corporations frequently use copyright claims to censor or punish expression, including important political speech. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (affirming finding of copyright violation against magazine for publishing account of Nixon pardon from President Ford's autobiography). For an account of varied corporate uses of aggressive copyright, see Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. TIMES, Jan. 25, 2004, p. 40 (magazine).

assertions that their common law or statutory rights trump their opponents' expressive interests.<sup>13</sup>

The threat of nongovernmental suppression of political debate intensifies during times of war and national emergency, when citizens literally and figuratively tend to "rally 'round the flag." Powerful voices call for citizens to set aside differences in deference to the common national cause.<sup>14</sup> In these circumstances, the national government itself enjoys a freer hand to restrict speech. Paradoxically, however, taking the risk of constitutional sanction inherent in suppressing speech may make less sense for the government in wartime than under normal circumstances, despite courts' notorious squeamishness about overriding elected officials' decisions during times of war and national emergency.<sup>15</sup> If the government censors political debate in wartime, it risks inflaming dissenters and fracturing the sense of national unity.<sup>16</sup> Fortuitously for government, it need not take that risk. Many nongovernmental institutions willingly squelch speech critical of government policies in wartime, whether motivated by sincere animus against dissenters, desire to curry favor with customers, or interest in the benefits wartime economic and military initiatives can bring to industry.<sup>17</sup> Our nation's

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<sup>13</sup> Records of actual litigation understate the force of nongovernmental suppression of speech, because the mere threat of litigation often silences speakers who lack the means to fight back in court. In late 2002, for example, a left-wing group called the Yes Men marked the anniversary of the catastrophic Union Carbide toxic gas leak in Bhopal, India by circulating a mock press release from Dow Chemical, Union Carbide's parent corporation. Dow then threatened litigation against Verio, the upstream Internet access provider that leased space to the Yes Men's smaller service provider, Thing.net. Verio reacted by shutting down the entire Thing network, which housed 255 other Internet addresses besides the Yes Men, and it subsequently terminated Thing.net's contract. See C. Carr, *Dow v. Thing: A Free Speech Infringement That's Worse Than Censorship*, VILLAGE VOICE, Jan. 17, 2003, p. 49.

<sup>14</sup> See Cecilia O'Leary and Tony Platt, *Pledging Allegiance: The Revival of Prescriptive Patriotism*, in PHIL SCRATON ED., *BEYOND SEPTEMBER 11: AN ANTHOLOGY OF DISSENT* 173, 173 (2002) (describing, in wake of September 11 attacks, "a new wave of orchestrated patriotism . . . aimed at closing down debate and dissent through the imposition of a prescribed allegiance").

<sup>15</sup> Examples of this phenomenon in the Supreme Court include *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (affirming President's prerogatives in negotiating end to Iranian hostage crisis); *Korematsu v. United States*, 323 U.S. 214 (1944) (rejecting constitutional challenge to military's internment of Japanese Americans during World War II); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (same); and *Ex parte Quirin*, 317 U.S. 1, 25 (1942) (declining to second-guess military's determinations regarding combatant status in World War II); but see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding Executive Order seizing steel mills during Korean War beyond President's powers and therefore unconstitutional). A recent analogue is *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (urging district court to act cautiously when reviewing military's decisions made during military conflict).

<sup>16</sup> See Diane L. Zimmerman, "Private" War: *The Problem of Access*, in SHIMON SHETREET ED., *FREE SPEECH AND NATIONAL SECURITY* 181, 181 (1991) (suggesting that government suppression of wartime dissent may undermine public support for war).

<sup>17</sup> See David Whyte, *Business as Usual? Corporate Moralism and the War Against Terrorism*, in SCRATON, *supra* note 14, at 150, 154-56 (describing potential benefits for business of post-September 11 U.S. economic policies and war in Afghanistan).

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history provides numerous examples of nongovernmental authorities' zeal for clamping down on wartime political debate.

Reprisals for past or perceived political affiliations are a familiar form of censorship during wartime. The most familiar examples are the Red Scares that occurred during the uneasy periods following the two World Wars. Government officials in these two periods played a prominent role in purging alleged communists from the civil service, academia, and the arts. The federal government prosecuted political dissenters during World War I,<sup>18</sup> and after the war Attorney General A. Mitchell Palmer set a tone of intimidation by authorizing violent raids against radical groups.<sup>19</sup> Beginning in the late 1940s, Senator Joseph McCarthy<sup>20</sup> and the House Un-American Activities Committee (HUAC)<sup>21</sup> sought to ferret out subversives both in the government and among nongovernmental professionals.

Much of the ruinous political intimidation in these periods, however, resulted from voluntary, even enthusiastic nongovernmental behavior. The infamous Hollywood blacklist evolved from film industry leaders' decision in 1947 to fire the so-called Hollywood Ten, the initial group of screenwriters and directors tarred as communists, in order to avert an amorphous danger of public outcry and boycotts.<sup>22</sup> Over the next decade, movie studios fired numerous directors, writers, and actors because of real or alleged communist associations. Studio bosses destroyed the careers even of people whose only crime was to support organizations that opposed the blacklists<sup>23</sup> or to sign briefs and petitions on behalf of alleged communists.<sup>24</sup> Other actual or suspected political radicals lost their jobs in industries from manufacturing<sup>25</sup> to the news media<sup>26</sup> to

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<sup>18</sup> See William J. Brennan, Jr., *The American Experience: Free Speech and National Security*, in SHETREET, *supra* note 16, at 10, 13-15 (describing prosecutions of antiwar activists during World War I).

<sup>19</sup> See RICHARD M. FRIED, NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE 41-43 (1990) (describing federal government's role in 1919-1920 Red Scare).

<sup>20</sup> See *generally id.* at 120-43 (describing Sen. McCarthy's leadership of anticommunist frenzy from 1950-1954).

<sup>21</sup> See *id.* at 150-61 (describing HUAC investigations and hearings in early 1950s).

<sup>22</sup> See LARRY COPLAIR & STEVEN ENGLUND, THE INQUISITION IN HOLLYWOOD: POLITICS IN THE FILM COMMUNITY 1930-1960 at 328-31 (1980) (describing November 1947 meeting of studio heads that decided fate of Hollywood Ten).

<sup>23</sup> See *id.* at 394-95 (discussing studios' persecution of artists for membership in organizations that fought blacklist).

<sup>24</sup> See DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER 497 (1978) (describing film industry reprisals against actors and others who signed petitions or amicus briefs that defended accused colleagues or advocated political and expressive freedoms).

<sup>25</sup> See FRIED, *supra* note 19, at 151 (describing automobile body manufacturer's suspension of two workers after their testimony at a HUAC hearing prompted work stoppage by other employees).

private academia.<sup>27</sup> Even Harvard University, a cornerstone of liberal American academia, declared in 1953 that academic freedom did not include the right to be a communist, and as late as 1957 the university's president declared that no communist should serve on a university faculty.<sup>28</sup> Professional associations, from the Screen Actors' and Directors' Guilds<sup>29</sup> to the American Bar and Medical associations<sup>30</sup> to the American Federation of Teachers,<sup>31</sup> vigorously assisted in purging actual and suspected communists from their respective professions.

The business of ferreting out alleged communists became a model of free enterprise. In Hollywood, leading figures such as writer-director Elia Kazan and actor Sterling Hayden fingered friends and associates as communists in order to advance their own careers.<sup>32</sup> Numerous other Hollywood luminaries helped themselves by offering congressional investigators extravagant accounts of communist influence in the movies.<sup>33</sup> Professional blacklists – led by American Business Consultants, publisher of a compendium of left-wing industry figures called *Red Channels* – unearthed and published information about film artists' political activities and allegiances and then offered to “clear” suspects of communist ties – essentially a protection racket.<sup>34</sup> *Red Channels* became required reading for film and television producers and advertisers, many of whom cravenly abandoned performers the booklet listed in order to avoid bad publicity.<sup>35</sup> In like manner, painters and sculptors marginalized by the avant-garde fanned fears of communism in order to encourage ideological attacks on their modernist colleagues.<sup>36</sup>

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<sup>26</sup> See CAUTE, *supra* note 24, at 449-52 (describing firings by newspapers and America Newspaper Guild of employees who had communist ties or had invoked Fifth Amendment rights in government investigations).

<sup>27</sup> See, e.g., *id.* at 410-11 (describing suspension and forced resignation of M.I.T. professors who admitted past communist ties); *id.* at 415-16 (describing politically motivated dismissals of professors at Columbia and New York Universities).

<sup>28</sup> See *id.* at 411-13 (describing Harvard's responses to 1950s Red Scare).

<sup>29</sup> See FRIED, *supra* note 19, at 154-55 (describing anticommunist activities of film guilds).

<sup>30</sup> See CAUTE, *supra* note 24, at 403 (describing role of major professional associations in anticommunist purges).

<sup>31</sup> See *id.* at 405-06 (describing A.F.T.'s refusal to defend teachers who declined to deny membership in Communist Party).

<sup>32</sup> See COPLAIR & ENGLUND, *supra* note 22, at 377-78 (recounting Kazan's and Hayden's admissions that they had consigned others to blacklist in order to avoid blacklisting themselves).

<sup>33</sup> See CAUTE, *supra* note 24, at 492-93 (describing testimony before Congress of Hollywood figures including Ronald Reagan, Adolphe Menjou, and Walt Disney).

<sup>34</sup> See COPLAIR & ENGLUND, *supra* note 22, at 386-87 (describing private organizations that used information to facilitate and profit from blacklist); FRIED, *supra* note 19, at 156-57 (describing activities of professional blacklists).

<sup>35</sup> See CAUTE, *supra* note 24, at 521-23 (describing interactions among professional blacklists, producers, and advertising executives).

<sup>36</sup> See FRIED, *supra* note 19, at 30 (describing anticommunist crusades in visual arts).

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Economic self-interest on the part of both employers<sup>37</sup> and ambitious union officials<sup>38</sup> led to purges of communists in the labor movement during both Red Scares.<sup>39</sup>

The possibility or reality of war often has undermined public debate in another less direct but arguably even more damaging way: by prompting the news media to forego aggressive, critical newsgathering and reporting in exchange for sycophantic or cynical acquiescence to official policy. As in the matter of reprisals against perceived political opponents, wartime governments have acted to manipulate or intimidate the press. Much of the blame for the news media's failures in wartime, however, falls at the media's own feet. Media outlets at times have seen financial gain in inflaming passions for war – most notoriously when newspaper publisher William Randolph Hearst helped ignite the Spanish-American War, through selective reporting and outright fabrications,<sup>40</sup> in order to boost his papers' circulation.<sup>41</sup> At other times, as in the period leading up to the United States' decision to join the allied cause in World War I, media corporations have advocated war because they believed the public favored that course.<sup>42</sup> Similarly, ideology often has led the press to tar political dissenters with unsubstantiated charges of disloyalty, a powerful tactic in both the first and second Red Scares.<sup>43</sup> In addition, media firms have willingly, sometimes even enthusiastically, embraced

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<sup>37</sup> See *id.* at 152 (describing General Electric's intimidation of left-wing unions during labor dispute in early 1950s).

<sup>38</sup> See *id.* at 35 (referring to economically motivated anticommunism in labor movement).

<sup>39</sup> Although anticommunist mania had abated by the time of the Vietnam War, some employers during that period terminated workers for antiwar activities. See, e.g., JAMES W. CLINTON, *THE LOYAL OPPOSITION: AMERICANS IN NORTH VIETNAM, 1965-1972* at 11 (1995) (presenting oral history of Harold Supriano, who lost several jobs after making factfinding trip to Hanoi in 1965).

<sup>40</sup> See FRANK LUTHER MOTT, *AMERICAN JOURNALISM: A HISTORY: 1690-1960* at 527 (3d ed. 1962) (noting that Hearst papers' biased reporting even "swept blindly over the last-minute capitulation by Spain on all the points at issue"); W.A. SWANBERG, *CITIZEN HEARST: A BIOGRAPHY OF WILLIAM RANDOLPH HEARST* 110 (1961) (stating that Hearst reporters and other U.S. journalists in Cuba "published accounts of battles that never occurred" and "narrated a succession of Spanish atrocities entirely unauthenticated").

<sup>41</sup> See MOTT, *supra* note 40, at 531-32 (discussing economic motivation for Hearst's pro-war reporting); SWANBERG, *supra* note 40, at 108 (same).

<sup>42</sup> See MOTT, *supra* note 40, at 616 (describing U.S. newspapers that advocated entry into World War I as taking their cues from prevailing public opinion). The press' role in encouraging U.S. entry into World War I also reflected British manipulation of American war correspondents. See PHILLIP KNIGHTLEY, *THE FIRST CASUALTY: FROM THE CRIMEA TO VIETNAM: THE WAR CORRESPONDENT AS HERO, PROPAGANDIST, AND MYTH MAKER* 122 (1975) (describing effect of British propaganda on U.S. public opinion).

<sup>43</sup> See CAUTE, *supra* note 24, at 446-49 (describing newspapers' trumpeting of innuendoes about citizens' alleged communist ties during late 1940s and early 1950s); FRIED, *supra* note 19, at 40-41 (describing newspapers' red baiting of left-wing union leaders during 1919-1920 Red Scare).

constraints on their battlefield reporting.<sup>44</sup>

Everyone should care about nongovernmental reprisals against wartime political dissenters and the media's failures to assess government policy critically because those actions threaten the national interest. Informed, open political debate is essential to a well-functioning democratic system, especially when wars and national emergencies increase the stakes of policy decisions.<sup>45</sup> Understanding the danger that suppression of speech, whether initiated by the government or not, poses to our system requires analysis of why expressive freedom stands at the heart of our constitutional order. That analysis implicates First Amendment theory, and particularly a theoretical explanation of the First Amendment's speech protection that I have labeled the public rights theory of expressive freedom.

## *2. The Public Rights Theory of Expressive Freedom and the Necessity of Robust Political Debate for Democratic Government*

The dominant theory of expressive freedom in American law, which I have called the private rights theory,<sup>46</sup> reflects no special concern for political debate or dissent. That theory explains constitutional expressive freedom as intended to safeguard individual autonomy by protecting the act of speaking. Under the private rights theory, the First Amendment affords a formal, negative shield against government action that limits any speech, subject to balancing against the government's competing regulatory interests. The theory assigns no particular weight to speech aimed at influencing government policy; rather, it emphasizes the value of self-interested expression.<sup>47</sup> In contrast, an overriding emphasis on the rights of political dissenters emerges from the private rights theory's major rival, the public rights theory.<sup>48</sup> The public rights theory treats the First Amendment as protecting not individuals' interests in autonomy but the political

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<sup>44</sup> See KNIGHTLEY, *supra* note 42, at 123-24 (describing U.S. military efforts to control war correspondents' reports during World War I); *id.* at 274-76, 317-30 (describing military censorship of correspondents during World War II); *id.* at 381-82 (describing U.S. government's disinformation strategies during Vietnam War). For a description of recent media acquiescence in military controls beginning with the 1991 Gulf War, see *infra* notes 104-06 and accompanying text.

<sup>45</sup> See JEFFERY A. SMITH, *WAR AND PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER* vii (1999) (positing harm to democratic decisionmaking from government's tendency to suppress political debate during wartime); Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J. L. & PUB. POL'Y 441, 444 (2002) (contending that aggressive government investigations that discredit political dissenters "undermine the effectiveness of popular self-government").

<sup>46</sup> For a thorough explanation of the private rights theory, see Magarian, *supra* note 9, at 1947-59.

<sup>47</sup> See *id.* at 1953-54 (describing pluralist and individuated character of expressive freedom under private rights theory).

<sup>48</sup> For a thorough explanation of the public rights theory, see *id.* at 1972-91.

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community's interest in informed, broadly participatory policymaking. It views the Amendment as a substantive guarantor of a positive value: open, robust democratic discourse. Expressive freedom, under the public rights theory, means more than shielding formal opportunities for expression against government interference; it means ensuring that vigorous debate about policy matters actually takes place.<sup>49</sup>

The public rights theory has its roots in the seminal writings of Alexander Meiklejohn. Based on his view that the absolutist language of the First Amendment required some substantive limitation in the Amendment's scope,<sup>50</sup> Meiklejohn contends that we should understand the First Amendment as protecting only speech necessary to the democratic process, thereby ensuring "that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another."<sup>51</sup> Meiklejohn defends this choice on the ground that self-government is the essential object of the Constitution.<sup>52</sup> While the limitation to political speech leaves Meiklejohn open to cogent criticism for consigning much important speech to the dubious mercies of the political majority,<sup>53</sup> it allows him and his inheritors to advocate comprehensive protection for speech with a substantial claim to centrality in the constitutional scheme. Meiklejohn's First Amendment theory emphasizes the interest not of the speaker, but of the listener. His concern is "not that everyone shall speak, but that everything worth saying be said."<sup>54</sup> This emphasis reflects the underlying purpose that Meiklejohn identifies with the First Amendment: wise, informed deliberation in the service of democratic self-government. "[C]onflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant."<sup>55</sup>

Political dissent stands at the core of Meiklejohn's First Amendment. He sharply criticizes Justice Holmes' initial conception of the "clear and present danger" test, which allowed criminalization of subversive advocacy in wartime.<sup>56</sup> "Taken literally," warns Meiklejohn of Holmes' formulation, "it

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<sup>49</sup> See *id.* at 1983-85 (discussing substantive nature of expressive freedom under public rights theory).

<sup>50</sup> See MEIKLEJOHN, *supra* note 8, at 19-21 (positing paradox of First Amendment's scope).

<sup>51</sup> *Id.* at 26-27.

<sup>52</sup> See *id.* at 27 ("The principle of the freedom of speech springs from the necessities of the program of self-government.").

<sup>53</sup> See, e.g., Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 596-97 (1982) (criticizing narrow focus of Meiklejohn's First Amendment theory). For a discussion of Meiklejohn's eventual expansion of his concept of political speech, see *infra* notes 317-18 and accompanying text.

<sup>54</sup> MEIKLEJOHN, *supra* note 8, at 26.

<sup>55</sup> *Id.* at 28.

<sup>56</sup> See *Schenck v. United States*, 249 U.S. 47, 52 (1919). The original "clear and present danger" test still cast a long shadow at the time Meiklejohn wrote. As recently as

means that in all ‘dangerous’ situations, minorities, however law-abiding and loyal, must be silent.”<sup>57</sup> Meiklejohn forthrightly accepts the danger that unfettered political speech might destroy the very system that protects it, invoking with admiration Holmes’ later dissent in *Gitlow v. New York*.<sup>58</sup> “If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”<sup>59</sup> For Meiklejohn, that sentiment embodies “Americanism.”<sup>60</sup> He celebrates dissent because he insists unpopular viewpoints, by virtue of their variance with accepted wisdom, make a singularly valuable contribution to informed political decisionmaking in a democratic society.<sup>61</sup> Meiklejohn’s position emulates the Supreme Court’s greatest statement on the necessity of dissent, Justice Brandeis’ concurrence in *Whitney v. California*:<sup>62</sup> “Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.”<sup>63</sup>

Meiklejohn’s approach to the First Amendment has received vital elaboration from subsequent theorists. Most notably, Owen Fiss<sup>64</sup> and Cass Sunstein<sup>65</sup> have urged approaches to the First Amendment that focus on substantive political debate as the democratic bottom line of expressive freedom. Fiss argues forcefully for the value of activist government in sustaining the conditions needed for democratic discourse.<sup>66</sup> Sunstein mounts a two-layered, civic republican argument for a First Amendment theory that would either focus on the results of expressive freedom controversies for democratic deliberation<sup>67</sup> or simply give primacy to political speech.<sup>68</sup> Their rhetoric, however, nowhere matches the force of

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*Dennis v. United States*, 341 U.S. 494 (1951), the Court took a highly permissive position on punishment of subversive advocacy. Not until *Brandenburg v. Ohio*, 395 U.S. 444 (1969), would the Court fully abandon the “clear and present danger” formulation in favor of the much more speech-protective incitement test.

<sup>57</sup> MEIKLEJOHN, *supra* note 8, at 44.

<sup>58</sup> 268 U.S. 652 (1925).

<sup>59</sup> *Id.* at 673 (Holmes, J., dissenting) (quoted in MEIKLEJOHN, *supra* note 8, at 42).

<sup>60</sup> MEIKLEJOHN, *supra* note 8, at 43.

<sup>61</sup> *Id.* at 28 (“When a question of policy is ‘before the house,’ free men choose to meet it not with their eyes shut, but with their eyes open. To be afraid of ideas, any idea, is to be unfit for self-government.”).

<sup>62</sup> 274 U.S. 357.

<sup>63</sup> *Id.* at 376; see also *id.* at 375 (ascribing to founding generation the belief “that the greatest menace to freedom is an inert people”).

<sup>64</sup> See Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987) (hereinafter Fiss, *Why the State?*); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986) (hereinafter Fiss, *Social Structure*).

<sup>65</sup> See Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992) (hereinafter Sunstein, *Free Speech*).

<sup>66</sup> See, e.g., Fiss, *Why the State?*, *supra* note 64, at 781-83 (offering New Deal regulation of economic activity as basis for allowing some government regulation of expressive activity).

<sup>67</sup> See Sunstein, *Free Speech*, *supra* note 65, at 263-300.

<sup>68</sup> See *id.* at 301-15.

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Meiklejohn's special concern with suppression of political dissent. Rather, in advocating a shift in First Amendment priorities, both Fiss and Sunstein focus more on what they see the First Amendment as improperly protecting – corporate license, special access for the wealthy to means of expression, pornography – than on what they see it as failing sufficiently to protect.<sup>69</sup> They worry more about misallocations of expressive opportunities than about outright suppression of dissenting positions.<sup>70</sup> Given that Fiss and Sunstein made their contributions to the public rights theory in the late 1980s and early 1990s, a period marked by relative peace and prosperity, their focus on distributive injustices rather than blatant censorship makes perfect sense.

In contrast, Meiklejohn wrote his essays on the First Amendment forty years earlier, at the height of the second Red Scare's asphyxiation of political debate. Meiklejohn, in fact, actively resisted the anticommunist purge, coauthoring a Supreme Court amicus brief on behalf of the Hollywood Ten in 1949<sup>71</sup> and assailing the ACLU's condemnation of the Communist Party in 1953.<sup>72</sup> He witnessed firsthand the federal judiciary's failure to protect political debate from the tide of anticommunist political correctness.<sup>73</sup> In perhaps the most passionate words he ever wrote, Meiklejohn situated his First Amendment theory

[i]n these wretched days of postwar and, it may be, of prewar, hysterical brutality, when we Americans, from the president down, are seeking to thrust back Communist belief by jailing its advocates, by debarring them from office, by expelling them from the country, by hating them . . .<sup>74</sup>

Similarly overt threats to dissenters in the wartime, postwar, and prewar years of the early 20<sup>th</sup> Century formed the context for Justices Holmes' and Brandeis' initial development of the Supreme Court's modern First

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<sup>69</sup> See Fiss, *Why the State?*, *supra* note 64, at 788 (positing that “the market brings to bear on editorial and programming decisions factors that might have a great deal to do with profitability or allocative efficiency . . . but little to do with the democratic needs of the electorate); Sunstein, *Free Speech*, *supra* note 65, at 258 (criticizing shift in attention of First Amendment discourse from less powerful to extremely powerful claimants).

<sup>70</sup> Indeed, Fiss contrasts his theoretical concerns with what he characterizes as First Amendment theory's foundational focus on the street corner speaker. See Fiss, *Social Structure*, *supra* note 64, at 1408-11. That Fiss associates the image of the street corner speaker with an ideal of autonomy rather than of dissent, going so far as to portray Meiklejohn as having emphasized autonomy, *see id.* at 1410-11, tells a great deal about the differences between the divergent historical contexts of Meiklejohn and Fiss.

<sup>71</sup> See ADAM R. NELSON, EDUCATION AND DEMOCRACY: THE MEANING OF ALEXANDER MEIKLEJOHN 1872-1964, at 275-76 (2001) (summarizing Meiklejohn's brief).

<sup>72</sup> See *id.* at 283-84.

<sup>73</sup> See Morton J. Horwitz, *Rights*, 23 HARV. CIV. R.-CIV. L. L. REV. 393, 397 & n.30 (1988) (describing Supreme Court's rejection in 1950s of First Amendment challenges to elements of anticommunist purges) (hereinafter Horwitz, *Rights*).

<sup>74</sup> MEIKLEJOHN, *supra* note 8, at 43.

Amendment jurisprudence.<sup>75</sup> The first decade of our new century, with its climate of polarized mass sentiment against a deeply frightening international threat, bears striking similarities to the ages that inspired these thinkers to emphasize the necessity of protecting dissent. As in those ages, pundits today argue that the presence of an international threat transforms political dissent into a species of treason.<sup>76</sup> Meiklejohn's analysis of the First Amendment, however, provides a compelling account of why our nation needs dissent most deeply when the dangers we face are gravest.

History bears out Meiklejohn's emphasis on the value of dissent and open political discourse. The anticommunist purges described above, today a source of national embarrassment, sustained themselves largely by their attacks on dissenting voices.<sup>77</sup> The antiwar and civil rights movements of the 1960s provide the most prominent instances in recent American history of the ability of popular, grassroots dissenters to spur crucial policy changes.<sup>78</sup> Over the past decade, emerging democracies' emphasis on creating avenues for dissent and debate has underscored the necessity of vigorous political discourse for a healthy democratic system.<sup>79</sup>

Why have open debate and dissent proved so indispensable?

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<sup>75</sup> The seminal First Amendment opinions of Justices Holmes and Brandeis came in cases that involved either antiwar protest, communist advocacy, or both. *See* *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring) (suggesting that prosecution under state statute based only on membership in Socialist Party would violate First Amendment); *Gitlow v. New York*, 268 U.S. 652, 672 (1923) (Holmes, J., dissenting) (contending that publication of communist materials that present no clear and present danger of overthrowing government was protected speech); *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 417 (1921) (Brandeis, J., dissenting) (arguing that allowing Postmaster broad powers to exclude from mails publications alleged to intend interference with military operations would violate First Amendment); *id.* at 436 (Holmes, J., dissenting) (same); *Gilbert v. Minnesota*, 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting) (arguing that state statute that banned publishing statements that urged resisting military recruitment violated First Amendment); *Frohwerk v. United States*, 249 U.S. 204 (1919) (Holmes, J.) (affirming conviction based on speech intended to obstruct recruitment); *Debs v. United States*, 249 U.S. 211 (1919) (Holmes, J.) (affirming conviction for public advocacy of resistance to war with intent and effect of preventing recruiting); *Schenck v. United States*, 249 U.S. 47 (1919) (Holmes, J.) (affirming, under "clear and present danger" test, conviction based on distribution of leaflets that urged resistance to draft); *see also* *Masses Pub. Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917) (Hand, J.) (affirming plaintiffs First Amendment right to publish anti-war statements in absence of direct advocacy of violating law).

<sup>76</sup> As the invasion of Iraq commenced, Fox News commentator Bill O'Reilly stated: "It is our duty as loyal Americans to shut up once the fighting begins . . ." Steve Chapman, *The Protesting Patriots*, *BALT. SUN*, April 1, 2003, p. A11 (quoting O'Reilly). Conservative activist David Horowitz expressed a similar view: "In war, some sort of basic unity against the enemy is necessary. To seek to disrupt that unity is to aid the enemy." Dick Polman, *A Clash Over Who Is a Patriot*, *PHILA. INQUIRER*, March 23, 2003, p. C1 (quoting Horowitz).

<sup>77</sup> *See supra* notes 18-39 and accompanying text.

<sup>78</sup> *See generally* CHARLES DEBENEDETTI, *AN AMERICAN ORDEAL: THE ANTIWAR MOVEMENT OF THE VIETNAM ERA* (1990); HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY 1954-1980* (1981).

<sup>79</sup> *See, e.g.*, STJEPAN MALOVIC AND GARY W. SELNOW, *THE PEOPLE, PRESS, AND POLITICS OF CROATIA* (2001).

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Deliberative polling, a system that gauges the effect of debate on decisionmaking, suggests that discourse about contentious issues enables people to formulate more independent, better grounded policy positions.<sup>80</sup> A deliberative poll conducted at the University of Pennsylvania in early 2003 illustrates the device in the present national crisis. Participants in the Pennsylvania exercise filled out a survey about their views on various foreign policy questions, then spent a weekend in discussions with foreign policy experts and ordinary citizens. At the end of the weekend, the participants revisited the survey questions. According to their revised responses, more viewed Iraq as a threat, favored increased foreign aid, and advocated cooperation with the United Nations. In addition, more participants could accurately answer factual questions about foreign policy.<sup>81</sup> Debate and discussion of a wide range of views led these citizens to more broadly informed, more nuanced positions on a range of important issues.

The Pennsylvania exercise confirms longstanding insights about the value of open debate for wise collective decisionmaking. In an analysis of recent social and political science literature on dissent, Professor Sunstein recounts a series of experiments by social psychologist Solomon Asch in which test subjects, presented with simple problems, conformed their responses to group pressures even to the extent of validating obviously incorrect responses.<sup>82</sup> When Asch varied the experiment by placing one “voice of reason” within the conformist group, the test subjects proved more willing to deviate from group opinion and solve the problems correctly.<sup>83</sup> The beneficial effects of dissent extend even to success in war. Sunstein recounts the observations of a Roosevelt administration official who had studied the effects of political systems on the warmaking capacities of the nations that fought World War II. The official concluded that, in spite of the apparent efficiencies of totalitarian political organization, democracy and expressive freedom gave the United States and its democratic allies an important competitive advantage – because public debate encouraged wise policy choices.<sup>84</sup>

Unfortunately, as discussed above,<sup>85</sup> wars and similar periods of national anxiety tend to discourage the very political debate and dissent they render so essential. Prior to the September 11 attacks, lessons about

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<sup>80</sup> For a description and discussion of deliberative polling, see JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* (1995).

<sup>81</sup> See Michael C. Schaffer, *Foreign-Policy Session Alters Group's Views*, PHILA. INQUIRER, Jan. 14, 2003, p. A8. For details on the project's methodology and results, see [http://www.pbs.org/newshour/btp/ric\\_main.html](http://www.pbs.org/newshour/btp/ric_main.html) (visited Oct. 10, 2003).

<sup>82</sup> See CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 20-21 (2003).

<sup>83</sup> See *id.* at 26-27.

<sup>84</sup> See *id.* at 146-49.

<sup>85</sup> See *supra* section I.A.1.

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the danger of private suppression of wartime political debate seemed like remote footnotes to history. The events of the past two years, however, have led to an incidence of nongovernmental censorship not seen since at least the Vietnam era, at great cost to the national interest. The next section describes the most prominent instances of nongovernmental impediments to public political debate during the present campaign against international terrorism. This narrative lays a foundation for the second and third parts of this article, which explain why our present understanding of the First Amendment fails to address nongovernmental suppression of political debate and advocates a changed understanding of constitutional law that would allow courts to rectify that failing.

*B. Nongovernmental Censorship of Political Speech During  
the “War on Terrorism”*

Two key events have bracketed the current U.S. initiative against international terrorism: the attacks of September 11, 2001 and the American-led invasion and occupation of Iraq beginning in March 2003. The period defined by these two events, especially the months following the attacks and the months leading up to the Iraq war, has produced profound and pronounced divisions in public opinion in the United States. The federal and state governments have taken relatively few actions against dissenters that would trigger opportunities for judicial relief under the First Amendment. Congress in the U.S.A. Patriot Act forbade advising “known terrorist groups,”<sup>86</sup> a provision a District Court struck down on First Amendment vagueness grounds.<sup>87</sup> Opponents also have challenged a provision of the Act that authorizes scrutiny of, among other things, library patrons’ borrowing records, thereby discouraging access to information that might arouse suspicion.<sup>88</sup> Government institutions, such as colleges, have made some efforts to discourage debate.<sup>89</sup> Military

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<sup>86</sup> See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (U.S.A Patriot Act), H.R. 3162, 107th Cong., Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>87</sup> See Eric Lichtblau, *Citing Free Speech, Judge Voids Part of Antiterror Act*, N.Y. TIMES, Jan. 27, 2004, p. A16.

<sup>88</sup> See U.S.A Patriot Act, 115 Stat. 272 (amending Title V of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1861) to require production of “any tangible things” including books, records, papers and other documents in investigations regarding international terrorism); Associated Press, *Patriot Act Draws Lawsuit*, PHILA. INQUIRER, July 31, 2003, p. A3.

<sup>89</sup> See, e.g., Kate Zernike, *Professors Protest as Students Debate*, N.Y. TIMES, April 5, 2003, p. A1 (reporting that “Irvine Valley College in Southern California sent faculty members a memo that warned them not to discuss the war unless it was specifically related to course material”).

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officials have tried, apparently with little success, to suppress expressions of concern among service members and their families about the reconstruction of Iraq.<sup>90</sup> Perhaps most disturbing, numerous antiwar groups and other peaceful dissenters have suffered law enforcement infiltration and investigation, in a strategy reminiscent of Vietnam-era domestic spying.<sup>91</sup> **For the most part, however, government officials have avoided actions that might prompt First Amendment challenges.**

In contrast, nongovernmental authorities have frequently and overtly impeded debate. In some cases, censorship may result from concrete relationships between nongovernmental institutions and the government. Such relationships theoretically may support legally cognizable claims of state action, although the Court's willingness to credit such claims is doubtful.<sup>92</sup> But voluntary nongovernmental suppression of speech based on real or perceived self-interest is, on the conventional understanding, wholly private and therefore beyond the First Amendment's reach. The following discussion catalogues the most prominent instances of nongovernmental censorship during the present antiterrorism campaign. These instances fall into three principal categories: media corporations' misinformation and suppression of information; bans against dissenting speech on private property frequented by the public; and reprisals against people who have previously engaged in dissent.

*1. Misinformation and Suppression of Information by  
News Media*

One feature of the public rights theory that has enjoyed substantial currency in the legal mainstream is the idea that the press – print and electronic – has a special capacity, and thus a special responsibility, to inform the public about arguable failings by the government and to provide information necessary for political debate.<sup>93</sup> Never is this

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<sup>90</sup> See Jerry Adler, *Families Ask Why*, Newsweek, Aug. 4, 2003, p. 30 (discussing email from U.S. Army commander that discouraged military family members from raising concerns with government or media).

<sup>91</sup> See Michelle Goldberg, *A Thousand J. Edgar Hoovers*, Salon.com, Feb. 12, 2004 ([http://www.salon.com/news/feature/2004/02/12/dissent\\_two/index.html](http://www.salon.com/news/feature/2004/02/12/dissent_two/index.html)) (visited Feb. 12, 2004) (documenting infiltration and aggressive investigations of groups and individuals opposed to Iraq war by federal and local law enforcement agencies); Michelle Goldberg, *Outlawing Dissent*, Salon.com, Feb. 11, 2004 (<http://www.salon.com/news/feature/2004/02/11/cointelpro/index.html>) (visited Feb. 11, 2004) (same); Matthew Rothschild, *The New McCarthyism*, PROGRESSIVE, Jan. 2002, p. 9 (describing federal investigations of people and institutions who had expressed opposition to U.S. foreign policy or antiterrorism tactics).

<sup>92</sup> See *infra* section II.A.1. (discussing state action doctrine).

<sup>93</sup> See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 554-65 (discussing relationship between Meiklejohn's First

function more important than in wartime.<sup>94</sup> Since the September 11 attacks the American media often have performed this task assertively. Far too frequently, however, news organizations have gone out of their way to avoid presenting information that might fuel criticism of government policy. Increasingly controlled by large entertainment corporations that strive to avoid alienating consumers and advertisers, national media outlets have suppressed information of potentially great importance for assessing government policy. At times media outlets have gone farther, slanting their newsgathering and reporting to support dubious government assertions. The government has encouraged some of these failings, but they all ultimately depend on media corporations' voluntary withdrawal from vigorous newsgathering and reporting.

The 2001 terrorist attacks made Osama bin Laden a figure of intense interest and importance for the American public. The al Qaeda leader fueled Americans' fear and rage by issuing several videotaped messages that, among other things, urged Muslims to take up arms against the United States. Initially, the broadcast media prominently featured bin Laden's videos in prime time news reports. On October 10, 2001, however, the major U.S. television networks, prodded by a request from National Security Adviser Condoleezza Rice, promised the government they would not broadcast messages from bin Laden and his followers without at least reviewing them first.<sup>95</sup> The Bush Administration argued primarily that bin Laden's messages might contain operational signals to terrorists, although this suggestion rested on mere speculation and ignored the easy availability of bin Laden's recordings through other media.<sup>96</sup> More troubling was Bush spokesman Ari Fleischer's dismissal of the tapes' informational value as "[a]t best . . . propaganda, calling on people to kill Americans."<sup>97</sup> The networks willingly denied the public this intensely salient information. A CNN statement summed up the networks' posture: "In deciding what to air, CNN will consider guidance

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Amendment theory and idea that First Amendment centrally protects media check on government); Neil W. Netanel, *The Commercial Mass Media's Continuing Fourth Estate Role*, in NIVA ELKIN-KOREN & NEIL W. NETANEL EDS., *THE COMMODIFICATION OF INFORMATION* 317, 320-23 (2002) (describing necessary functions of mass media in sustaining liberal democracy) (hereinafter Netanel, *Mass Media*); Potter Stewart, "Or of the Press," 26 *HAST. L.J.* 631 (1975) (advancing thesis that Press Clause of First Amendment charged press with special responsibility to check government abuses).

<sup>94</sup> See ROBERT W. MCCHESENEY & JOHN NICHOLS, *OUR MEDIA NOT THEIRS: THE DEMOCRATIC STRUGGLE AGAINST CORPORATE MEDIA* 64-65 (2002) ("When a democracy considers whether to engage in war, the free flow of information is of dramatic significance: How can parents decide that the favor sending their sons and daughters off to fight when they lack adequate information about the causes, goals, and strategies of the proposed fight?").

<sup>95</sup> See Sumana Chatterjee, *Networks Pledge Restraint on bin Laden Tapes*, *PHILA. INQUIRER*, Oct. 11, 2001, p. A10.

<sup>96</sup> See *id.*

<sup>97</sup> *Id.*

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from appropriate authorities.”<sup>98</sup>

Major news organizations displayed similar fealty to authority in their credulous treatment of government positions before and during the Iraq war. First, the press appears to have perpetuated its historic pattern of fostering public support for war.<sup>99</sup> During late 2002 and early 2003, the Bush administration argued relentlessly that Iraq posed an immediate threat to the United States that warranted a preemptive invasion. Opinion polls from this period reveal a remarkable set of public misperceptions about Iraq’s military capacity and alleged relationship to the September 11 attacks, beyond even the administration’s boldest assertions. In a major national poll taken in January 2003, 44 percent of respondents expressed the view that all or most of the September 11 hijackers were Iraqi citizens, and 41 percent believed Iraq possessed nuclear weapons.<sup>100</sup> The next month, almost two thirds of respondents to another nationwide poll believed United Nations weapons inspectors had found proof that Iraq was hiding weapons of mass destruction.<sup>101</sup> In that survey 57 percent of respondents also believed Saddam Hussein had aided the September 11 hijackers, and in March two major polls found that about half the public believed Hussein was personally involved in the September 11 attacks.<sup>102</sup> No serious evidence has ever arisen to support the Hussein-September 11 link, and the other beliefs recited above were and are demonstrably false. This disconnect between public perception and reality at best reflects a profound failure by the media to inform the American people about issues of deep national import and at worst evinces reporting slanted in favor of going to war.

Second, the news media’s coverage of the Iraq war often sacrificed independence and critical analysis for access to official decisionmakers and feel-good patriotism. Frank reporting about the conduct of a war can inspire and substantiate antiwar dissent, as occurred dramatically when war correspondents in the late 1960s exposed the American public to the carnage in Vietnam.<sup>103</sup> Despite the importance of unfettered reporting

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<sup>98</sup> *Id.*

<sup>99</sup> See *supra* notes 40-44 and accompanying text.

<sup>100</sup> See Ari Berman, *Polls Suggest Media Failure in Pre-War Coverage*, EDITORPUBLISHER.COM, March 26, 2003 (citing January 2003 Knight-Ridder/Princeton Research poll).

<sup>101</sup> See *id.* (citing February 2003 Pew Research Center/Council on Foreign Relations survey).

<sup>102</sup> See *id.*

<sup>103</sup> See KNIGHTLEY, *supra* note 42, at 382-83 (contending that battlefield reporting from Vietnam “toppled a president, split the country, and caused many Americans to make a serious reappraisal of the basic nature of their nation”); Michael D. Steger, *Slicing the Gordian Knot: A Proposal to Reform Military Regulation of Media Coverage of Combat Operations*, 28 U.S.F.L. REV. 957, 966 (1994) (describing impact of nightly televised broadcasts of Vietnam war on public opinion). A similar backlash occurred when news

from the battlefield, national media organizations during the 1991 Gulf War agreed to substantial constraints on reporting, including limits on the number of reporters granted access to the battlefield and even military screening of dispatches.<sup>104</sup> When independent media challenged those constraints in court, the mainstream media stood silent, trading independence for access and competitive advantage within the government's prescribed limits.<sup>105</sup> Once the Iraq war began in March 2003, the U.S. media gained international notoriety for its refusal to depict injured or dead Iraqi civilians, frightened American prisoners of war, and other images of the war's human costs.<sup>106</sup> CNN's top war correspondent, Christiane Amanpour, decried her own network's war coverage as "muzzled" due to "intimidat[ion] by the administration and by its foot soldiers at Fox News."<sup>107</sup>

Several major media corporations, notably the *New York Times* and CNN, reported credulously about supposed discoveries of Iraqi weapons of mass destruction that turned out to be false alarms.<sup>108</sup> Some of the *Times* reports relied on questionable sources and received clearance from

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footage of soldiers dragged through the streets of Mogadishu shifted public support against continued U.S. involvement in the Somali civil war. See Capt. William A. Wilcox, Jr., *Media Coverage of Military Operations: OPLAW Meets the First Amendment*, 1995 ARMY LAW. 42, 49 (1995) (arguing that extensive media coverage may have precipitated early withdrawal of troops from Mogadishu).

<sup>104</sup> See William E. Lee, "Security Review" and the First Amendment, 25 HARV. J. L. & PUB. POL'Y 743, 746-47 (2002) (describing restrictions agreed to by media organizations covering Gulf War); Steger, *supra* note 103, at 972-73 (same). Military screening of stories, beyond its directly restrictive effects, also chilled and impeded aggressive reporting. See Lee, *supra*, at 761-62 (describing effects of military security review on journalists during Gulf War).

<sup>105</sup> See Lee, *supra* note 104, at 752-53 (analyzing large U.S. media outlets' refusal to sue government over wartime constraints on newsgathering and reporting). Legal challenges to government constraints on wartime reporting have a basis in First Amendment decisions granting the media rights of access to certain public proceedings. See Zimmerman, *supra* note 16, at 184-89 (explaining basis in precedent for claims of First Amendment rights of access to battlefields).

<sup>106</sup> See, e.g., Cynthia Cotts, *News of the Dirty War*, VILLAGE VOICE, April 9, 2003, p. 34 (cataloguing U.S. media's failure to report widely on U.S.-led coalition's bombings of Iraqi civilians, use of cluster bombs, and actions against foreign reporters). Brit Hume of the unapologetically pro-war Fox News provided a telling apologia for this tendency: "You don't have to be a genius to know that war is bloody and people die and injuries happen and these things are ugly. It does not need to be splayed out in graphic detail." *Did We See the Real War? Or Just What the Pentagon Wanted Us to See?*, ROLLING STONE, June 12, 2003, at 43, 45.

<sup>107</sup> Peter Johnson, *Amanpour: CNN Practiced Self-Censorship*, USATODAY.COM, Sep. 14, 2003, [http://www.usatoday.com/life/columnist/mediamix/2003-09-14-media-mix\\_x.htm](http://www.usatoday.com/life/columnist/mediamix/2003-09-14-media-mix_x.htm) (visited Sep. 16, 2003) (quoting Christiane Amanpour). Responding to Amanpour's comments, Fox News spokeswoman Irena Briganti declared: "Given the choice, it's better to be viewed as a foot soldier for Bush than a spokeswoman for al-Qaeda." *Id.*

<sup>108</sup> See Cynthia Cotts, *What, No Smoking Gun?*, VILLAGE VOICE, April 29, 2003, p. 33. President Bush eventually had to withdraw his claim that Iraq had possessed illicit weapons. See David E. Sanger, *Bush Backs Away From His Claims About Iraq Arms*, N.Y. TIMES, Jan. 28, 2004, p. A1.

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military officials.<sup>109</sup> Amanpour admitted that CNN's reporting on Iraqi weapons reflected "disinformation at the highest levels."<sup>110</sup> In addition, American reporters uncritically accepted the Pentagon's account of the rescue of a prisoner of war, Army private Jessica Lynch, which became one of the most prominent media events in the war. Later reports by the BBC suggested the Army had exaggerated the episode deliberately to fabricate a heroic myth.<sup>111</sup>

The present antiterrorism campaign has generated numerous other instances of compromised news reporting. In one notorious episode during the Iraq war, President Bush let slip in a press conference exchange with CNN correspondent Jon King that the White House had prescreened scripted questions.<sup>112</sup> This embarrassing episode, which produced "a ripple of nervous laughter" among the assembled reporters, was conspicuous by its absence from the national media's accounts of the press conference.<sup>113</sup> After the September 11 attacks, the CNN Airport Network delayed or censored reports about aviation safety "that might cause anxiety or concern."<sup>114</sup> The network assiduously shielded air travelers from information many of them likely considered of the utmost relevance, going so far as to cut off in mid-broadcast one report about a deranged passenger's antics aboard a Chicago-bound jetliner.<sup>115</sup> Around the same time, conservative commentator John Podhoretz fumed that the media ignored a graphic Associated Press report in which he described a virulent anti-American celebration at a Palestinian university, which included desecration of an American flag.<sup>116</sup> Months after the attacks, a *New York Daily News* reporter revealed that his editors, apparently at government urging, had refused to publish information he uncovered about the extent of the health risks posed by the twin towers'

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<sup>109</sup> See Russ Baker, 'Scoops' and Truth at the Times, NATION, June 23, 2003, p. 18.

<sup>110</sup> Johnson, *supra* note 107 (quoting Amanpour).

<sup>111</sup> See Edward Wasserman, *Jessica Lynch's story and the media jungle*, PHILA INQUIRER, July 3, 2003, p. A19.

<sup>112</sup> A verbatim account of this March 27, 2003 exchange appears in Matt Taibbi, *Cleaning the Pool: The White House Press Corps Politely Grabs Its Ankles*, N.Y. PRESS, April 1, 2003, <http://www.nypress.com/16/11/news&columns/cage.cfm> (visited Oct. 15, 2003).

<sup>113</sup> *Id.*

<sup>114</sup> Mark Maremont, *CNN Airport Network Censors Reports That Could Be Disturbing to Passengers*, WALL STREET JOURNAL, Oct. 10, 2001, p. B8 (quoting CNN spokeswoman Edna Johnson).

<sup>115</sup> *See id.*

<sup>116</sup> John Podhoretz, *Now P.C. Means Censorship*, N.Y. POST, Sep. 26, 2001, p. 39. Podhoretz argued that "because the United States and news organizations are coming down hard on bin laden, the Taliban and other extremist Muslims, editors in these organizations feel it would be overkill to make a big deal out of this dangerous display." *Id.*

destruction.<sup>117</sup> **The Sinclair Broadcast Group, the nation’s largest owner of television stations, refused to air on its eight ABC affiliates a broadcast of ABC’s *Nightline* program dedicated to reading the names of Americans killed in the Iraq war, because Sinclair asserted that the program sought to convey an antiwar message.**<sup>118</sup> While some news outlets were acceding to government constraints and suppressing uncomfortable facts, others compromised their objective distance from government policy with conspicuous displays of patriotic fervor.<sup>119</sup>

News media misinformation and self-censorship has left the people of the United States with lesser grounds for assessing the merits of critical policy decisions about war and terrorism than a truly independent press would provide. Although the government played a leading role in constraining reporting about the bin Laden tapes and about some aspects of the Iraq war, media corporations bear ultimate responsibility for the constraints. Had news organizations held out for greater freedom to report information openly, they would have either prevailed or forced the government to fight legal battles to mandate limits on reporting. Instead, by betraying their duty to gather and report information impartially and vigorously, the news organizations let the government have its cake and eat it too: the government got the silence it wanted without having to risk constitutional liability.

## 2. Exclusions of Political Speakers from Privately Owned Public Spaces.

Private property is often essential for political debate because so much public interaction takes place in privately owned space, from shopping malls to the Internet. No one advocates wholesale appropriation of private property for the sake of public discourse, but expressive activity is a natural and appropriate by-product of the general uses to which certain property owners – such as shopping mall owners, media corporations that depend on advertising revenues, and Internet service providers – choose for self-interested reasons to dedicate their property. During the campaign against international terrorism, numerous property owners of this sort have clamped down on political debate, barring critics of government policies from channels of expression opened by their own

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<sup>117</sup> See JUAN GONZALEZ, *FALLOUT: THE ENVIRONMENTAL CONSEQUENCES OF THE WORLD TRADE CENTER COLLAPSE* 16-20 (2002).

<sup>118</sup> See Lisa de Moraes, *Stations to Boycott “Nightline’s” List of the Fallen*, *Wash. Post*, April 30, 2004, p. C7.

<sup>119</sup> See Ed Bark, *Media’s Allegiance Debated*, *DALLAS MORNING NEWS*, Sept. 25, 2001, p. 25A (asking, shortly after terrorist attacks: “[W]hen 24-hour cable news networks incorporate the Stars and Stripes into on-air logos, are they in any way compromising their journalistic integrity?”); James Poniewozik, *Whose Flag Is Bigger?*, *TIME*, April 14, 2003, p. 71 (criticizing, during Iraq war, “[media] decision makers who should be providing context and balance rather than festooning their screens with bunting”).

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invitations for the public to use their property.

The most emblematic incidents involved expulsion of lone, peaceful protesters from spaces frequented by the public. Stephen Downs' arrest at the Crossgates Mall<sup>120</sup> followed an incident a few months earlier in which the same mall had called the police to expel several local peace activists who had taped antiwar messages to their clothing and entered the mall.<sup>121</sup> Around the same time, a New York City K-Mart store had shopper Amy Hamilton-Thibert arrested for trespassing. Hamilton-Thibert expressed herself somewhat more flamboyantly than Downs had: she wore an Easter bunny costume and handed out plastic eggs to protest K-Mart's sale of military themed Easter baskets.<sup>122</sup> Similar, farther-reaching incidents involved intangible private space. In the broadcast arena, television networks and channels including CNN and CBS refused to sell advertising time to various advocacy groups who sought to air their views on Middle East controversies, including the invasion of Iraq, and wartime economic policies.<sup>123</sup> The broadcasters claimed that refusing "controversial" advertisements protected "the integrity of . . . news department[s], *the public discourse* and local sensibilities around the country,"<sup>124</sup> but they offered no explanation of how stifling political debate was supposed to advance public discourse.

In cyberspace, several Internet service providers (ISPs) suspended or dropped content providers for posting controversial information about terrorism or Iraq. After the September 11 attacks, ISP Hypervine shut down an entire content network, Cosmic Entertainment, until Cosmic removed IRA Radio, Al Lewis Live, and Our Americas, programs that had all broadcast interviews with alleged terrorists.<sup>125</sup> In addition, portal sites such as America Online and Yahoo reportedly "severely censored or pulled the plug entirely on certain message boards that had attracted anti-

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<sup>120</sup> See *supra* note 2 and accompanying text.

<sup>121</sup> See Barr, *supra* note 2, at 1, 18.

<sup>122</sup> See Erik Baard, *Bunny Busters*, VILLAGEVOICE.COM (March 11, 2003), <http://www.villagevoice.com/issues/0311/baard2.php> (visited Oct. 15, 2003).

<sup>123</sup> See *A Super Bowl Deficit*, N.Y. TIMES, Jan. 31, 2004, p. A16 (describing refusal by CBS to sell MoveOn.org time during 2004 Super Bowl for advertisement critical of President); Nat Ives, *MTV Refuses Antiwar Commercial*, N.Y. TIMES, March 13, 2003, p. C4 (describing refusal by MTV to sell time for advertisements opposing invasion of Iraq).

<sup>124</sup> Ives, *supra* note 122, at C4 (paraphrasing statement of CBS executive vice president Martin Franks) (emphasis added).

<sup>125</sup> See Janet Kornblum, "*Radical*" radio shows forced from the Net, USAToday.com, Oct. 16, 2001 (<http://www.usatoday.com/tech/news/2001/10/16/ebrief.htm>) (visited June 6, 2003). Hypervine's CEO, Travis Towle, claimed he acted in response to a call from someone identifying himself as a federal agent, who said the government could seize the company's assets for presenting pro-terrorist materials. The government refused comment. See *id.*

American and anti-Islam postings.”<sup>126</sup> During the Iraq War, Massachusetts-based ISP Akamai Technologies cancelled its contract to host Arabic-language news service Al-Jazeera.<sup>127</sup> Florida-based ISP Vortech temporarily removed a left-wing news site, YellowTimes.org, because the site had posted images of U.S. prisoners captured in the Iraq war.<sup>128</sup> Vortech reportedly condemned the pictures as “disrespectful, tacky, and disgusting”<sup>129</sup> and claimed that their display violated a terms-of-service agreement signed by YellowTimes, although YellowTimes reported that Vortech had altered the terms-of-service agreement to fit the incident.<sup>130</sup>

Numerous entertainment corporations and institutions refused to display or publish art that questioned government policies in the wake of September 11. Censorship of popular music was especially widespread. Just after the terrorist attacks, officials of the Clear Channel radio empire circulated a “suggested” list of 150 songs to be barred from airplay.<sup>131</sup> The list was both comically random – including, for example, the Bangles’ “Walk Like an Egyptian” and the Beatles’ “Ob-La-Di, Ob-La-Da” – and ominously ideological: the lone musical group singled out for a total ban were Rage Against the Machine, the most aggressively left-wing rock band in recent memory.<sup>132</sup> Major music retailers refused to carry an album by rapper Paris entitled *Sonic Jihad*, whose cover depicted a jet about to slam into the White House.<sup>133</sup> Country singer Toby Keith even faced censorship for expression deemed overly patriotic when ABC dropped his performance of the revenge anthem “Courtesy of the Red, White and Blue” from its 2002 July 4<sup>th</sup> telecast.<sup>134</sup>

Elsewhere in the entertainment world, Hollywood studios delayed or cancelled numerous films scheduled for late 2001 releases – with one,

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<sup>126</sup> *Terrorism Rears Its Anti-U.S. Message on Net*, MILW. JOURNAL-SENTINEL, Sep. 25, 2001, p. M2 (reprinted from HOLLYWOOD REPORTER).

<sup>127</sup> See Sandeep Junnarkar, *Akamai ends Al-Jazeera server support*, CNET News.com, April 4, 2003 (<http://news.com.com/1200-1035-995546.html>) (visited April 7, 2003).

<sup>128</sup> See Bernhard Warner, *Censorship debate as POW pictures pulled* (Reuters), March 25, 2003 (<http://uk.news.yahoo.com/030325/80/dw9a3.html>) (visited June 6, 2003).

<sup>129</sup> *Id.* (quoting Vortech email to YellowTimes editor Erich Marquardt).

<sup>130</sup> See Firas al-Atraqchi, *War pictures cause Yellowtimes.org to be shut down, again*, YellowTimes.org, March 24, 2003 (<http://www.unknownnews.net/yellowtimes032403.html>) (visited June 6, 2003).

<sup>131</sup> See Clea Simon, *Attacks Prompt List of “Banned” Songs*, BOS. GLOBE, Sep. 20, 2001, p. D3.

<sup>132</sup> See *id.* (reprinting Clear Channel list).

<sup>133</sup> See Neil Strauss, *Furor Over Rapper’s Cover Art Statement*, N.Y. TIMES, April 3, 2003, p. E3.

<sup>134</sup> See *Singer Says ABC’s Jennings Gave Him the Boot*, CNN.com, June 13, 2002 ([http://www.cnn.com/2002/SHWBIZ/Music/06/13/toby\\_keith.abc/index.html](http://www.cnn.com/2002/SHWBIZ/Music/06/13/toby_keith.abc/index.html)) (visited Aug. 5, 2002).

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Phillip Noyce's adaptation of Graham Greene's novel *The Quiet American*, shelved by Miramax for more than a year because it criticized expansionist U.S. foreign policy.<sup>135</sup> The Baltimore Museum of Art removed a painting that prominently featured the word "terrorist" after patrons reportedly called the work "disturbing."<sup>136</sup> The Boston Symphony Orchestra cancelled a previously scheduled performance of excerpts from John Adams' opera *The Death of Klinghoffer*, citing similar "sensitivity" concerns.<sup>137</sup> HarperCollins nearly cancelled publication of Michael Moore's *Stupid White Men*, which went on to become a bestseller, because the book criticized President Bush; the publisher relented only after an email campaign by librarians.<sup>138</sup> **Moore faced corporate censure again in 2004, when Walt Disney's Miramax division refused to distribute his documentary film *Fahrenheit 911*, which criticized President Bush's actions around the 2001 attacks.**<sup>139</sup> Cartoonists Aaron McGruder and Ted Rall saw newspapers drop their strips for criticizing, respectively, President Bush and families of the terror attacks' victims.<sup>140</sup> All of these artistic creations and performances, in their varied ways, encouraged listeners and viewers to confront perspectives or acknowledge emotions that many would have found offensive or unpleasant.<sup>141</sup> Their censorship served to stifle the insights such confrontations often bring.

3. Reprisals Against Political Expression.

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<sup>135</sup> See Anne Thompson, *Films With War Themes Are Victims of Bad Timing*, N.Y. TIMES, Oct. 17, 2002, p. E1. Another Miramax film, Gregor Johnson's *Buffalo Soldiers*, screened at the Toronto Film Festival in September 2001 but had its U.S. theatrical release canceled because of its negative portrayal of U.S. soldiers. See *id.*

<sup>136</sup> Michael Scarella, *BMA Pulls Art Bearing Word "Terrorist,"* BALT. SUN, Sep. 17, 2001, p. 3B.

<sup>137</sup> See Mark Swed, "Klinghoffer": Too Hot to Handle?, L.A. TIMES, Nov. 20, 2001, sec. 6 at 1.

<sup>138</sup> See Eric Demby, *Angry White Men*, VILLAGE VOICE, Aug. 21-27, 2002 (<http://www.villagevoice.com/issues/0234/demby.php>) (visited June 6, 2003)

<sup>139</sup> See **Jim Rutenberg & Laura M. Holson, *Disney Takes Heat on Blocking Bush Film*, N.Y. TIMES, May 6, 2004, p. \_\_\_\_.**

<sup>140</sup> See Stephen Lemons, *Aaron McGruder, Creator of "The Boondocks,"* Salon.com, Dec. 7, 2001

(<http://archive.salon.com/people/feature/2001/12/07/mcgruder/print.html>) (visited June 6, 2003) (discussing major newspapers' refusal to run *Boondocks* strips critical of President Bush); Lisa O'Carroll, *New York Times Cartoon Mocked September 11 Widows*, GUARDIAN, March 7, 2002, <http://media.guardian.co.uk/attack/story/0,1301,663312,00.html> (visited Oct. 15, 2003) (discussing New York Times' removal of Rall cartoon from Web site).

<sup>141</sup> See MEIKLEJOHN, *supra* note 8, at 117 (contending that consideration of public issues, protected by First Amendment, includes consideration of "works of art of many kinds" and of a "vast array of idea of fact, of science and fiction, of poetry and prose"); Sunstein, *Free Speech*, *supra* note 65, at 304 (noting political character of much art and literature).

First Amendment law has always reflected a central concern with the chilling of speech – the danger that threats or reprisals against unpopular speakers will dissuade others from speaking their minds and challenging the status quo. The anticommunist purges that followed the two World Wars are only the most prominent examples of how nongovernmental reprisals and intimidation can chill political expression.<sup>142</sup> The present campaign against international terrorism has brought many new examples of this phenomenon.

Immediately after the September 11 attacks, Columnists at the Grants Pass, Oregon *Daily Courier* and the Texas City, Texas *Sun* independently wrote columns that branded the President irresponsible and cowardly for failing to return to Washington immediately when the attacks began.<sup>143</sup> Dan Guthrie, a ten-year veteran of the *Daily Courier*, entitled his column “When the going gets tough, the tender turn tail,”<sup>144</sup> while Tom Gutting of the *Sun* characterized the President as “flying around the country like a scared child.”<sup>145</sup> Each column apparently provoked strongly negative reader reactions, and the papers subsequently fired the columnists. While neither paper admitted to a direct connection between column and firing, each sent strong indications that the column played a role, and neither appears to have cited any other ground for the firing.<sup>146</sup> At least two California radio stations dropped left-wing commentators for criticizing government policies on terrorism, with one station owner explaining that “it is not in the public interest to broadcast what we consider to be divisive and destructive material at a time when it is critical to support our elected leaders.”<sup>147</sup> Such reprisals in the wake of September 11 were not limited to liberal critics. No less a conservative bastion than the *National Review* fired columnist Ann Coulter after she declared on the magazine’s Web site that the United States “should invade [Islamic] countries, kill their leaders, and convert them to Christianity.”<sup>148</sup>

<sup>142</sup> See *supra* notes 18-39 and accompanying text.

<sup>143</sup> When the terrorists struck on the morning of September 11, President Bush initially flew from Florida to air force bases in Louisiana and Nebraska, returning to Washington about 7:00 p.m. Dan Balz, *Bush Confronts a Nightmare Scenario*, WASH. POST, Sep. 12, 2001, p. A2.

<sup>144</sup> Joel Davis, *Two Casualties of Terror War?*, EDITOR & PUBLISHER, Oct. 1, 2001, p. 4. Guthrie wrote in his column that the President “skedaddled” and “hid out in a Nebraska hole.” Simon Houpt, *The War on Dissent*, TORONTO GLOBE & MAIL, Oct. 6, 2001, p. R1 (quoting Guthrie column).

<sup>145</sup> Davis, *supra* note 142, at 4.

<sup>146</sup> See *id.* *Sun* Publisher Les Daughtry, Jr. personally wrote a page 1 apology for Gutting’s column, along with an op-ed piece entitled “Bush’s leadership has been superb.” *Id.*

<sup>147</sup> Will Evans, *Another Dissenting Voice Gone*, S.F. BAY GUARDIAN, Oct. 24, 2001, <http://www.sfbg.com/News/36/04/04ldw.html> (visited Oct. 15, 2003) (quoting Michael Zwerling, owner of Santa Cruz station KSCO/KOMY-AM, on dropping talk show host Peter Werbe’s nationally syndicated program).

<sup>148</sup> Houpt, *supra* note 142, at R1 (quoting Coulter column).

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A higher-profile media firing occurred during the Iraq War. Peter Arnett, a top NBC news war correspondent, granted an interview to his counterparts at Iraq's government-controlled television network in which he criticized the United States-led coalition's conduct of the war. Among other things, Arnett opined that the coalition's initial strategy "failed because of Iraqi resistance"<sup>149</sup> and that his reporting on Iraqi civilian casualties helped those who oppose the war.<sup>150</sup> NBC initially defended Arnett's remarks as analysis and "professional courtesy."<sup>151</sup> When the interview prompted a storm of condemnation, however, NBC quickly shifted gears and fired its star correspondent. The network emphasized Arnett's airing "his personal observations and opinions" to, in essence, an engine of enemy propaganda.<sup>152</sup> It failed to acknowledge the irony that Arnett apparently felt the need to voice his sour assessment of the war to the state network of a totalitarian regime because his employer would not air such sentiments. The war brought reprisals against reporters from more than just their own employers. In March 2003, the Arabic-language television network Al Jazeera broadcast images of dead and imprisoned American soldiers in Iraq. In response, both the New York Stock Exchange and the Nasdaq barred Al Jazeera's financial correspondents from the exchanges' trading floors.<sup>153</sup> The N.Y.S.E. told Al Jazeera's correspondent that an excess of reporters on the floor necessitated his expulsion, but an exchange official stated that Al Jazeera's reporting from Iraq disqualified it from the ranks of "responsible news organizations."<sup>154</sup> Whether motivated by substantive distaste for dissent or more pragmatic fears about losing business, all of these reprisals silenced reporters who challenged prevailing opinion and, over a wider horizon, gave other reporters a strong incentive to stifle reports or commentary critical of the government.

Prominent entertainers as well have faced nongovernmental reprisals for questioning government policies on war and terrorism. After the September 11 attacks, numerous television stations and advertisers temporarily boycotted the program "Politically Incorrect" after its host, Bill Maher, stated on the program that the government's "lobbing cruise missiles from 2,000 miles away" was "cowardly" while "[s]taying in the

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<sup>149</sup> Jim Rutenberg, *NBC News Fires Arnett Over Iraqi TV Interview*, N.Y. TIMES, March 31, 2003 (late ed.), p. B2 (quoting Arnett interview).

<sup>150</sup> See Poniewozik, *supra* note 118, at 71.

<sup>151</sup> Rutenberg, *supra* note 147, at B2 (quoting initial NBC statement).

<sup>152</sup> *Id.* (quoting NBC spokeswoman Allison Gollust).

<sup>153</sup> See Junnarkar, *supra* note 126; Joyce Purnick, *Censorship Is Patriotism to Big Board*, N.Y. TIMES, Mar. 27, 2003, p. D1.

<sup>154</sup> Purnick, *supra* note 151, at D1 (quoting N.Y.S.E. executive vice president for communications Robert Zito).

airplane when it hits the building” was not.<sup>155</sup> During the Iraq War, the National Baseball Hall of Fame cancelled a scheduled tribute to the movie *Bull Durham* because one of the invited participants, actor Tim Robbins, had criticized the government’s Iraq policy.<sup>156</sup> Hall of Fame President Dale Petroskey, in a letter to Robbins, explained: “we believe your very public criticism of President Bush at this important – and sensitive – time in our nation’s history helps undermine the U.S. position, which ultimately could put our troops in even more danger.”<sup>157</sup> Meanwhile, numerous radio stations – many owned by Clear Channel – banned the Dixie Chicks’ music from the airwaves after the group’s lead singer, Natalie Maines, sharply criticized President Bush during a London concert.<sup>158</sup> At least one station suspended disc jockeys for daring to play songs by the most popular group in country music.<sup>159</sup> Retaliation against dissent in the entertainment world, like the direct suppression of politically expressive art discussed above,<sup>160</sup> impedes democratic discourse by muffling ideas that help shape people’s political attitudes.

Nongovernmental suppression of speech has impeded political debate during the present campaign against international terrorism, just as it impeded debate during earlier periods of war and national emergency. True, public discourse itself ameliorates some speech-threatening nongovernmental actions: the Dixie Chicks became a civil libertarian *cause celebre*, and the news media have grown more critical of the administration’s Iraq policy as the occupation has dragged on. But many important voices and ideas have disappeared without fanfare, and in any event, resilience in the face of censorship and misinformation does not obviate them as threats to democracy. Allowing nongovernmental authorities to undermine political debate – especially at the moments when the stakes of policymaking are highest – increases the danger that our government will make unwise, democratically uninformed decisions. That danger compels the question why federal courts have failed to defend our democratic system by curbing nongovernmental censorship. The next part of this article examines the doctrinal reason for that failure

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<sup>155</sup> Houpt, *supra* note 142, at R1 (quoting Maher). These actions may have taken their impetus from criticism by the Bush administration. See *supra* note 5 and accompanying text.

<sup>156</sup> See Ira Berkow, *The Hall of Fame Will Tolerate No Dissent*, N.Y. TIMES, April 11, 2003, p. S4.

<sup>157</sup> *Id.* (quoting Petroskey letter). Petroskey subsequently acknowledged that he should have handled the situation differently, but he maintained the appropriateness of barring dissenting political statements from the Hall of Fame, and he made no effort to restore the invitation to Robbins. See Ira Berkow, *Hall of Fame President Acknowledges Mistake*, N.Y. TIMES, April 12, 2003, p. S3.

<sup>158</sup> See Alisa Solomon, *The Big Chill*, NATION, June 2, 2003, p. 17 (describing airplay ban on Clear Channel stations).

<sup>159</sup> See Steve Carney & Geoff Boucher, *Big Radio Chain Is Whistling Dixie Again*, L.A. TIMES, May 7, 2003, sec. 5 at 2 (reporting suspension of Disc jockeys Dave Moore and Jeff Singer by country station KKCS in Colorado Springs, Colo.).

<sup>160</sup> See *supra* notes 130-39 and accompanying text.

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– the public-private distinction in constitutional law – and proposes a doctrinal shift that would allow courts to enjoin nongovernmental suppression of wartime political debate.

II. FROM PRIVATE SPHERE TO PERSONAL INTEGRITY

The First Amendment is presumptively irrelevant for the numerous recent cases, catalogued above, in which private actors during the current national crisis have suppressed political dissent. Mainstream constitutional theory posits a strict distinction between private actors, who are shielded from constitutional liability and enjoy constitutional protections, and governmental actors, who are subject to constitutional constraints against interference with private actors' rights.<sup>161</sup> Most commentators agree that this rigid public-private distinction cannot form a coherent basis for constitutional adjudication. Nonetheless, the distinction persists as a central element in the Supreme Court's constitutional jurisprudence, leaving expressive freedom unprotected from private suppression.<sup>162</sup> This part considers why, and to what extent, the public-private distinction should matter in constitutional law. The first section summarizes the Court's doctrinal embodiment of the public-private distinction – the state action doctrine – and the normative arguments offered in defense of the distinction. The second section sets forth the principal critiques of the public-private distinction. The third section develops a methodology for incorporating the distinction into constitutional jurisprudence. My conclusion is that courts, in adjudicating constitutional rights claims, should presumptively insulate from constitutional claims only the personal actions of individuals and should presumptively extend constitutional rights only to individuals. This approach would honor both our substantive understandings of constitutional rights and our strongest instincts about the value of personal integrity. The

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<sup>161</sup> My focus in the discussion that follows on the public-private distinction's function of shielding private actors from constitutional liability should not obscure its equally important function of constraining government action. Under the public rights theory of expressive freedom, judicious governmental regulation can play a critical role in advancing First Amendment values. See Magarian, *supra* note 9, at 1976-78. Rigid categorical restrictions on "public" action can indiscriminately restrict regulation. See Maimon Schwarzschild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, 1988 SUP. CT. REV. 129, 159-60 (noting potential of flexible state action doctrine for establishing constitutionality of affirmative action programs); David A. Strauss, *State Action After the Civil Rights Era*, 10 CONST. COMM. 409 (1993) (advocating permissive functional analysis of government regulations under state action doctrine) (hereinafter Strauss, *State Action*); see also Sunstein, *Free Speech*, *supra* note 65, at 268 (suggesting that collapsing public-private distinction would require courts mechanically to enjoin all institutional behavior in which government may not engage under present law).

<sup>162</sup> See, e.g., *Cyber Promotions, Inc. v. America Online*, 948 F. Supp. 436 (E.D. Pa. 1996) (rejecting on state action grounds claim that Internet service provider's restriction on unsolicited email violated First Amendment).

final part of this article will work through this methodology in the First Amendment context to address nongovernmental suppression of wartime dissent.

### A. *The Public-Private Distinction in Action*

#### 1. *The State Action Doctrine*

The key provisions of the Constitution that deal with individual rights identify the government as the object of their prohibitions. The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>163</sup> The Fourteenth Amendment, the most significant guarantor of rights against the states, specifies that “no state shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>164</sup> These textual elements have led the Supreme Court to conclude that no constitutional cause of action lies against a nongovernmental defendant. In the classic articulation of this rule, *The Civil Rights Cases*,<sup>165</sup> the Court held that the Fourteenth Amendment authorized Congress to regulate only state conduct, not private conduct. The public-private distinction reached its legal apex in the early 20<sup>th</sup> Century, when the Supreme Court in such cases as *Lochner v. New York*<sup>166</sup> and *Coppage v. Kansas*<sup>167</sup> designated contract and property relationships as fundamental private freedoms, shielded by the Due Process Clause from states’ regulatory authority. After the Court abandoned the economic substantive due process doctrine,<sup>168</sup> the constitutional role of the public-private distinction shifted to the question when nominally private entities “may be appropriately characterized as ‘state actors’” by federal courts.<sup>169</sup>

Under the modern state action doctrine, the Court inquires “whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority.”<sup>170</sup> Occasionally the

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<sup>163</sup> U.S. CONST. Amend. I.

<sup>164</sup> U.S. CONST. Amend. XIV, sec. 1.

<sup>165</sup> 109 U.S. 3 (1883).

<sup>166</sup> 198 U.S. 45 (1905) (striking down, as violation of due process right to contract, New York statute that set maximum hours for bakery employees).

<sup>167</sup> 236 U.S. 1 (1915) (striking down, as violation of due process right to contract, Kansas statute that banned employers from prohibiting union membership).

<sup>168</sup> See, e.g., *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding New York regulation that set maximum retail price for milk against due process challenge and disavowing aggressive constitutional review of property and contract regulations).

<sup>169</sup> *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

<sup>170</sup> *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

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Court has approached this analysis by inquiring whether a nongovernmental defendant performs the sorts of functions traditionally associated with government.<sup>171</sup> More commonly, the Court has inquired whether the nongovernmental defendant has a sufficiently close nexus with the government – through a relationship such as contract, authorization, or regulation – that the Court can attribute its conduct to the government.<sup>172</sup> Under the state action doctrine, courts may enjoin only the state. If a court finds nongovernmental conduct entwined with the state, it either deems the nongovernmental conduct state action<sup>173</sup> or directs a remedy against the government entity that has facilitated the nongovernmental conduct.<sup>174</sup> The Court has resolved the state action issue on a case-by-case basis: “Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance.”<sup>175</sup>

The state action doctrine has led the Court to a bewildering series of unpredictable results that, at a minimum, bear out its characterization of the doctrine as heavily fact-dependent. A restaurant that leases space in a government building engages in state action when it commits racial discrimination,<sup>176</sup> but a club that secures a government license to sell liquor may discriminate with impunity.<sup>177</sup> Judicial enforcement of a racially restrictive real estate covenant is state action,<sup>178</sup> but judicial enforcement of a racially discriminatory condition in a will is not.<sup>179</sup> A landlord’s racial discrimination in renting, authorized by the state Constitution’s repeal of local antidiscrimination laws, is state action,<sup>180</sup> but a warehouseman’s sale of bailed goods to satisfy a lien, authorized by the state’s adoption of the Uniform Commercial Code, is not.<sup>181</sup> A creditor that uses state courts to attach a debtor’s property in an *ex parte*

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<sup>171</sup> See, e.g., *Marsh v. Alabama*, 326 U.S. 501 (1946) (enjoining limitation on expressive freedom by “company town”). This “public function” approach may boil down to an implicit balancing of rights claimants’ interests against property holders’ interests. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 873 (14<sup>th</sup> ed. 2001) (suggesting balancing interpretation of *Marsh*).

<sup>172</sup> See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (enjoining racial discrimination by restaurant located in state-owned building).

<sup>173</sup> See, e.g., *Burton*, 365 U.S. at 724-25 (holding that, when nonstate actor and state are interdependent, nonstate actor’s conduct may be attributed to state).

<sup>174</sup> See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 19-20 (1948) (barring state court from enforcing racially restrictive real estate covenant).

<sup>175</sup> *Burton*, 365 U.S. at 722.

<sup>176</sup> See *Burton*, 365 U.S. 715.

<sup>177</sup> See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

<sup>178</sup> See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>179</sup> See *Evans v. Abney*, 396 U.S. 435 (1970).

<sup>180</sup> See *Reitman v. Mulkey*, 387 U.S. 369 (1967).

<sup>181</sup> See *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978).

proceeding is a state actor,<sup>182</sup> but a utility that uses its state-conferred monopolistic power to cut off a customer's electric service without notice or a hearing is not.<sup>183</sup> A statewide interscholastic athletic association that includes both public and private schools is a state actor,<sup>184</sup> but a nationwide interscholastic athletic association that includes both public and private schools is not.<sup>185</sup> Everyone agrees that public schools by definition are state actors, and yet a nominally private school that receives nearly all its funding from the state and must adhere to extensive state regulations is not.<sup>186</sup>

In the First Amendment context, the Court over the past six decades has moved from an expansive view of state action to an increasing reluctance to impose constitutional obligations on nongovernmental actors. In *Marsh v. Alabama*,<sup>187</sup> the Court enjoined a company from proscribing expressive activity in a "company town." The majority found the company town functionally indistinguishable from a traditional town and accordingly held it to the same First Amendment standards enforced against governments. In *New York Times Co. v. Sullivan*,<sup>188</sup> the Court enjoined a defamation action that threatened to chill the expression of civil rights advocates. Although the action involved only private parties, the Court held that judicial enforcement of a judgment for the plaintiff would have amounted to redressable state action. More recent cases, however, have retreated from the implications of *Marsh* and *Sullivan*. In a sequence of cases from the late 1960s and early 1970s, the Court ultimately refused to extend First Amendment obligations to privately owned shopping malls.<sup>189</sup> During the same period, the Court rejected contentions that newspapers and television networks had sufficient public ties to make them properly subject to state regulation.<sup>190</sup>

## 2. Normative Defenses

<sup>182</sup> See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

<sup>183</sup> See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

<sup>184</sup> See *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001).

<sup>185</sup> See *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

<sup>186</sup> See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

<sup>187</sup> 326 U.S. 501 (1946).

<sup>188</sup> 376 U.S. 254 (1964).

<sup>189</sup> See *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (holding that shopping center could not bar union organizers from picketing); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (rejecting antiwar protestors' First Amendment challenge to exclusion from shopping mall); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (overruling *Logan Valley*). For further discussion of these cases, see *infra* notes 344-52 and accompanying text.

<sup>190</sup> See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down state statute that required newspapers to grant right of reply to political candidates criticized in print); *CBS, Inc. v. Democratic National Comm.*, 412 U.S. 94, 119 (1973) (rejecting argument that broadcast licensee was state actor) (plurality opinion). For further discussion of *CBS v. DNC*, see *infra* notes 353-60 and accompanying text.

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Beyond its textual bases, the public-private distinction implicates normative concerns. Some of those concerns are structural, positing that the federal government or the judicial branch is the wrong entity to place constraints on private behavior. More significant is the argument that a sphere of private behavior, shielded from constitutional norms, is a necessary element of constitutional liberty. That argument, which posits private autonomy as an irreducible minimum of rights, demands the attention of critics, discussed in the next section, who fault the public-private distinction for insulating violations of rights.

In the *Civil Rights Cases*, the Court justified the state action doctrine on grounds of federalism, striking down a federal ban on racial discrimination in public accommodations because the ban encroached on states' exclusive prerogative to regulate various sorts of private behavior.<sup>191</sup> The Court's willingness since that decision to expand the boundaries of state action has tended to vary inversely with its fervor for state prerogatives.<sup>192</sup> Commentators occasionally reprise the argument that courts should enforce the public private distinction in order to preserve states' regulatory authority.<sup>193</sup> Several flaws undermine this position. First, the premise that the Constitution requires broad preservation of state prerogatives lacks force.<sup>194</sup> Second, even if the

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<sup>191</sup> See *Civil Rights Cases*, 109 U.S. 3, 11 (1882). The Court's decision, however, presumed not only that states had authority to protect personal freedom but that they actually did protect freedom. See *id.* at 17 (holding that Fourteenth Amendment "does not invest Congress with power to legislate upon subjects which are within the domain of State legislation"). Thus, the decision does not stand for the proposition that federal courts must give states *carte blanche* to permit violations of rights.

<sup>192</sup> For a historical analysis of this relationship, see Ronna Greff Schneider, *State Action – Making Sense Out of Chaos – an Historical Approach*, 37 U. FLA. L. REV. 737 (1985).

<sup>193</sup> See William M. Burke & David J. Reber, *State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment*, 46 SO. CAL. L. REV. 1003, 1015 (1973) (arguing that Fourteenth Amendment is designed to constrain states "without unduly interfering with the state's primary responsibility to develop the basic positive law that governs individuals"); Jesse H. Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, 1979 WASH. U. L.Q. 757, 762 (arguing that state action doctrine safeguards "the fourteenth amendment's restriction on the authority of the national government vis-à-vis the states regarding the regulation of the myriad relationships that occur between one individual and another"); Kevin Cole, *Federal and State "State Action": The Uncritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 358-62 (1990) (articulating federalism justification for state action limitation on federal courts); Lino A. Graglia, *State Action: Constitutional Phoenix*, 67 WASH. U. L.Q. 777, 781 (1989) (arguing that state action doctrine "serves the cause of federalism by limiting control by Congress . . . and the federal courts over matters otherwise left to the states"); cf. William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3, 21 (1961) ("The local prerogative to determine which interests are worthy of legal protection should be recognized through application of the state action requirement, but only when the local determination is made for purposes which are constitutionally legitimate.").

<sup>194</sup> See, e.g., Gregory P. Magarian, *Toward Political Safeguards of Self-Determination*,

premise had force, serious doubt would remain whether federal judges should act to preserve state prerogatives.<sup>195</sup> Finally, even if judicial preservation of state prerogatives were appropriate, deeming various defendants immune from federal constitutional or statutory authority would be an imprecise, indirect means to that end.<sup>196</sup> The Court could simply articulate federalism-based limits on substantive federal authority, as in recent years it has proved more than willing to do.<sup>197</sup>

Other commentators have defended the public-private distinction in constitutional law based on the separation of powers, arguing that courts should not or cannot make the value judgments required to adjudicate rights controversies.<sup>198</sup> Michael Seidman makes a persuasive historical case that New Deal liberals developed the contemporary state action doctrine as a check on judicial interference with the emerging regulatory state.<sup>199</sup> He also explains, however, that the state action doctrine is an incoherent device for constraining judges, because the very legal revolution liberals sought to protect from judicial intervention destabilized the distinction between the public and private spheres.<sup>200</sup>

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46 VILL. L. REV. 1219, 1224-36 (2001) (criticizing arguments for broad-based protection of state prerogatives in federal system). The notion that robust state power protects liberty is especially dubious, given states' historically poor record in conflicts over rights. *See id.* at 1229-33.

<sup>195</sup> Several commentators have argued persuasively that various features of our political system serve to protect state prerogatives from federal interference. *See* Jesse H. Choper, *The Scope of National Power Vis-à-vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 552 (1954).

<sup>196</sup> *See, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 N.W.U. L. REV. 503, 542-47 (1985) (hereinafter Chemerinsky, *Rethinking*).

<sup>197</sup> *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (announcing limit on congressional authority to enforce Fourteenth Amendment against states).

<sup>198</sup> *See* Burke & Reber, *supra* note 191, at 1017 (extolling state action doctrine as a means to judicial restraint); Frank I. Goodman, *Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. PA. L. REV. 1331, 1339 (1982) (defending state action doctrine based on "skepticism as to judges' capacity to identify . . . rights in an objective and principled fashion [and] conviction that the choice among competing social and moral values and interests should be made through the political rather than the judicial process"); Graglia, *supra* note 191, at 781 (arguing that state action doctrine "serves the cause of separation of powers by limiting opportunities for judicial policymaking"); Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMM. 329, 340 (1993) (expressing concern about shift of legal authority from "ordinary law" to Constitution, which state action doctrine prevents); William Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 N.W.U.L. REV. 558, 563-67 (1985) (defending state action doctrine on ground that it prevents judges from having to balance competing constitutional interests); Strauss, *State Action*, *supra* note 159, at 416-17 (arguing that legislatures are better equipped than courts to address various contemporary constitutional issues).

<sup>199</sup> *See* Louis M. Seidman, *The State Action Paradox*, 10 CONST. COMM. 379, 398 (1993).

<sup>200</sup> *See id.* at 399. For a discussion of problems with distinguishing the public and private spheres, see *infra* section II.B.1. (describing ontological critique of public-private distinction).

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Moreover, to the extent the separation-of-powers defense rests on a pessimistic assessment of judges' ability to balance the interests at stake in rights disputes, it proves too much. Judges routinely balance important interests, and they must do so under any conception of constitutional adjudication.<sup>201</sup> Moreover, the argument that courts lack either the authority or the capacity to balance rights, like the federalism argument, ultimately depends on the dubious view that courts should constrain their authority indirectly rather than through forthright constitutional or prudential doctrines.<sup>202</sup>

A more forceful defense extols the public-private distinction as a necessary precondition for liberty. The notion of a public-private distinction relates closely to natural rights theories that hold certain spheres of human activity inviolable.<sup>203</sup> Robert Mnookin explains that "[t]he distinction between public and private connects with a central tenet of liberal thought: the insistence that because individuals have rights, there are limits on the power of government vis-à-vis the individual."<sup>204</sup> Maimon Schwarzschild praises the public-private distinction for leaving "private persons and institutions . . . presumptively free to act in accordance with manifold and differing values, lest some authentic values be submerged altogether."<sup>205</sup> Libertarian arguments for the public-private distinction depend on the premise that government has a unique capacity to coerce behavior and impede personal freedom. In Charles Fried's formulation: "The state is the law, and the law is final – even when the law appears in the humble guise of

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<sup>201</sup> See, e.g., Charles Black, *Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 103 (1967) (positing that judges are amply equipped to perform the sorts of analyses required in constitutional cases).

<sup>202</sup> See, e.g., Chemerinsky, *Rethinking*, *supra* note 194, at 547 (criticizing state action doctrine as a means of dividing authority among branches of government). For an argument that faults the public-private distinction precisely because it prevents further examination of social problems through constitutional discourse, see Paul S. Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 COLO. L. REV. 1263, 1289-1305 (2000).

<sup>203</sup> See Paul Brest, *State Action and Liberal Theory*, 130 U. PA. L. REV. 1296, 1300 (1982) (noting "mutually sympathetic" character of state action doctrine and natural rights theory); Morton J. Horowitz, *The History of the Public / Private Distinction*, 130 U. PA. L. REV. 1423, 1423 (1982) (tracing concept of private sphere to development of natural rights theories in 16<sup>th</sup> and 17<sup>th</sup> centuries) (hereinafter Horowitz, *Public-Private*); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1209 (1985) (linking public-private distinction with notion in social contract theory that individuals sacrifice autonomy only on understanding that government will remain neutral as to private relations); *but see* Chemerinsky, *Rethinking*, *supra* note 194, at 527-32 (arguing that state action doctrine is incompatible with natural rights theory, which holds that rights predate the state); Goodman, *supra* note 196, at 1332-34 (advancing process-based argument that natural rights theory requires an activist judiciary while state action doctrine enforces judicial restraint).

<sup>204</sup> Robert H. Mnookin, *The Public-Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429, 1429 (1982).

<sup>205</sup> Schwarzschild, *supra* note 159, at 137.

a municipal ordinance.”<sup>206</sup> Indeed, some defenders of the public-private distinction in constitutional law insist the present state action doctrine constrains too narrow a range of government authority to sustain a meaningful zone of private autonomy.<sup>207</sup>

Defenses of a rigid public-private distinction in the particular context of the First Amendment rely primarily on libertarian arguments. In the most pointed argument for limiting expressive freedom guarantees to governmental actors, Julian Eule and Jonathan Varat emphasize the implicit First Amendment interests of property owners who resist First Amendment constraints,<sup>208</sup> and they extol property owners’ roles as “private speech regulators” who decide independently which free speech norms to follow.<sup>209</sup> Eule and Varat argue that extending First Amendment norms to nongovernmental actors would amount to government-imposed “orthodoxy of the First Amendment itself,”<sup>210</sup> preventing “the development of alternative perspectives and values that might contribute to adjustment of currently prevailing First Amendment standards.”<sup>211</sup> This naked preference for economic markets to determine the nature and extent of expressive freedom is a more straightforward account of the “necessary indeterminacy of public discourse” posited by Robert Post.<sup>212</sup> Post deems the public-private distinction practically necessary, even if descriptively unclear, because eliding the distinction would eviscerate the autonomy essential to maintaining public discourse.<sup>213</sup> Fried echoes the point that courts must preserve nongovernmental prerogatives to censor in order to foster

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<sup>206</sup> Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 236 (1992); see also Schwarzschild, *supra* note 159, at 138 n.41 (stressing that “even the most powerful corporation cannot directly control the armed might of the state”).

<sup>207</sup> See Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 U.C.L.A. L. REV. 1537, 1549 (1998) (arguing that Court’s focus on defining public sphere prevents state action doctrine from creating “coherent zone of private autonomy”); Kay, *supra* note 196, at 351 (arguing that state action doctrine fails to maintain a zone of individual autonomy because it does not limit the reach of federal statutes or state law); see also Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383, 397 (1988) (noting that most behavior state action doctrine restricts courts from enjoining is behavior legislatures have power to restrict).

<sup>208</sup> See Eule & Varat, *supra* note 205, at 1554-61 (discussing, among other cases, *Marsh v. Alabama*, 326 U.S. 501 (1946), and *Hudgens v. NLRB*, 424 U.S. 507 (1976)). For a discussion of state action precedents in the First Amendment area, see *supra* notes 185-88 and accompanying text.

<sup>209</sup> See Eule & Varat, *supra* note 205, at 1605. Eule and Varat’s case for private entities’ prerogatives to set independent free speech norms focuses intently on educational institutions. See, e.g., *id.* at 1606. How strongly they would maintain their argument in the context of noneducational entities, such as business corporations, is unclear.

<sup>210</sup> *Id.* at 1617.

<sup>211</sup> *Id.* at 1618.

<sup>212</sup> Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1117 (1993).

<sup>213</sup> This is a necessarily slim summation of the complex discussion in *id.* at 1125-28.

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independent conceptions of expressive freedom,<sup>214</sup> and he brushes off the dangers of private censorship with the assurance that private law will prevent excesses.<sup>215</sup>

Defenses of the public-private distinction in the First Amendment context tend to posit individual autonomy as the chief value underlying expressive freedom,<sup>216</sup> and they maintain that government generally should allow the economic market to distribute expressive opportunities and to dictate the availability of information.<sup>217</sup> These are hallmarks of the private rights theory of expressive freedom, which treats the First Amendment as a negative protection of expressive autonomy against governmental interference.<sup>218</sup> The public-private distinction is integral to the private rights theory in several ways. The distinction underwrites the private rights theory's individuated notion of expressive freedom as analogous to a

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<sup>214</sup> See Fried, *supra* note 204, at 237 (arguing that private restrictions on speech “issue from the limiting person’s own exercise of liberty” and also “derive from other rights that the limiter might have”).

<sup>215</sup> See *id.* at 234-35.

<sup>216</sup> See Eule & Varat, *supra* note 205, at 1621 (emphasizing “self-development, self-definition, and self-determination values” as “among the most powerful reasons for according the protection of speech such a high priority in the public realm”); Fried, *supra* note 204, at 233 (asserting that “[f]reedom of expression is properly based on autonomy”); Post, *supra* note 210, at 1118-19 (stating that “[t]he enterprise of public discourse . . . rests on the value of autonomy”); see also John H. Garvey, *Private Power and the Constitution*, 10 CONST. COMM. 311, 316 (1993) (“If everything we do and think is state action, the freedom of speech rests on an illusion”); Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 274-77 (1996) (arguing that individual autonomy maintained by public-private distinction is essential to democracy). Even Vincent Blasi, who enlists the public-private distinction in his argument that the First Amendment allows the press to check government misconduct for the overall good of society, contrasts the individualist tilt of his theory with Meiklejohn’s collectivist commitments. See Blasi, *supra* note 93, at 538-41 (defending public-private distinction); *id.* at 562 (criticizing Meiklejohn for “hostil[ity] to many of the most prominent manifestations of individualism”).

<sup>217</sup> See Eule & Varat, *supra* note 205, at 1600 (“Frequently, when the government giveth, it simultaneously taketh away.”); Fried, *supra* note 204, at 251 (maintaining that the only neutral device for distributing expressive resources is “a society in which a significant portion of the resources are [sic] in private hands and beyond the reach of government altogether”); Post, *supra* note 210, at 1118 (arguing that “[t]he state ought not to be empowered to control the agenda of public discourse”); see also Gey, *supra* note 214, at 277-80 (warning against inevitable government excess in speech regulation); Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971, 979-82 (1995) (resisting conflation of economic and expressive marketplaces aimed at justifying regulation). Fried wins the prize for dogmatism on this point by tying advocates of government involvement in the distribution of expressive opportunities to “apologists for Marxism-Leninism.” Fried, *supra* note 204, at 252. In contrast, other defenders of the public-private distinction gingerly acknowledge the propriety of government intervention to advance expressive freedom in narrow areas. See Eule & Varat, *supra* note 205, at 1600 (approving some government regulation of campaign finance and broadcast licensing); Post, *supra* note 210, at 1132-33 (suggesting that some government regulation of campaign finance might be appropriate).

<sup>218</sup> See *supra* notes 46-47 and accompanying text.

property right rather than a social good directed at effective government.<sup>219</sup> The distinction's formalism parallels the theory's denial of any affirmative entitlement to expressive opportunity and its special solicitude for the free speech claims of powerful institutions.<sup>220</sup> Most directly, the distinction's barrier against government interference with private behavior enables the theory's rejection of government regulation to advance expressive freedom.<sup>221</sup>

The libertarian arguments in favor of the public-private distinction provide the most forceful normative claims for the distinction. Personal freedom is the very interest that animates criticism of the state action doctrine, because of the doctrine's frequent effect of invalidating legal claims of constitutional rights.<sup>222</sup> Defeating the libertarian defense requires a critique that demonstrates the public-private distinction's negative effect on rights. Accordingly, the next section turns to the distinction's critics.

### *B. Three Stages of Criticizing the Public-Private Distinction*

Critiques of the public-private distinction as a feature of our legal system have operated in three principal modes. The largest set of critiques, proceeding from insights of legal realism, has exposed the distinction as ontologically incoherent. Another type of critique, typified by observations of the Critical Legal Studies movement, has characterized the distinction as ideologically biased, advancing the political and economic agendas of the socially powerful. Recent critics have sought to accommodate the insights of the realist and critical perspectives to the reality that the public-private distinction continues to exert a powerful hold over the popular and legal imagination. These new critics have sought to reshape the ideological contours of the public-private distinction to satisfy a variety of normative concerns. I analogize the three stages of dealing with the public-private distinction to three stages through which psychologists posit people as moving when coping with grief: denial, anger, and acceptance.<sup>223</sup>

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<sup>219</sup> See Magarian, *supra* note 9, at 1953-54 (discussing private rights theory's individuated model of expressive freedom).

<sup>220</sup> See *id.* at 1954-56 (discussing private rights theory's formal conception of rights).

<sup>221</sup> See *id.* at 1957-58 (discussing private rights theory's distrust of government regulation).

<sup>222</sup> See, e.g., Chemerinsky, *Rethinking*, *supra* note 194, at 507-11.

<sup>223</sup> See generally ELIZABETH KUBLER-ROSS, *ON DEATH AND DYING* (1969). Just as the literal stages of grief are not always as distinct or as universal as some have assumed, the following discussion will show that the critiques of the public-private distinction analogous to those stages are not mutually exclusive and that some of them intermingle in particular arguments. The discussion that follows does not pretend to set forth every significant analysis of the public-private distinction, but it describes and assesses representative accounts of the major critiques.

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*1. Denial: The Ontological Critique*

Several generations of legal scholars have established that the rigid public-private distinction, manifested in the Court's state action doctrine, cannot do its supposed job: maintaining a principled distinction between actors that should be subject to constitutional constraint and those that should not. The Court has fanned this ontological critique with its numerous seemingly irreconcilable holdings about the character of nongovernmental action.<sup>224</sup> Rather than even attempting to reconcile these uncomfortably disparate holdings, the Court insists it is engaged in a principled, albeit necessarily fact-sensitive, analysis.<sup>225</sup> Ontological critics point to the Court's contortions as demonstrating how the terms "public" and "private" in constitutional law necessarily converge until no meaningful distinction is possible.<sup>226</sup> They charge that the Court's unprincipled distinctions expose "state action" as "nothing more than a catch-phrase."<sup>227</sup>

Under the familiar positivist understanding of rights, which holds that all legal prerogatives and duties result from state policy decisions, the notion that any right can exist free from governmental involvement is incoherent.<sup>228</sup> We may be able to distinguish nongovernmental actors' conduct from the government's conduct at a simple descriptive level, but in assessing constitutional claims, we can never extricate nongovernmental actors' behavior from government prohibition or facilitation.<sup>229</sup> "It has long been clear that the state can violate the

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<sup>224</sup> See *supra* notes 174-84 and accompanying text.

<sup>225</sup> See *supra* note 173 and accompanying text.

<sup>226</sup> See Duncan Kennedy, *The States of Decline of the Public / Private Distinction*, 130 U. PA. L. REV. 1349, 1354-57 (1982) (describing convergence of public and private categories).

<sup>227</sup> Black, *supra* note 199, at 88.

<sup>228</sup> See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 103 (1987) ("The notion that there is a meaningful private domain, dominated by consensual contract, obviously depends on ignoring the extent to which the state inevitably regulates the steps one can take to induce others to contract."); Brest, *supra* note 201, at 1301 (explaining tension between legal positivism and notion that rights can be violated absent state involvement); Chemerinsky, *Rethinking*, *supra* note 194, at 520-27 (same); Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 SO. CAL. L. REV. 208, 209 (1957) (contending that "whenever, and however, a state gives legal consequences to transactions between private persons there is 'state action'"); Cass R. Sunstein, *State Action Is Always Present*, 3 CHI. J. INT'L LAW 465, 466-67 (2002) (explaining dependence of "negative rights," notably freedoms of property and contract, on government action) (hereinafter Sunstein, *State Action*); Jerre S. Williams, *The Twilight of State Action*, 41 Tex. L. Rev. 347, 367 (1963) ("it is difficult to conceive of situations where state action is not present"); see also Peller, *supra* note 201, at 1226-40 (describing early critiques of public-private distinction in deconstructive strand of legal realism); but see Burke & Reber, *supra* note 191, at 1035-39 (criticizing conflation of state actions and omissions).

<sup>229</sup> Failure to appreciate this difference accounts for Frank Goodman's assertion that

[Fourteenth Amendment] by ‘inaction’ as well as by ‘action.’”<sup>230</sup> A classic example is the California constitutional provision struck down in *Reitman v. Mulkey*,<sup>231</sup> which repealed all local ordinances that banned discrimination in housing and prohibited enactment of such ordinances in the future. Justice Harlan, dissenting in *Reitman*, argued that the provision had not violated the Fourteenth Amendment because it did no more “than would have California’s failure to pass any such antidiscrimination statutes in the first instance.”<sup>232</sup> In his seminal extended metaphor, Charles Black responded that the provision had not “‘merely’ failed to throw the life-preserver” but rather had “put the life-preserver out of convenient reach, so as not to be tempted to throw it, and . . . passed the word down the line to those [the state] commands, that the life-preserver is not to be thrown.”<sup>233</sup>

The Fourteenth Amendment’s textual limitation to “state action”<sup>234</sup> settles nothing, because assessment of the government’s liability must encompass all of the active and passive ways in which government can “deprive” a citizen of a right or “deny” equal protection.<sup>235</sup> Indeed, Erwin Chemerinsky has argued persuasively that the Framers textually limited the federal Constitution’s reach to governmental action only on the

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the case of nongovernmental actors’ expressly unlawful conduct provides an undeniable instance of purely private conduct, thus demonstrating the viability of the state action doctrine. See Goodman, *supra* note 196, at 1343-44. When government prohibits private behavior and enforces that prohibition, it acts in a manner that should obviate any need for a constitutional claim against the behavior. When government fails to prohibit private behavior, or fails to enforce a legal prohibition, it acts in a manner likely to inspire a constitutional claim.

<sup>230</sup> Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473, 481 (1962). Mark Tushnet posits that the intuitive distinction between action and inaction may have much to do with the persistence of the state action doctrine, and he suggests the relationship may be somewhat circular, with the intuition owing much to the presence of the state action doctrine. See Tushnet, *supra* note 205, at 403-04.

<sup>231</sup> 364 U.S. 339 (1960).

<sup>232</sup> *Id.* at 389 (Harlan, J., dissenting).

<sup>233</sup> Black, *supra* note 199, at 83 (footnote omitted).

<sup>234</sup> See *supra* note 162 and accompanying text.

<sup>235</sup> See Black, *supra* note 199, at 84 (“[T]he question is not whether state action is present, but what the thrust and effect of the state action is.”); Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment “State Action” Requirement*, 1976 SUP. CT. REV. 221, 229 (contending that the relevant issue is not “whether a state has ‘acted,’ but whether a state has ‘deprived’ someone of a guaranteed right”); Henkin, *supra* note 228, at 481 (contending that relevant issue “is not whether the state has ‘acted,’ but . . . whether because of the character of state involvement, or the relation of the state to the private acts in issue, there has been a denial for which the state should be held responsible”); Horowitz, *supra* note 226, at 211 (“The critical issue here is not the presence or absence of state action; it is the far more difficult question of giving meaning to the phrase ‘deny the equal protection of the laws.’”); Sunstein, *State Action*, *supra* note 226, at 467-68 (calling for refocusing of analysis from state action question to meaning of substantive constitutional guarantees). The First Amendment’s narrower description of the prohibited action – “Congress shall make no law” – might appear less likely to harbor the negative predicate, but the Court has long since expanded those words to encompass governmental action other than lawmaking, creating a meaning as encompassing as that of the Fourteenth Amendment’s prohibitions.

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understanding that individuals possessed natural rights, which states were bound to protect – an understanding that rendered constitutional safeguards against nongovernmental violations of rights superfluous.<sup>236</sup> On this understanding, the Constitutional text states no affirmative bar on holding nongovernmental actors to rights guarantees; at most it suggests such a bar by negative implication. The reality of nongovernmental institutions' power to deny expressive freedom precludes allowing such an implication to rule constitutional doctrine. Thus, the Court's decisions in *Shelley v. Kramer*<sup>237</sup> and *New York Times Co. v. Sullivan*<sup>238</sup> reflect a necessary understanding that judicial enforcement of "private" legal interests amounts to state action.

Complementing the positivist insight that every circumstance involves state action is the reality that nongovernmental entities often rival or exceed the government's power to deny the values reflected in the Constitution's guarantees of rights.<sup>239</sup> Particularly in the employment setting, nongovernmental authorities often exert far greater control over individual behavior than government does.<sup>240</sup> The Supreme Court on occasion has acknowledged the coercive capacity of nongovernmental actors to deny rights, as in the ultimate holding of the White Primary Cases<sup>241</sup> that a political party acted unconstitutionally when it excluded

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<sup>236</sup> See Chemerinsky, *Rethinking*, *supra* note 194, at 511-16. Critics of the state action doctrine have cited this theory in defending the outcome in the Civil Rights Cases, 109 U.S. 3 (1882), maintaining that the Court there thought no constitutional remedy necessary because the state would vindicate its citizens' rights. See *id.* at 516; Horowitz, *supra* note 226, at 211.

<sup>237</sup> 334 U.S. 1 (1948) (holding judicial enforcement of racially restrictive real estate covenant to be state action that violated equal protection rights).

<sup>238</sup> 376 U.S. 254 (1964) (holding state court's enforcement of libel law to be state action that violated First Amendment rights).

<sup>239</sup> See KELMAN, *supra* note 226, at 109 (positing that "one can readily see people's relationship to local government authority as at least as voluntary as one's relationship to private corporate authority"); Chemerinsky, *Rethinking*, *supra* note 194, at 510-11 (noting that "the concentration of wealth and power in private hands, for example, in large corporations, makes the effect of private actions in certain cases virtually indistinguishable from the impact of governmental conduct") (footnote omitted); Robert L. Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627, 628 (1946) ("Employers or unions may as effectively as the state itself bar Negroes from certain occupations."); Tushnet, *supra* note 205, at 392 (refuting argument that government stands in unique position to infringe personal freedoms); see also Hor[witz], *Public-Private*, *supra* note 201, at 1428 (tying attacks on public-private distinction in late 19<sup>th</sup> and early 20<sup>th</sup> centuries to rise of powerful corporate entities). For a thorough discussion of corporate power's implications for community life, see CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* (1977).

<sup>240</sup> See CHARLES REICH, *OPPOSING THE SYSTEM* 30 (1995) ("Employers can and do demand a degree of subservience and conformity that public government could never require. Economic punishment is a more effective weapon than the punishment inflicted by law.").

<sup>241</sup> See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927); see also *Morse*

African-American voters from the party's primary elections.<sup>242</sup> More recently, the Court has acknowledged that private cable operators' power as "gatekeepers" of public access to information justifies greater lenience in reviewing regulations of their programming decisions.<sup>243</sup> The Court's failure to analyze the intent of governmental actors who facilitate certain nominally private denials of rights also suggests that nongovernmental actors can exert constitutionally cognizable coercive authority.<sup>244</sup> Acknowledging nongovernmental institutions' independent power un.masks as a formalism the argument that government's unique power to deny rights justifies the public-private distinction.<sup>245</sup>

The ontological critique provides a powerful response to the libertarian argument that undergirds the public-private distinction. If state power underwrites all behavior, then the liberty the state action doctrine protects stands on the same footing as the liberty the doctrine makes vulnerable to nongovernmental encroachments. We can no longer distinguish easily between rights holders and rights violators; rather, adjudication of constitutional rights disputes necessarily requires balancing the putative plaintiff's liberty interest against the putative defendant's liberty interest.<sup>246</sup> As Erwin Chemerinsky recognizes, "the state action doctrine is an absurd basis for choosing between the two liberties,"<sup>247</sup> because the doctrine ignores the substance of the interests at stake in favor of an ultimately meaningless inquiry into the defendant's relationship to the state.

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v. Republican Party of Virginia, 517 U.S. 186 (1996) (plurality opinion) (treating political party as state actor under Voting Rights Act).

<sup>242</sup> For a discussion of the problems political parties pose for the public-private distinction, see Magarian, *supra* note 9, at 2043-50.

<sup>243</sup> See *Turner Broadcasting System v. FCC*, 512 U.S. 622, 657 (1994) (Turner I) ("The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.").

<sup>244</sup> Jesse Choper notes the tension between cases in which the Court has found equal protection violations based on the actions of nongovernmental parties – such as *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) – and subsequent decisions, notably *Washington v. Davis*, 426 U.S. 229 (1976), that condition equal protection violations on discriminatory intent. See Choper, *supra* note 191, at 769-72. Because the ultimate government actors in the state action decisions presumably lacked discriminatory intent, we can resolve the tension only by reading the state action decisions as having found the nongovernmental actors themselves constitutionally liable. See *id.* at 776; see also Glennon & Nowak, *supra* note 233, at 255-57 (discussing Court's confusion about whether state action inquiry goes to action or actor).

<sup>245</sup> The private power insight forces defenders of the public-private distinction into a posture of relativism. See, e.g., Schwarzschild, *supra* note 159, at 138 ("[W]hich particular private powers are 'too powerful' is generally a matter of controversy. It is difficult to imagine how 'too powerful' could be defined as a matter of constitutional principle."). They simply deem government categorically different, denying any need to prove their position.

<sup>246</sup> See Chemerinsky, *Rethinking*, *supra* note 194, at 536-38 (dismantling argument that state action doctrine protects liberty interests).

<sup>247</sup> *Id.* at 537.

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*2. Anger: Ideological Critiques*

Building on the ontological critics' insight that public and private spheres are legally indistinguishable, a distinct set of critiques of the public-private distinction contends that our legal system has maintained the distinction as an ideological construct. On this view, the ontological critique points the way to a deeper understanding that the public-private distinction in constitutional law serves entrenched interests by preventing departures from established arrangements of power.<sup>248</sup> The distinction elevates the rights of powerful institutions over those of less powerful individuals while preventing government, particularly courts, from intervening in the conflict on the individuals' behalf.<sup>249</sup> As Paul Brest notes: "The state action doctrine . . . has seldom been used to shelter citizens from coercive federal or judicial power. More often, it has been employed to protect the autonomy of business enterprises against the claims of consumers, minorities, and other relatively powerless citizens."<sup>250</sup> Courts employ the public-private distinction to mark public power as the only threat to constitutional freedoms while concealing private exercises of coercive authority.<sup>251</sup> This process perpetuates economic, racial, and gender inequities.

Legal realists and their inheritors in the critical legal studies movement have advanced this ideological critique in economic terms. Aiming at the heart of the traditionally conceptualized private sphere, these critics have emphasized the structures of coercion and domination inherent in the supposedly nongovernmental domains of property and contract. They emphasize the historical development of the public-private distinction as an advanced capitalist legal device to safeguard private transactions from

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<sup>248</sup> Karl Klare's deconstruction of the public-private distinction's role in labor law illustrates well the progression from the ontological critique to an indictment of the distinction as ideologically driven. See Karl E. Klare, *The Public / Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982).

<sup>249</sup> See Erwin Chemerinsky, *More Speech Is Better*, 45 U.C.L.A. L. REV. 1635, 1639 (1998) ("Traditional law, as embodied in the state action doctrine, creates a bright-line rule that the private institution always wins and the individual fired or disciplined by it for expression always loses.") (hereinafter Chemerinsky, *More Speech*).

<sup>250</sup> Brest, *supra* note 201, at 1330; see also Tushnet, *supra* note 205, at 403 (positing that, "given our society's stated commitment to norms of equality, a great deal of the way things actually are would not survive" elimination of the state action doctrine).

<sup>251</sup> See Kenneth M. Casebeer, *Toward a Critical Jurisprudence – A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379, 395 (1983) (explaining how then-Justice Rehnquist's conception of public-private distinction made power "a derivative, and not an originating, concept"); Peller, *supra* note 201, at 1288 (explaining that, under public-private distinction, "democratic political practice . . . is represented as having a monopoly on social power" while "[e]verything outside the purview of this realm . . . is not viewed as an exercise of social power").

redistributive initiatives, which may be framed as constitutional rights claims.<sup>252</sup> Karl Klare's exhaustive survey of labor law doctrine leads him to conclude that the public-private distinction as applied to labor disputes serves "the effort to induce the belief that workers should be denied power and participation in industrial life."<sup>253</sup> Given the Court's repeated tendency to invoke the state action doctrine to shield such institutions as utilities,<sup>254</sup> bailees,<sup>255</sup> and medical facilities<sup>256</sup> from constitutional liability, commentators emphasize how the distinction aids powerful institutions in fending off rights claims brought by individuals.<sup>257</sup> In short, the state action doctrine safeguards the status quo.

Invocations of the state action doctrine to block constitutional claims have often provided cover for institutionalized racism.<sup>258</sup> Professor Black maintained near the height of the Civil Rights Era that the state action doctrine served only that purpose.<sup>259</sup> Although almost all of the Supreme Court decisions that have appreciably expanded the scope of "state action" rebuffed acts of discrimination against African Americans,<sup>260</sup>

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<sup>252</sup> See Hor[w]itz, *Public-Private*, *supra* note 201, at 1424-26 (demonstrating that legal concepts of public and private crystallized only with consolidation of market capitalism in the 19<sup>th</sup> century); Peller, *supra* note 201, at 1194-1207 (tracing development of public-private distinction in 19<sup>th</sup> Century liberty-of-contract jurisprudence).

<sup>253</sup> Klare, *supra* note 246, at 1418.

<sup>254</sup> See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (holding that state-licensed monopolistic utility was not bound to provide procedural due process when it shut off customer's electric service for nonpayment).

<sup>255</sup> See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (holding that warehouse's sale of goods it held to satisfy lien under Uniform Commercial Code not state action).

<sup>256</sup> See *Blum v. Yaretsky*, 457 U.S. 991 (1982) (holding that government reimbursements for care of Medicaid patients did not subject nursing home's transfer of those patients to less expensive facilities to procedural due process requirements).

<sup>257</sup> See REICH, *supra* note 238, at 35-38 (discussing how corporations' freedom from constitutional liability allows them to undermine personal freedoms); Casebeer, *supra* note 249, at 422-23 (contending that state action doctrine "masks classist protection of capital including warehouses, private utilities, private drinking clubs, private hospitals and private schools") (footnotes omitted); Chemerinsky, *Rethinking*, *supra* note 194, at 539 ([A]llowing the concept of state action to determine when rights are protected undermines liberty by allowing all private invasions of rights, even when the balance completely favors the victims.).

<sup>258</sup> See Hale, *supra* note 237, at 639 (charging that state action doctrine "makes a mockery of the Court's solemn declaration that Negroes have a constitutional right not to be segregated"); Strauss, *State Action*, *supra* note 159, at 411-14 (describing obstructionist role of state action limitation during Civil Rights Era).

<sup>259</sup> See Black, *supra* note 199, at 90 (contending that state action doctrine's "one practical function" in constitutional law was to "immunize[] racist prejudices from constitutional control"); see also *id.* at 70 ("'Separate but equal' and 'no state action' – these fraternal twins have been the Medusan caryatids upholding racial injustice.").

<sup>260</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding judicial assignment of liability for defamation to be state action that violated First Amendment, where defendants in defamation action were African-American civil rights advocates); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (holding exclusion of African-American customers by restaurant in government-owned building to be state action that violated Equal Protection Clause); *Reitman v. Mulkey*, 364 U.S. 339 (1960) (holding state constitutional provision that prohibited ordinances barring private racial discrimination in

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critical scholars have demonstrated that systems of private ordering continue to disadvantage African Americans and other minority groups by insulating oppressive features of the status quo from legal challenge.<sup>261</sup> Critical race theory posits that limiting constitutional protections to the public sphere makes no sense in a society that disadvantages people of color in most other aspects of life.<sup>262</sup> Dividing the world into public and private spheres forces constitutional challengers to overcome a putatively “common sense” distinction that actually owes its status to past judicial decisions.<sup>263</sup> The state action doctrine acts as a shield, allowing courts to avoid balancing underlying competing constitutional interests.<sup>264</sup> Furthermore, critical race theorists contend that the denial of a private cause of action based on equal protection grounds, combined with the protection of other constitutional provisions – primarily due process and First Amendment protections – creates a “private right to discriminate.”<sup>265</sup> Not only does this right legitimate private discrimination, it hinders passage of antidiscrimination legislation in areas such as economic relations.<sup>266</sup> Finally, critical race theorists emphasize the realist insight that governmental facilitation and protection of discriminatory conduct amounts to a higher level of state action that the courts have still refused to recognize.<sup>267</sup>

Feminist legal theory has emphasized the role of the public-private distinction in sustaining patriarchal authority. The distinction fosters an

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housing to be state action that violated Equal Protection Clause); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding judicial enforcement of racially restrictive covenant to be state action that violated Equal Protection Clause).

<sup>261</sup> See, e.g., Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1313 (1998) (discussing tendency of private social arrangements to perpetuate inequalities and evade constitutional checks).

<sup>262</sup> See Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor and Civil Rights Law*, 61 ORE. L. REV. 157, 180 (1982) (discussing connection between public/private and substance/form dichotomies in relation to race cases); see also Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 446-47 (1990) (highlighting idea that privacy has more worth to those with the means of taking advantage of it).

<sup>263</sup> Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 1991 STAN. L. REV. 1, 12-14 (arguing that division along public and private lines is a normative process that obscures political reasoning behind designations).

<sup>264</sup> See Lawrence, *supra* note 260, at 446-47 (1990) (contending that state action doctrine provides formalistic basis for resolving substantive conflicts between constitutional values).

<sup>265</sup> Gotanda, *supra* note 261, at 10-12 (illustrating that there exists an area where neither judicial decisions nor legislative enactments may permissibly prevent private discrimination).

<sup>266</sup> *Id.* at 11-12.

<sup>267</sup> See Mari J. Matsuda, *Public Responses to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2378-79 (arguing that characterization of racist speech as private ignores both passive and active roles state plays in its propagation).

illusion that women possess autonomy while simultaneously insulating structures that oppress women from legal challenges.<sup>268</sup> “Freedom from public intervention,” states Catharine MacKinnon, “coexists uneasily with any right that requires social preconditions [in order] to be meaningfully delivered.”<sup>269</sup> In rape law, the public-private distinction discourages legal attention to sexual violence, even though such violence represents the dominant exercise of coercive power in many women’s lives, because rape results from nominally private action.<sup>270</sup> At the same time, the law treats consent to sex as presumptively voluntary by locating sex in the private sphere, where people are presumed to make autonomous choices.<sup>271</sup> Legal approaches to family life depend on a subdivision of the private sphere into the distinct domains of the economic marketplace and the home. Women have historically faced exclusion from the public sphere and the marketplace,<sup>272</sup> while the law has shielded the “private” domain of the home from many forms of regulation.<sup>273</sup> Thus, even though the workplace has become subject to substantial government regulation, the law ignores many women’s status as unpaid full-time laborers in their own homes because it identifies the home with the private sphere.<sup>274</sup> On the same basis, the legal idea of family privacy insulates many marital conflicts from legal regulation or liability.<sup>275</sup>

Laying bare the ideological skeleton of the public-private distinction provides additional responses to the distinction’s libertarian defenders. The social fact that private institutions often match or exceed

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<sup>268</sup> See Ruth Gavison, *Feminism and the Public-Private Distinction*, 45 CAL. L. REV. 1,17, 20 (1992) (summarizing feminist accounts of ways in which public-private distinction conceals women’s lack of volition and structural oppression).

<sup>269</sup> CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 191 (1989).

<sup>270</sup> See KELMAN, *supra* note 226, at 199 (emphasizing pervasiveness of sexual violence in women’s lives); MACKINNON, *supra* note 267, at 191 (“To confront the fact that women have no privacy is to confront the intimate degradation of women as the public order.”). For a thorough discussion of background features of state rape laws that exacerbate women’s vulnerability to sexual violence, see Michelle A. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 924-39 (2001).

<sup>271</sup> See Peller, *supra* note 201, at 1195 (comparing liberty of contract and sexual consent as ideological constructs based on presumptions of privacy). This same view of sex as voluntary supports the framing of abortion rights in privacy terms. See MACKINNON, *supra* note 267, at 184-94 (criticizing privacy basis for abortion rights on ground that sex for women is not a matter of free choice); Nadine Taub & Elizabeth M. Schneider, *Women’s Subordination and the Role of Law*, in DAVID KAIRYS ED., THE POLITICS OF LAW 151, 157-60 (2<sup>nd</sup> ed. 1990) (same).

<sup>272</sup> See Taub & Schneider, *supra* note 269, at 152-54 (presenting historical and conceptual overview of women’s legal exclusion from public sphere).

<sup>273</sup> See Gavison, *supra* note 266, at 21-22 (discussing home-market division); Taub & Schneider, *supra* note 269, at 154-58 (presenting historical and conceptual overview of absence of law in private sphere).

<sup>274</sup> See MACKINNON, *supra* note 267, at 67 (explaining advocacy of wages for housework).

<sup>275</sup> See Taub & Schneider, *supra* note 269, at 154-56 (discussing property rules, tort law, rape, and battery).

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government's capacity to threaten personal freedom<sup>276</sup> becomes, in the ideological critics' analysis, more than a mere refutation of the public-private distinction's logic. Rather, the ideological critics view that seeming illogic as a smokescreen for a deliberate maintenance of standing power relationships.<sup>277</sup> They add that private institutions, unlike governments, are not politically accountable to citizens.<sup>278</sup> Thus, they contend that governmental intervention in nongovernmental relationships can be highly beneficial and that judicial enforcement of rights against nongovernmental institutions can be constitutionally valid.<sup>279</sup> They also maintain that courts should have authority to hold private entities themselves liable for rights violations, rather than having to assign liability to state actors with only indirect responsibility for the violations.<sup>280</sup> The ideological critique reveals that libertarian defenders of the public-private distinction rely on a politically charged vision of "liberty."

The ideological critics build on the insights of the ontological critics, taking realist insights about the incoherence of the public-private distinction in what is nominally a more radical direction. Unlike the ontological critique, however, the ideological critique implies a basis for partially reconciling the concept of the private in constitutional law. To condemn the state action doctrine as ideologically determined presupposes, at a minimum, that the public-private distinction has some coherent meaning. That premise, in turn, opens up the possibility of reconceptualizing the distinction in constitutional law to serve more desirable normative ends. This is the direction in which the final significant critique of the public private distinction has moved.

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<sup>276</sup> See *supra* notes 237-43 and accompanying text.

<sup>277</sup> See Casebeer, *supra* note 249, at 422 (contending that the Court, by enforcing state action limitation, "uses an incoherent doctrine to hide a necessarily unstable sphere of private right protected by the Constitution"); Peller, *supra* note 201, at 1208-13 (explaining circularity of state action analysis as reflecting ideological perspective that views private sphere as temporally preceding public sphere).

<sup>278</sup> See REICH, *supra* note 238, at 37 ("The rules that corporations make and enforce are not adopted democratically, nor are they enforced with the fairness required by due process of law."); Chemerinsky, *Rethinking*, *supra* note 194, at 511 (emphasizing need for judicial protection against infringements of rights by nongovernmental actors); Tushnet, *supra* note 205, at 392 (contending that freedom from political accountability can render corporations more threatening to rights than government).

<sup>279</sup> See, e.g., Chemerinsky, *More Speech*, *supra* note 247, at 1637-38 (describing value of imposing governmental free speech norms on certain private institutions).

<sup>280</sup> See Casebeer, *supra* note 249, at 413 ("*Responsibility* for the consequences of public power should not cease merely because those injured by its exercise cannot find a state actor triggerman in a situation where the public power organizes a pattern of acceptable social relations."); *but see* Larry Alexander, *The Public-Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMM. 361, 371-72 (1993) (asserting that "any constitutional challenge to the exercise of private power can and should be recharacterized as a constitutional challenge to . . . background laws").

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### 3. *Acceptance: Rehabilitating the Public-Private Distinction*

The ontological and ideological critiques of the public-private distinction in constitutional law carry great persuasive force. Those critiques, however, have permeated the legal literature for years, and the distinction still occupies a central place in the jurisprudence of constitutional rights. As no less ambitious a critical scholar than Mark Tushnet has acknowledged, the persistence of a legal doctrine against years of withering critical attacks strongly suggests “that the doctrine is doing something to which the critics are not attending.”<sup>281</sup> Recent analysis of the public-private distinction in constitutional law has therefore focused on justifying the distinction in light of the complaints against it. Unfortunately, many such efforts have made one of two mistakes.

The first mistake, the “useful fiction” fallacy, has been to retain the facade of something called “the public-private distinction” while building an entirely different doctrine behind it. William Marshall, for example, argues that courts require some sort of “guideline” to avoid the difficulties of balancing competing interests.<sup>282</sup> He nominates the state action doctrine for the task: “Given the extreme difficulty of choosing between competing rights in the first place, perhaps the decision to insulate private activity from constitutional scrutiny is justified as a way to avoid forcing judges to make impossible decisions.”<sup>283</sup> A more pessimistic, and perhaps more forthright, version of Marshall’s argument is Tushnet’s suggestion that constitutional law needs the public-private distinction because our jurisprudence has failed to generate what should stand in the distinction’s place – a substantive understanding of constitutional rights.<sup>284</sup> Conversely, Robert Glennon and John Nowak attempt to portray the state action doctrine as an implicit balancing analysis, calling it “merely the Court’s chosen manner of determining whether the challenged nongovernmental act is compatible with the

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<sup>281</sup> Tushnet, *supra* note 205, at 391; *see also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1698 (2d ed. 1988) (stating that persistence of public-private distinction renders critics “both correct and irrelevant”). For an examination of possible explanations for the vitality of the public-private distinction, *see* Berman, *supra* note 200, at 1284-89.

<sup>282</sup> *See* Marshall, *supra* note 196, at 363.

<sup>283</sup> *Id.* (footnote omitted). Marshall decries the idea that judges should replace the state action doctrine with a balancing of constitutional interests on the ground that such balancing “will create a class of constitutional ‘losers.’” *Id.* He fails to consider the numerous constitutional claimants who “lose” when courts dismiss their claims under the state action doctrine.

<sup>284</sup> *See* Tushnet, *supra* note 205, at 403 (“The state action doctrine, incoherent though it may be, is perhaps a useful mask to disguise the incoherence of substantive constitutional law.”); *see also* Horwitz, *Rights*, *supra* note 73, at 405 & n.74 (explaining that state action doctrine preserves traditional liberal distinction between social and political equality).

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substantive guarantees of the [Fourteenth] Amendment.”<sup>285</sup> One problem with treating the public-private distinction as a useful fiction is the increased danger that courts will overreach by misrepresenting what they are doing.<sup>286</sup> Another problem is that this sort of subterfuge implicitly attributes the persistence of the distinction to ignorance, and its architects make the suspect assumption that they can fool the ignorant while advancing some preferred value.

The second mistake, the “square one” fallacy, entails reconstructing the rigid public-private distinction in all its incoherent, ideologically charged ignominy. Christopher Stone, for instance, portrays the obligations traditionally associated with government as mechanisms to enforce virtuous behavior.<sup>287</sup> For Stone, extending this enforcement to a “private” sphere, specifically corporations, would “unacceptably extend the power and reach of government.”<sup>288</sup> Accordingly, Stone draws a public-private boundary that relieves entities not generally perceived as “public” of “public” obligations<sup>289</sup> and “most nearly assigns the [‘public’ liability] burden to general revenues.”<sup>290</sup> Richard Kay likewise bases his analysis of the state action doctrine on an assertion about the special danger of governmental power. Kay acknowledges the ontological critique<sup>291</sup> and the critical insight that nongovernmental power centers have achieved great prominence in contemporary society.<sup>292</sup> He argues, however, that the Constitution, unlike other sources of legal authority, should constrain only the formal making and enforcement of laws.<sup>293</sup> Kay

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<sup>285</sup> Glennon & Nowak, *supra* note 233, at 229; *see also* Steve Bachmann & Andrew Weltchek, *Book Review*, 30 U.C.L.A. L. Rev. 1078, 1086 (1983) (arguing for maintenance of public-private distinction “as a tool to be used for political protection from various forms of persecution, if for no other reason”) (reviewing DAVID KAIRYS ED., *THE POLITICS OF LAW* (1<sup>st</sup> ed. 1982)); Graglia, *supra* note 191, at 784 (extolling reinvigoration of state action doctrine as an “essential, albeit illogical” limit on “the application of unjustifiable constitutional restrictions that have resulted from decades of judicial hyperactivity”).

<sup>286</sup> *See* Tushnet, *supra* note 205, at 404 (criticizing “Bickelian prudentialist” claim that state action doctrine is a useful fiction).

<sup>287</sup> Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1494-96 (1982).

<sup>288</sup> *Id.* at 1494.

<sup>289</sup> *See id.* at 1497 (“[I]t is true that General Motors is big and powerful; nonetheless, its actions are not likely to be interpreted as the expression of the collective will.”).

<sup>290</sup> *Id.* at 1498.

<sup>291</sup> “Maintenance of the public-private distinction . . . creates an inescapable problem of self-reference: the Constitution is concerned only with public things and not with private things. The determination of the content of the categories of public and private things is a public thing.” Kay, *supra* note 196, at 337 (footnote omitted).

<sup>292</sup> *See id.* at 350 (noting argument “that the relative dangers from public and ostensibly private sources of power may be considerably different today than when the relevant constitutional provisions were enacted”).

<sup>293</sup> *See id.* at 342-43 (defending limitation of constitutional law to field of “lawmaking” as necessary to preserve “distinction between constitutional law and ordinary law”).

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justifies this rigid limitation as providing “the security that may be derived from the existence of stable and knowable limits on the power of the state.”<sup>294</sup> The problem with the square one fallacy is that those who commit it, while paying lip service to critical insights, end up reconstructing the public-private distinction as a device to insulate entrenched ideas about limited government and corporate license.

If rehabilitation of the constitutional public-private distinction, in light of the distinction’s conceptual weaknesses, should not take the form of a façade for preferred values or a reconstruction of fallacies, what form should it take? Any attempt to answer this question requires an acknowledgement that the analysis has too many and broad implications to allow confidence that any theory will be generally valid or free of unforeseen flaws. The reason to forge on past this hesitation is that, once we realize the inadequacy of the doctrinal status quo, the question requires an answer.

*C. Developing a Useful Role for the Public-Private  
Distinction in Constitutional Adjudication*

Our constitutional system reflexively gives the abstract, formal idea of “the private” a centrality that properly belongs to a closely related but significantly different idea the integrity of natural persons. Our deepest intuitions about the substance and limits of constitutional rights concern individuals’ decisions to behave as they choose, and courts’ understandings about constitutional rights should reflect those intuitions. Shifting our attention from the abstract private sphere to the concept of personal integrity has important consequences both for determining which entities bear constitutional obligations and for defining the substance of constitutional rights. Once the idea of personal integrity underwrites our notion of immunity from constitutional liability, nongovernmental institutions have no special, presumptive freedom from constitutional obligations, as they do under the conventional public-private distinction. At the same time, personal integrity provides a sounder basis than the bald designation “private” for asserting constitutional rights. This section considers these ideas in the abstract; Part III uses them to build a new First Amendment model for dealing with nongovernmental assaults on wartime political debate.

Consideration of a genuine role for the public-private distinction in constitutional adjudication begins with a key insight of the distinction’s critics: Constitutional adjudication should focus on the substance of the asserted constitutional right at issue. The traditional state action inquiry errs in replacing that substantive analysis with a formalistic inquiry into the defendant’s identity. This critical insight has both descriptive and normative dimensions. Descriptively, ontological critics insist that the state action doctrine is only comprehensible by reference to substantive theories of

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<sup>294</sup> *Id.* at 360.

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rights. Laurence Tribe posits that the Court's rejection after 1937 of the unified theory of rights that had characterized the *Lochner* era left it bereft of a principled basis for determining when governmental acquiescence in private conduct gave rise to state action.<sup>295</sup> His effort to make sense of the contemporary state action decisions entails seizing on substantive theories of particular rights where the Court has identified them.<sup>296</sup> Normatively, ideological critics contend that the state action doctrine serves improperly to protect powerful nongovernmental institutions from substantively valid claims of rights violations.<sup>297</sup>

Abandoning the formal state action inquiry for a focus on the substance of rights does not mean, however, that every offense against a constitutionally ingrained interest is unconstitutional.<sup>298</sup> Rather, that shift allows us to advance to the functional concern that the state action doctrine clumsily tries to address: Under what circumstances should courts treat an offense against constitutional interests as constitutionally unlawful?<sup>299</sup> Most scholars respond that, at a minimum, the state does not act unconstitutionally when it facilitates a violation of one person's constitutional interest in the name of another's superior interest in privacy or autonomy.<sup>300</sup> The familiar

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<sup>295</sup> See TRIBE, *supra* note 279, at 1697.

<sup>296</sup> See *id.* at 1714-15 (criticizing Court's decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948), for insufficient attention to substantive conception of rights at issue); see also Brest, *supra* note 201, at 1302 (stating that legal positivism requires "a substantive, normative theory of rights" to sustain public-private distinction); Tushnet, *supra* note 205, at 383 (contending that "there can be no doctrine of state action that is independent of the applicable substantive constitutional law.").

<sup>297</sup> Numerous other commentators have called for replacing the conventional state action doctrine with a focus on substantive rights. See Chemerinsky, *Rethinking*, *supra* note 194, at 550-51 (advocating abolition of state action doctrine in favor of rights focus); Horowitz, *supra* note 226, at 221 (proposing inquiry focused on the relationship among state authority, the nongovernmental violation of rights, and the degree of the deprivation of rights); Van Alstyne & Karst, *supra* note 191, at 7-8 (criticizing state action doctrine because "it directs attention to formal questions instead of the real interests which compete for constitutional recognition" and outlining interests court should take into account).

<sup>298</sup> See Chemerinsky, *Rethinking*, *supra* note 194, at 506 (noting that, even in absence of state action doctrine, nongovernmental actors may be able to justify their behavior in ways government cannot).

<sup>299</sup> One obvious class of private violations of rights that could not give rise to constitutional liability even absent the state action doctrine are those for which the law provides an adequate remedy. See Chemerinsky, *Rethinking*, *supra* note 194, at 551-52 (explaining that presence of legal remedies would prevent most ordinary crimes and torts from becoming constitutionally actionable); Tushnet, *supra* note 205, at 395-96 (stating that putatively unreasonable search by private detective would not be a constitutional violation if state law made the search unlawful).

<sup>300</sup> See Black, *supra* note 199, at 101 (advocating "the limitation of the fourteenth amendment when it collides with another constitutional guarantee"); Brest, *supra* note 201, at 1323 (explaining persistence of state action doctrine in terms of "our psychological and ideological need to believe that there are essentially private realms . . . in which actions are autonomous"); Henkin, *supra* note 228, at 487 (discussing "exceptional category" of equal protection cases in which "there exist, against the claim of equality, important

hypothetical is that of the racist dinner host. If every action is state action, may a court compel me to invite an African American to dinner at my home if I hate African Americans? The Constitution's equal protection guarantee compels courts to prevent exclusions based on race; at the same time, the Constitution's due process guarantee establishes a zone of privacy in the home. Enjoining the racist dinner host is out of bounds, not because his action is not "state action" – the law of trespass necessarily underwrites the power to exclude people from one's home – but because a superior constitutional value is at stake.<sup>301</sup> On this basis, critics of the public-private distinction usually conclude that courts should abandon the distinction in favor of directly balancing competing constitutional interests.<sup>302</sup>

At this point, however, a problem arises. What makes the racist dinner host's due process interest superior to the excluded guest's equal protection interest? Couldn't the same argument effectively subordinate any equal protection claim to a defendant's asserted "privacy" interest in, for example, refusing to serve or hire African Americans? Insulating certain decisions from constitutional accountability simply because of their "private" character seems to entail devolution to the formalism of the state action doctrine.<sup>303</sup> As a practical matter, this problem far

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countervailing rights of liberty and privacy that enjoy substantial constitutional protection"). One consequence of this view is that nongovernmental defendants can assert against constitutional claims certain interests that are not available to the government. See Alexander, *supra* note 278, at 365 "To say . . . that the realm of the private is defined and buttressed by law . . . is not to say that private choices within it are held to the same standards as the Constitution imposes on, say, the state police or a welfare department."); Chemerinsky, *Rethinking*, *supra* note 194, at 537-38 (noting that, even absent state action doctrine, personal liberty interests often would shield nongovernmental actors from liability where similar action by government would be unconstitutional).

<sup>301</sup> Variations on this analysis of the hypothetical appear in Chemerinsky, *Rethinking*, *supra* note 194, at 538; Hale, *supra* note 237, at 629-30; Henkin, *supra* note 228, at 770; Williams, *supra* note 226, at 368.

<sup>302</sup> See Chemerinsky, *Rethinking*, *supra* note 194, at 538-39 (calling for abandonment of state action doctrine in favor of balancing approach); Henkin, *supra* note 228, at 488 (maintaining that balancing of equality interests against liberty and property interests is unavoidable); Williams, *supra* note 226, at 389-90 (urging focus on "the merits of accommodating the interests" rather than "the nature of a formula which is irrelevant to the interests involved"). One analysis in the mid-1970s argued that the Court actually was using a balancing analysis in the guise of the state action doctrine. See Glennon & Nowak, *supra* note 233, at 227.

<sup>303</sup> Professor Tushnet expresses a concern that, absent a public-private distinction in constitutional law, judges will tend to identify and elevate privacy rights to defeat novel equality claims out of reluctance to disturb the status quo. See Tushnet, *supra* note 205, at 406 (arguing that "the collapse of the [state action] doctrine into substantive constitutional law forces the courts between doing everything and doing nothing") (footnote omitted). A reason not to take Tushnet's concern so seriously as to perpetuate the present role of the public-private distinction in constitutional law is that courts frequently use the state action doctrine to do exactly what Tushnet warns against. See, e.g., *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995) (labeling parade organizers who sought to exclude gay marchers as private actors while effectively treating putative gay marchers as state actors because they invoked state antidiscrimination law). A variation on Tushnet's concern is that eliding the state action doctrine, by broadening the Constitution's coverage, would result in watered down constitutional protections. See Garvey, *supra* note 214, at

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outstrips the wildly hypothetical notion that anyone would invoke judicial power to invade someone else's dining room.<sup>304</sup>

Louis Henkin's 40-year old consideration of the problem provides the essence of a solution. Henkin maintains that "a small area of liberty [is] favored by the Constitution even over claims to equality."<sup>305</sup> He would have courts balance competing rights depending on the extent to which the defendant's discrimination touches community affairs. Thus, a court should enforce the theoretical claim of the racist dinner host because his interest is entirely insular.<sup>306</sup> In contrast, the court should not allow a shopkeeper to discriminate based on race, because such discrimination "is public, blatant, and widespread; the inequality and indignity therefore notorious and extensive, with important communal consequences" and "the relationship of owner to prospective clients and that of customers with each other are superficial, not intimate."<sup>307</sup>

A practical distinction between insular and communal decisions corresponds to the descriptive difference between natural persons and institutions. Accordingly, courts should treat natural persons – not every legal entity that populates an abstract private sphere – as the locus of constitutional rights adjudication. Emphasis on the rights of natural persons is a familiar element in liberal theories of rights.<sup>308</sup> Although the concept of the "natural person" presents its own conceptual problems, it effectively delineates the intimate interests, preferences, and relationships that every individual in a democratic system should be entitled to control for herself.

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314-15 (discussing role of state action doctrine in preserving Constitution's "economy of restraint"); Marshall, *supra* note 196, at 567 ("The more broadly rights are drawn, the more difficult it becomes to enforce those rights stringently."). Whatever the merits of that objection, the substantive approach this Article takes to First Amendment theory defuses it by advocating a narrower substantive scope for expressive freedom under the First Amendment. See *supra* section I.A.2. (describing public rights theory of expressive freedom).

<sup>304</sup> See Black, *supra* note 199, at 101 ("No suit is of record in which the prayer was for a mandatory injunction that a dinner invitation issue.").

<sup>305</sup> Henkin, *supra* note 228, at 496.

<sup>306</sup> See *id.* at 498.

<sup>307</sup> *Id.* at 499; see also Black, *supra* note 199, at 101 (contending that privacy interests should not bar constitutional claims "where the problem is in the public life of the community").

<sup>308</sup> Martha Nussbaum has emphasized "the separateness of persons" as an essential component of liberal theory. MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 62 (2000). She explains this concept as reflecting

the basic fact that each person has a course from birth to death that is not precisely the same as that of any other person; that each person is one and not more than one, that each feels pain in his or her own body, that the food given to A does not arrive in the stomach of B.

*Id.*; see also JEREMY WALDRON, *LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991* at 131 (1993) ("Our sense of what it is to have and exercise freedom is bound up with our conception of ourselves as persons and of our relation to value, other people, society and the causal order of the world.").

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*First*, only natural persons should enjoy presumptive immunity from constitutional obligations. Courts should not, as the state action doctrine directs, afford every nongovernmental institution a presumptive license to violate constitutional rights. Rather, they should extend that license only to natural persons, leaving nongovernmental institutions presumptively subject to constitutional obligations. Courts may, and no doubt should, grant various nongovernmental institutions, in particular circumstances, freedom to disregard constitutional norms.<sup>309</sup> Such determinations, however, should require specific reasons, not the mere imprimatur of “the private.”

*Second*, and closely related, only natural persons should presumptively enjoy constitutional rights. Commentators frequently assert that the conventional public-private distinction is necessary to make a system of rights coherent, because the idea of the private is necessary for distinguishing rights-holders from the government.<sup>310</sup> The reach of that assertion, however, exceeds its grasp. A coherent system of rights requires courts only to distinguish natural persons from institutions.<sup>311</sup> As in the matter of immunities, courts may extend rights to various institutions, but only for particular reasons, as where institutional rights are instrumentally necessary to effectuate the rights of natural persons.

Understanding the role of personal integrity in securing any given constitutional right requires a substantive theory of the right at issue. The concept of personal integrity has obvious salience for some areas of constitutional protection, such as rights of privacy. Less obvious, but equally important, is the significance of personal integrity for the public rights theory of expressive freedom. This article now returns to the First Amendment and considers how the foregoing analysis of the public-private distinction should lead courts to address nongovernmental suppression of wartime political debate and dissent.

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<sup>309</sup> I discuss this proviso in the First Amendment context *infra* notes 330-35 and accompanying text.

<sup>310</sup> Tushnet, *supra* note 205, at 403; *see also* Seidman, *supra* note 197, at 393 (“All substantive rights rest on the assumption that we can define a sphere of private conduct not attributable to the state.”); Van Alstyne & Karst, *supra* note 191, at 7 (“[W]hile the search for a merely formal connection – for ‘state action’ – is misleading, the search for the values which stand behind the state action limitation is indispensable.”).

<sup>311</sup> Professor Schwarzschild, in my view, errs when he insists on “a principle” to justify our intuitions about this close form of privacy. Schwarzschild, *supra* note 159, at 135-36. The determination is necessarily normative. Thus, Henkin incisively notes that “we are invoking ‘substantive due process’ – or something quite like it – to form an exception or a reasonable classification under the equal protection clause.” Henkin, *supra* note 228, at 504. That analysis becomes even more interesting in light of the Court’s subsequent, normatively charged revival of substantive due process to protect the very sort of privacy interest Henkin describes. *See, e.g.*, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (striking down state prohibition on “sodomy” as a violation of Fourteenth Amendment’s substantive due process principle).

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III. APPLYING THE PUBLIC RIGHTS FIRST  
AMENDMENT TO NONGOVERNMENTAL  
CENSORSHIP OF WARTIME POLITICAL DEBATE

This part considers how a public rights account of the First Amendment should accommodate the public-private distinction in the particular context of nongovernmental constraints on wartime political debate and dissent. The first section articulates general principles for invoking the First Amendment to enjoin nongovernmental suppression of political speech. If, as the public rights theory maintains, the First Amendment exists to guarantee the robust exchange of ideas necessary for self-government, then our habit of shielding “private” actions from First Amendment constraints must yield where those actions seriously compromise political debate. At the same time, individuals must maintain sufficient autonomy to process information, formulate positions about political matters, and assess alternative viewpoints.

The second section applies the principles of the first in the specific context of nongovernmental suppression of wartime debate. It contends that courts should apply the First Amendment to enjoin many nongovernmental constraints on political speech in times of war and national emergency. The extreme value and vulnerability of robust political debate in wartime<sup>312</sup> makes this an important testing ground for my thesis. The third section addresses some concerns about assigning federal courts the duty to remedy nongovernmental constraints on expression.

*A. The Role of Personal Integrity in Applying the Public  
Rights First Amendment*

The public rights theory of expressive freedom has a complicated relationship with the public-private distinction. On one hand, the public rights theory gives the processes of government central importance. Meiklejohn accords First Amendment protection only to “the freedom of public discussion,”<sup>313</sup> limiting individuals’ “private right of speech” to the procedural safeguards of the Fifth Amendment.<sup>314</sup> My own terms for democracy-based and autonomy-based approaches to the First

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<sup>312</sup> See *supra* Part I. The task of distinguishing times of war and national emergency requires a functional inquiry. In general, courts will have to determine whether the importance and vulnerability of political speech in particular circumstances warrants enforcing the First Amendment against nongovernmental actors.

<sup>313</sup> MEIKLEJOHN, *supra* note 8, at 37.

<sup>314</sup> *Id.*

Amendment – “public rights” and “private rights” – echo the public-private distinction. On the other hand, the public rights theory recognizes a convergence between the public and private spheres.<sup>315</sup> Because the theory emphasizes a substantive bottom line of democratic discourse, it recognizes the danger nongovernmental power can pose for expressive freedom<sup>316</sup> and trusts government in some circumstances to advance expressive freedom.<sup>317</sup> At a deeper level, the rigid public-private distinction’s reification of atomistic individualism is antithetical to the public rights theory’s emphasis on the public interest as the object of political deliberation.<sup>318</sup>

The challenge that the idea of the private poses for the public rights theory animates Meiklejohn’s treatment of art and literature. By limiting the First Amendment’s protection to political speech, he consigns “private” categories of speech to the procedural protections of the Due Process Clause.<sup>319</sup> At the same time, Meiklejohn acknowledges that art and literature – which in a sense are quintessentially private forms of expression – can exert powerful influences over people’s decisions about how to approach political issues. Accordingly, the First Amendment must protect art for the same reasons it protects facially political speech: so that citizens have access to the full range of inputs that enhance their wisdom as self-governors.<sup>320</sup> Although the public rights theory disdains the pride of place that the private rights theory accords to individual autonomy, Meiklejohn’s treatment of art affirms that no community can exist, let alone govern itself, without the conscientious independence of the individuals who constitute it. Likewise, the category of “political

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<sup>315</sup> See Magarian, *supra* note 9, at 1985-87 (describing public-private convergence under public rights theory).

<sup>316</sup> See, e.g., Chemerinsky, *More Speech*, *supra* note 247, at 1641 (“The reality is that when private institutions prohibit and punish expression there is a loss of speech, just as when the government prohibits and punishes expression.”).

<sup>317</sup> See, e.g., Fiss, *Why the State?*, *supra* note 64, at 783 (contending that “the first amendment . . . points toward the necessity of the activist state”); Sunstein, *Free Speech*, *supra* note 65, at 288-89 (advocating government action to ensure that broadcast media advance First Amendment values). Both Fiss and Sunstein forswear any direct attack on the public-private distinction. See Fiss, *Social Structure*, *supra* note 64, at 1414 (“Nothing I have said is meant to destroy the distinction presupposed by classical liberalism between state and citizen, or between the public and private.”); Sunstein, *supra*, at 267 (maintaining “that the First Amendment is aimed only at governmental action, and that private conduct raises no constitutional question”). Each, however, advocates doctrinal shifts that would require courts to rethink the uses of the distinction in constitutional law. See *supra* notes 64-70 and accompanying text.

<sup>318</sup> Compare Hor[witz], *Public-Private*, *supra* note 201, at 1427 (tying vitality of public-private distinction to widespread rejection of the notion of a substantive public interest) (hereinafter) with Magarian, *supra* note 9, at 1980-82 (discussing central importance of substantive public interest in public rights theory of expressive freedom).

<sup>319</sup> See MEIKLEJOHN, *supra* note 8, at 79-80.

<sup>320</sup> See *id.* at 117 (noting value of art and literature for political deliberation); Sunstein, *Free Speech*, *supra* note 65, at 304 (acknowledging political content of some art and literature).

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issues” expands with our understanding that institutions outside government often make decisions that broadly affect the political community and thus become proper, even necessary, objects of democratic discourse.

The public rights theory’s emphasis on deliberative democracy makes the concept of personal integrity essential for expressive freedom. In order for the First Amendment to ensure robust democratic discourse, it must respect a zone of individual conscience that allows people to evaluate information, formulate ideas, and participate meaningfully in democratic processes. This conception of personal integrity embodies a functional corollary to the public rights theory’s recognition of a public-private convergence. The public-private distinction should inform First Amendment analysis only to the extent the distinction serves the core First Amendment value of participatory democracy. Respecting a zone of individual conscience shields members of the political community from any conceivable First Amendment liability while also identifying them as First Amendment rights-holders.<sup>321</sup> The essential role of individual conscience in collective self-government is what puts the “rights” in the public rights First Amendment. The importance of allowing individuals to exercise their conscientious faculties in political processes precludes any First Amendment check on their treatment of others’ speech.

In contrast, nongovernmental institutions are not members of the political community, nor do they possess the similar sort of individual privacy interest, predicated on the Due Process Clause, that can properly fend off constitutional claims in general.<sup>322</sup> In fact, the economic power of many nongovernmental institutions makes them significant threats to public rights of expressive freedom,<sup>323</sup> a fact that justifies courts in enjoining nongovernmental interference with political debate.<sup>324</sup> That same economic power can transform institutions’ First Amendment claims into weapons against government reforms designed to enrich and broaden political debate.<sup>325</sup> As I discuss below, many nongovernmental

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<sup>321</sup> See *supra* note 307 and accompanying text. Under the public rights theory, nonmembers of the political community may be appropriate First Amendment *claimants*, to the extent their contributions to political dialogue advance deliberative democracy. See MEIKLEJOHN, *supra* note 8, at 118-19 (discussing expressive freedom of noncitizens).

<sup>322</sup> See *supra* notes 296-300 and accompanying text.

<sup>323</sup> Commentators in the public rights tradition since Meiklejohn have recognized threats to political expression, whether from governmental or nongovernmental sources, primarily in the allocation of expressive opportunities but have had less occasion to emphasize censorship of political debate. See *supra* notes 69-70 and accompanying text.

<sup>324</sup> For a discussion of the necessity of direct injunctions against nongovernmental actors, see *infra* notes 440-43 and accompanying text.

<sup>325</sup> See, e.g., *First National Bank v. Bellotti*, 435 U.S. 765 (1978) (upholding corporations’ challenge to state’s ban on corporate contributions or expenditures in initiative or referendum campaigns).

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institutions make sufficiently important contributions to democratic discourse to warrant protecting their expressive autonomy.<sup>326</sup> Determining when to extend such protection, however, requires a nuanced functional analysis – not merely a reflex to slap the label “private” on any institution outside government.

Removing the public-private distinction’s automatic protection of nongovernmental censors would outrage defenders of the rigid public-private distinction in First Amendment law, who condemn any notion of exposing nongovernmental institutions to First Amendment liability.<sup>327</sup> Their objections would rest on two premises. The first premise – that the First Amendment does nothing more or less than protect the speech of all nongovernmental entities, great and small, from governmental interference – clashes with the public rights theory’s fundamental commitment to a positive role for the First Amendment in promoting democratic discourse.<sup>328</sup>

The second premise for shielding nongovernmental institutions from First Amendment obligations is that government presents the only constitutionally cognizable threat to freedom because government enjoys a monopoly on the use of force.<sup>329</sup> Government does enjoy unique power to wage war, a power whose distinctive importance for the common welfare animates this article’s argument. Short of war, however, government’s ability to use force is less distinctive.<sup>330</sup> Certain constitutional rights, notably those related to criminal procedure, may matter only in light of government’s unique attributes, but those attributes have only limited relevance for the capacity to suppress speech. An employer that fires an employee for speaking, a shopping mall that excludes political protestors, or a broadcaster that buries a story critical of government policy does not need the threat of force. It only needs the

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<sup>326</sup> See *infra* notes 330-35 and accompanying text.

<sup>327</sup> See *supra* notes 206-15 and accompanying text.

<sup>328</sup> Actually, the private rights theory may result in greater free speech protection for powerful institutional speakers than for individuals. See Magarian, *supra* note 9, at 1955-56.

<sup>329</sup> See, e.g., Blasi, *supra* note 93, at 538-39 (emphasizing government’s “unique . . . capacity to employ legitimized violence” as basis for public-private distinction in First Amendment context); see also *supra* notes 237-43 and accompanying text (discussing nongovernmental institutions’ coercive capacity).

<sup>330</sup> Numerous corporations and other nongovernmental authorities employ armed security personnel. True, those authorities require governmental permission before they can use force. But that fact – even if we ignore private authorities’ practical capacity to use force illegally – merely underscores the government’s ability to distribute the power to use force to private authorities. Through lobbying, private authorities can cash in their economic power for authority to use force. Moreover, divisions of governing power under our constitutional scheme belie the vision of a monolithic, Hobbseian “state.” Most First Amendment claims target actions of state and local governments. Local governments employ force only on the authority of state governments, and state governments’ use of force under their police powers is subject to federal judicial oversight, congressional preemption, and superior federal military power. Thus, most “state” First Amendment defendants enjoy no greater independence in the use of force than nongovernmental authorities do.

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authority that it maintains a prerogative to exercise over its employees, patrons, or reporters.

Good reasons exist for taking governments very seriously as dangers to expressive freedom. They exercise substantial control over people's lives. They employ enormous bureaucracies that often display no sensitivity to expressive rights and can suppress expression without any one person's having to bear the legal and psychological burdens of responsibility. Their interests frequently create significant incentives to censor speech. Each of these statements, however, also describes private authorities in many situations. Moreover, from a constitutional standpoint, private authorities carry the extra risk factor of immunity from direct political control. Thus, judicial distinctions between governmental and nongovernmental authorities as threats to expressive freedom should be matters of degree and nuance, not of categorical certainty.<sup>331</sup>

Discarding the categorical distinction between governmental and nongovernmental authorities in First Amendment adjudication means that courts must articulate a reason, beyond the formal public-private distinction, for shielding any given nongovernmental institution from First Amendment liability or for allowing such an institution to raise First Amendment claims. The principal possibility, applicable in cases that present conflicting First Amendment claims,<sup>332</sup> is that a nongovernmental institution, by virtue of its distinctive characteristics, may make important contributions to democratic discourse that justify protection for its expressive conduct, including arguably expressive decisions to censor speech.<sup>333</sup> Serious doubt exists whether some types of nongovernmental authorities – notably business corporations – contribute to democratic discourse in a manner that justifies broad First Amendment protection of their expressive activities.<sup>334</sup> Other nongovernmental institutions,

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<sup>331</sup> For a nuanced discussion, rooted in an autonomy-centered First Amendment theory, about the difficulties of counterbalancing governmental and nongovernmental threats to expressive freedom, see David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991) (hereinafter Strauss, *Persuasion*).

<sup>332</sup> A prominent descriptive insight of the public rights theory is that expressive freedom controversies often involve conflicting claims of speech rights. See Magarian, *supra* note 9, at 1986-87; see also R. George Wright, *Why Free Speech Cases Are as Hard (and as Easy) as They Are*, 68 TENN. L. REV. 335 (2001) (examining some implications of opposing free speech interests in First Amendment cases). Restricting a nongovernmental entity's ability to censor speech often entails, at least from the private entity's standpoint, limiting the entity's own supposed expressive rights.

<sup>333</sup> Value for individuals' understanding of political issues likewise provides the only basis on which an institution, as distinct from an individual, can raise a First Amendment claim under the public rights theory.

<sup>334</sup> Development of this point requires a more thorough assessment, under the public rights theory, of the idea that the First Amendment should protect corporations' expressive freedom. See, e.g., *First National Bank v. Bellotti*, 478 U.S. 765, 768 (1978) (positing

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however, play valuable roles in maintaining robust democratic discourse, either as political associations of individuals<sup>335</sup> or because they perform functions that promote political debate.<sup>336</sup> Courts need to consider a given institution's contributions to expressive freedom in assessing its claims for First Amendment protection or insulation from First Amendment obligations.<sup>337</sup>

A thorough assessment of how courts should decide whether and when to accord particular nongovernmental institutions First Amendment protections or immunities from First Amendment liability lies beyond the scope of this article. Courts would need to develop a body of doctrine that assessed nongovernmental institutions' First Amendment-styled claims and defenses in light of the public rights theory of expressive freedom. My goal in this section has been to establish that the public rights theory requires a protected sphere of personal conscience and justifies substantial limits on the prerogatives of institutions to constrain political speech. The next section turns to a particular context in which those principles compel imposition of First Amendment liability on nongovernmental institutions: suppression or censorship of wartime political debate.

### *B. Enjoining Nongovernmental Suppression of Wartime Political Debate*

According to the public rights theory of expressive freedom, robust political debate is essential in a democratic society for wise policymaking, and the value of debate is greatest when the stakes of

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necessity of corporate free speech for an informed electorate).

<sup>335</sup> See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958) (recognizing importance of associations' advocacy role for public discourse).

<sup>336</sup> The First Amendment's Press Clause provides strong textual support for the intuition that the news media fall into this category. See U.S. CONST. Amend. I, cl. 4. For a discussion of how the First Amendment should affect news media failures to facilitate political debate, see *supra* section III.B.3. The category of nongovernmental institutions that promote debate also would encompass publishers, insulating from First Amendment objections some of their economically motivated decisions to delay or not to publish particular works. Similarly, universities' and libraries' contributions to democratic discourse would justify sparing them many First Amendment obligations.

<sup>337</sup> Circumstances might conceivably arise in which a court could properly hold some nonspeech interest of a nongovernmental defendant to outweigh a First Amendment plaintiff's expressive interest. In general, however, the public rights theory's narrow focus on political expression obviates the need for the sort of balancing common in present First Amendment adjudication. See Magarian, *supra* note 9, at 1987-88 (explaining preference for categorical methodology under public rights theory). Thus, if a challenged action has encroached on the First Amendment core of political speech, the defendant's countervailing nonspeech interest should carry little weight. My suggestions in the following discussion that the Court adapt balancing analyses to evaluate certain instances of nongovernmental censorship reflect both the practical utility of adopting existing tests and a high degree of caution in making sweeping changes to existing doctrine.

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policy decisions are highest.<sup>338</sup> Given that value, and this article's analysis of the public-private distinction in constitutional law, the First Amendment should provide substantial protection against nongovernmental censorship or suppression of political debate in times of war and national emergency. As discussed in detail above, nongovernmental action against many and varied challenges to government policies and conventional wisdom has undermined political debate since the September 11 terrorist attacks. This section sets forth the specific implications of extending the First Amendment to the three categories of nongovernmental action catalogued in that discussion: exclusions of political speakers from privately owned public spaces, reprisals against political expression, and suppression of information by the news media.

*1. Exclusions of Political Speakers from Privately Owned  
Public Spaces*

Political speakers who find themselves barred in times of war and national emergency from property generally open to the public should be able to secure First Amendment injunctions to enable their expression.<sup>339</sup> A sensible analysis would resemble the familiar public forum doctrine, which applies to exclusions of speakers from government-owned spaces. Under that doctrine, the government generally may limit expressive activity on property that serves a function unrelated to expression, such as a prison or military base.<sup>340</sup> In contrast, content-based limits on speech in spaces generally open to expressive activity, such as public sidewalks and government buildings available for public use, are subject to strict scrutiny.<sup>341</sup> More deferential scrutiny applies to content-neutral limits on expression, including regulations of conduct that incidentally affect speech<sup>342</sup> and regulations of the time, place, and manner of expression.<sup>343</sup> Finally, where the government has opened its property to expressive activity for a limited purpose, it enjoys substantial latitude to proscribe

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<sup>338</sup> See *supra* section I.A.2.

<sup>339</sup> See *supra* section I.B.2.

<sup>340</sup> See *Adderly v. Florida*, 385 U.S. 39 (1966) (upholding trespass convictions of students who occupied county jail); *Greer v. Spock*, 424 U.S. 828 (1976) (upholding regulations that restricted political activity on army base).

<sup>341</sup> See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981) (striking down under Free Speech Clause state university's denial to religious student group of right to use generally available meeting space).

<sup>342</sup> See *United States v. O'Brien*, 391 U.S. 367 (1968) (rejecting First Amendment challenge to federal ban on burning draft cards).

<sup>343</sup> See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (rejecting First Amendment challenge, brought by activists who sought to dramatize plight of homeless, to federal ban on sleeping in certain public parks).

speech outside the forum's purpose, but it must forego content-based regulation of speech that serves that purpose.<sup>344</sup> Courts could easily adapt the public forum doctrine to nongovernmental exclusions of expressive activity.<sup>345</sup> Such an analysis would respect property interests that are genuinely incompatible with expressive activity: a company would not have to allow a protest march through its offices. At the same time, the analysis would facilitate expressive activity that uses property generally open to the public.

An analysis derived from the public forum doctrine would have altered the results of two important Vietnam-era cases with striking similarities to present circumstances. In *Lloyd Corp. v. Tanner*,<sup>346</sup> the Court rejected a First Amendment challenge by antiwar protesters threatened with arrest for leafleting in an urban shopping mall. Justice Powell, writing for the majority, had to confront the Court's decision four years earlier in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*<sup>347</sup> that a suburban shopping center could not bar union organizers from picketing on shopping center property. Justice Marshall's majority opinion in *Logan Valley* had emphasized that a shopping center served the functions of a municipal business district and was open to the public for commercial activity.<sup>348</sup> His opinion had relied on a vision of expressive freedom consistent with the public rights theory:

The large-scale movement of this country's population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center. . . . Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their [controversial] practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a cordon sanitaire of parking lots around their stores. Neither precedent nor policy compels a result so at variance with *the goal of free*

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<sup>344</sup> This somewhat elusive "limited purpose" doctrine provides the clearest explanation for the result in *U.S. Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981), in which the Court rejected a First Amendment challenge to the Postal Service's restriction on depositing unstamped mail in home letter boxes, reasoning that letter boxes were openly available only for the deposit of paid mail.

<sup>345</sup> By utilizing the public forum doctrine as the most readily available device for curbing nongovernmental denials of access to speakers, I do not mean to dismiss cogent objections that the doctrine is an unduly formalistic analytic tool that overshadows conflicts between competing principles in First Amendment cases. See, e.g., Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1224 (1984) (contending that public forum analysis "distracts attention from the first amendment values at stake in a given case").

<sup>346</sup> 407 U.S. 551 (1972).

<sup>347</sup> 391 U.S. 308 (1968).

<sup>348</sup> See *id.* at 320-21 (discussing government's various prerogatives for limiting speech on public property and stating that private property owners' rights "are at the very least co-extensive with the powers possessed by States and municipalities").

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*expression and communication that is the heart of the  
First Amendment.*<sup>349</sup>

The *Lloyd Corp.* opinion limited *Logan Valley* to its facts. The majority insisted that “property [does not] lose its private character merely because the public is generally invited to use it for designated purposes.”<sup>350</sup> A First Amendment right to protest in privately owned business districts would constitute a “doctrine of dedication of private property to public use.”<sup>351</sup> Justice Powell saw no conflict between expressive freedom and this aggressive defense of property interests.<sup>352</sup> He offered nothing to refute the First Amendment theory at the heart of *Logan Valley*.<sup>353</sup>

Under the analysis of this article, the Court probably decided *Logan Valley* correctly and certainly erred in the wartime context of *Lloyd Corp.* As Justice Marshall recognized in *Logan Valley*, a shopping center is a space designed to foster public interaction and communication. Although shopping centers exist for commercial purposes, the variety and number of interactions they promote gives rise to an expectation that all manner of communications will occur. Because shopping centers and malls crowd out the public streets and sidewalks that once served as centers of interpersonal engagement, allowing their owners to proscribe political speech would drastically limit expressive freedom. Where self-governing people confront the question whether to start or continue a war, such a limitation severely undermines the public interest. Accordingly, Stephen Downs should have been able to wear his antiwar t-shirt around the Crossgates Mall<sup>354</sup> secure in the First Amendment’s protection. Political protestors should be free to speak in the concourses of shopping malls

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<sup>349</sup> *Id.* at 324-25 (emphasis added).

<sup>350</sup> *Lloyd Corp.*, 407 U.S. at 569.

<sup>351</sup> *Id.*

<sup>352</sup> *See id.* at 570:

The Framers of the Constitution certainly did not think these fundamental rights of a free society are [sic] incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear.

<sup>353</sup> The Court in *Hudgens v. NLRB*, 424 U.S. 507 (1976), abandoned the pretense of accommodation in *Lloyd Corp.* and overruled *Logan Valley* altogether. *See Hudgens*, 424 U.S. at 520-21. The Court’s method of dispensing with *Logan Valley* did little credit to any of the principals. Justice Marshall, author of *Logan Valley*, insisted at length in his *Lloyd Corp.* dissent that the two cases could not be distinguished, *see Lloyd Corp.*, 407 U.S. at 577-86 (Marshall, J., dissenting), then declared in dissent in *Hudgens* that they could be. *See Hudgens*, 424 U.S. at 535 (Marshall, J., dissenting). Justice Powell, after maintaining in his *Lloyd Corp.* majority opinion that the case was indistinguishable from *Logan Valley*, conveniently conceded error in his *Hudgens* concurrence. *See Hudgens*, 424 U.S. at 523-24 & n.2 (Powell, J., concurring). Justice Stewart, having joined Justice Marshall’s majority in *Logan Valley* and dissent in *Lloyd Corp.*, had to deliver the majority opinion in *Hudgens*, a role for which he all but apologized. *See Hudgens*, 424 U.S. at 518.

<sup>354</sup> *See supra* note 2 and accompanying text.

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and should have recourse to the courts if mall owners try to stop them. Mall owners, consistent with the public forum doctrine, should have some latitude to regulate the time, place, and manner of expression. They should not, however, have authority to sever their lucrative commerce with the public from the political discourse that naturally accompanies that commerce.

In a second Vietnam-era case, *CBS, Inc. v. Democratic National Committee*,<sup>355</sup> an antiwar group and the DNC brought a First Amendment challenge against broadcasters' refusal to sell advertising time for political messages. As in the shopping center cases, the challengers contended that the Constitution compelled private property owners to allow political speakers access to property the owners had opened to expressive activity. As in *Lloyd Corp.*, the Court rebuffed the challenge, with a plurality concluding that the First Amendment created no general right of access to the mass media. Chief Justice Burger's opinion characterized the broadcasters' policy against running editorial messages as "expressly based on a journalistic judgment that 10- to 60-second spot announcements are ill-suited to intelligible and intelligent treatment of public issues."<sup>356</sup> He acknowledged the public trust of broadcast licensees but concluded that Congress had given licensees primary responsibility for determining how to effectuate that trust.<sup>357</sup> He subordinated the challengers' First Amendment claim to the broadcasters' autonomy interest:

[I]t would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction.<sup>358</sup>

Justice Brennan, dissenting, raised traditional state action arguments against the plurality's analysis. Broadcasters, he pointed out, require a publicly owned resource – the airwaves – in order to do business.<sup>359</sup> They depend on the government for their right to use that resource, and the government subjects them to extensive regulatory control.<sup>360</sup>

This article's analysis of the First Amendment and the public-private distinction precludes the plurality's reasoning and result in *CBS v. DNC*. When the nation is wrestling with questions of war and peace, the First Amendment cannot countenance broadcast licensees' active efforts to prevent political views from circulating. The plurality's analysis of

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<sup>355</sup> 412 U.S. 94 (1973).

<sup>356</sup> *Id.* at 118 (plurality opinion).

<sup>357</sup> *See id.* at 117.

<sup>358</sup> *Id.* at 120-21.

<sup>359</sup> *See id.* at 173-74 (Brennan, J., dissenting).

<sup>360</sup> *See id.* at 175-78.

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broadcasters' editorial discretion is correct but beside the point. The media's editorial discretion properly enjoys formidable First Amendment protection,<sup>361</sup> but it does not suffer when a broadcaster has made advertising time available and someone with a political message seeks to purchase it.<sup>362</sup> As in the shopping center cases, the Justices who advocated public access gave the game away by playing on the field of conventional state action reasoning. Whether or not national broadcasters' privileges as licensees should mark them formally as "state actors," they control which political ideas reach massive numbers of people. Broadcasters' refusals to accept advertising revenue from activists with varied viewpoints on the impending war with Iraq<sup>363</sup> were the costly legacy of *CBS v. DNC*. Under a better understanding of the First Amendment, those activists, rebuffed by CNN or CBS, should have had no trouble securing injunctions to compel acceptance of their political messages on the same terms as other paid advertisements. Broadcasters are free to determine how much advertising time they sell and what they charge for it, but they should not have latitude to engineer a content-based exclusion of political expression.

Some might object that a constitutional allowance for political speakers to use nongovernmental property would violate the First Amendment rights of property owners to be free from "compelled speech" because it would force the owners to present messages with which they disagreed.<sup>364</sup> The argument has both practical and theoretical deficiencies. On a practical level, most people neither know nor care who owns their favorite shopping center or television station. The idea that shoppers or viewers would ascribe to those unknown owners any protestor's political message, let alone the multiplicity of competing and contradictory messages that a constitutional allowance for public access would produce, defies imagination. On the level of the public rights theory, the public's interest in information and open debate dwarfs property owners' autonomy interests, including their interest in avoiding association with ideas they disdain.<sup>365</sup> Another potential objection is that, assuming the Court incorrectly decided *Lloyd Corp.* and *CBS v. DNC*, it

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<sup>361</sup> See *infra* notes 380-81 and accompanying text

<sup>362</sup> This was the interest that troubled the Court in *CBS v. DNC*. See 412 U.S. at 124 (declining to require broadcasters to accept political advertising because such a requirement would cause "a further erosion of the journalistic discretion of broadcasters in the coverage of public issues").

<sup>363</sup> See *supra* notes 122-23 and accompanying text.

<sup>364</sup> See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) (striking down on compelled speech grounds New Hampshire requirement that motorists display "Live Free or Die" slogan on license plates).

<sup>365</sup> See Magarian, *supra* note 9, at 1982 (discussing public rights theory's elevation of collective informational interests over individual autonomy interests).

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could correct those errors simply by holding mall owners and broadcasters to be state actors. That approach, in my view, would underscore the shallow formalism of the state action doctrine while ignoring the important reason for overturning the precedents: the necessity, in a healthy democratic system, of robust political discourse.

## 2. Reprisals Against Political Expression

The public rights theory dictates that, as in cases where property owners exclude political speakers from areas generally open to the public, courts should invoke the First Amendment to enjoin reprisals by private authorities against individuals' expression of their political views.<sup>366</sup> Courts should not allow majoritarian pique, which may reflect covert or implicit government pressure, to justify institutional retaliation against socially beneficial speech. Actions that properly subject individuals to reprisals, such as failures to perform job duties, may in some cases involve political expression. Institutional retaliation aimed at the political content of speech, however, is rarely if ever justified. Nongovernmental institutions' participation in political debates may often enrich the public's understanding of important issues. In contrast, courts should not tolerate those institutions' leveraging their resources to silence public debate, any more than courts tolerate censorship by the government.

Here, as in the context of access to property, a doctrine applied to date only against government defendants provides a blueprint for analysis of claims against nongovernmental authorities. In *Pickering v. Board of Education*,<sup>367</sup> the Court held that, although the public interest in efficient services empowers the government to place greater constraints on employees' speech than it may place on citizens generally, it must exercise substantial restraint in disciplining employees for speaking about "matters of public concern."<sup>368</sup> A public employer may justify a restriction on such speech only by showing that the "necessary impact on the [employer's] actual operation" outweighs the employer's expressive interest.<sup>369</sup> Most *Pickering* cases involve employees' criticisms of their employers, and the Court occasionally has upheld employers' retaliation against such criticism.<sup>370</sup> In contrast, the Court has shown little tolerance

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<sup>366</sup> See *supra* section I.B.3.

<sup>367</sup> 391 U.S. 563 (1968).

<sup>368</sup> *Id.* at 568.

<sup>369</sup> *Id.* at 571.

<sup>370</sup> See *Connick v. Myers*, 461 U.S. 138 (1983) (upholding employee's discharge for complaining about internal office policy); *but see Waters v. Churchill*, 511 U.S. 661 (1994) (vacating summary judgment in favor of employer and supervisor who fired employee for criticizing her department); *Perry v. Sindermann*, 408 U.S. 593 (1972) (affirming decision that professor who had criticized college president and regents was entitled to pursue lawsuit for wrongful termination). The force of the *Pickering* doctrine's protection even for

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for reprisals against employees' broader political statements, even applying *Pickering* to reverse the firing of a clerk who expressed hope that someone would assassinate the President.<sup>371</sup> From the standpoint of the public rights theory, the *Pickering* standard has the virtue of incorporating the distinction between speech on matters of general and individual interest.<sup>372</sup> The Court in applying *Pickering* has emphasized the informational interests of audiences as well as the autonomy interests of speakers.<sup>373</sup>

Subjecting nongovernmental employers to a *Pickering*-type analysis would have given Dan Guthrie and Tom Gutting, the newspaper columnists fired for their criticisms of President Bush's behavior after the September 11 terrorist attacks,<sup>374</sup> strong grounds for First Amendment challenges to their dismissals. Guthrie's and Gutting's accusations of presidential cowardice in the face of crisis boldly challenged official conduct and popular sentiment on a matter of the most serious national concern. Their employers, in arguing for the functional necessity of firing the columnists, probably would have maintained that the firings were essential to prevent angry readers from canceling their subscriptions. This argument would have presented problems of both fact and principle. On a practical level, the newspapers would have needed to substantiate claims of potential losses in readership, and the fact that Grants Pass, Ore. and Texas City, Tex. are not centers of media competition would have complicated that effort. As a matter of principle, the First Amendment precludes even weighty arguments for the instrumental necessity of chilling or punishing speech.<sup>375</sup> The newspaper owners' angry published responses to their columnists, besides probably placating most offended readers, reflected the positive instinct to rebut

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employees who directly criticize their employers becomes apparent through a contrast with similar cases involving nongovernmental employers, in which lower courts have consistently refused to find First Amendment violations. See Robert F. Ladenson, *Free Speech in the Workplace and the Public-Private Distinction*, 7 LAW & PHIL. 247, 252 & n.22 (1989) (cataloguing decisions).

<sup>371</sup> See Rankin v. McPherson, 483 U.S. 378 (1987). The *Pickering* doctrine, like any legal constraint on employers' reasons for taking job-related actions, has relevance primarily for dismissals or disciplinary actions against existing employees, although a *Pickering*-based claim for failure to hire a job applicant based on her speech would presumably be possible given sufficient evidence.

<sup>372</sup> See Connick, 461 U.S. at 147 (holding that *Pickering* test does not apply when employees speak "upon matters only of personal interest").

<sup>373</sup> See, e.g., United States v. National Treasury Employees Union, 513 U.S. 454, 468 (1995) (considering "the interests of both potential audiences and . . . present and future employees" in employees' ability to accept honoraria for speaking).

<sup>374</sup> See *supra* notes 141-44 and accompanying text.

<sup>375</sup> See, e.g., Texas v. Johnson, 491 U.S. 397 (1989) (rejecting interests offered in support of criminal prosecution for burning of American flag).

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arguments, rather than censor them.<sup>376</sup> The firings, unfortunately, recast the owners' reasoned responses as mere adjuncts to their superior economic power. Extension of the *Pickering* analysis to nongovernmental workplaces would largely preclude employer retaliation as a weapon against political dissenters.<sup>377</sup>

A roughly similar analysis could apply in retaliation cases outside the employment context. For example, in considering a legal challenge to the major stock exchanges' bar against Al Jazeera journalists because of their colleagues' reporting on the Iraq war,<sup>378</sup> a court could have inquired whether the importance of the ban to the exchanges' operation outweighed the public's interest in multifaceted news reporting.<sup>379</sup> The exchanges would have brought even less to that balance than the newspapers that fired Guthrie and Gutting. The idea that anyone would have criticized the exchanges, let alone stopped dealing with them, had they not gone out of their way to suspend Al Jazeera's floor privileges is inconceivable. On the other hand, the images of dead and imprisoned American soldiers whose broadcast prompted the suspensions had tremendous potential to influence debates about the wisdom of the Iraq war. The exchanges appear to have used their institutional might to chill such reporting, and accordingly to diminish public debate, out of nothing more than offended sensibilities. As in the newspaper firing cases, the exchanges might have done the public a service by standing up for their sensibilities and criticizing Al Jazeera's journalistic standards. In contrast, their choices to cut their opponent off at the knees offended First Amendment values in a way that a democratic society at war cannot afford.

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<sup>376</sup> Had the newspapers chosen not to publish the offending columns, rather than punish the authors, courts would have had to defer to their editorial discretion. Reprisals against columnists for the content of their articles transcends that discretion. I propose an indirect approach for dealing with news media misinformation and suppression of information *infra* section III.B.3.

<sup>377</sup> For an argument that legislatures should constrain nongovernmental employers' retaliation against employees' speech but the First Amendment should not, see Ladenson, *supra* note 368, at 256-61. Ladenson's opposition to constitutionalizing the problem stems from his premises that the First Amendment serves primarily to check any institution with "sufficient power to control thought over an entire society" and that only the government has such power. *Id.* at 257. The first premise, in my view, sets too high a standard for First Amendment concern, and the second underestimates nongovernmental institutions' capacity to curb expressive freedom.

<sup>378</sup> See *supra* notes 151-52 and accompanying text.

<sup>379</sup> Although the banned journalists presumably were not American citizens, the public rights theory's emphasis on the public's interest in information dictates that courts extend full First Amendment protection to noncitizen speakers who address matters of public importance. See MEIKLEJOHN, *supra* note 8, at 118-19. The al-Jazeera episode does not implicate the interesting question whether the daily workings of stock exchanges are matters of public importance, because the concern in retaliation cases is that a restriction will chill a speaker's expression, and al-Jazeera expresses many views on political matters. Finally, the Internet and satellite television render immaterial the fact that al-Jazeera's primary audience is outside the United States.

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*3. Misinformation and Suppression of Information by  
News Media*

The public rights theory of expressive freedom requires strong First Amendment protection of the news media, because they make an essential contribution to democratic discourse by gathering information and disseminating it to the public.<sup>380</sup> Accordingly, my proposal to enforce First Amendment standards against nongovernmental actors must address news organizations' failures to report information salient to policy disputes.<sup>381</sup> At the same time, the news media present an especially thorny problem for that proposal. As the Supreme Court has often noted, the media's informational functions involve the constant exercise of subjective editorial discretion.<sup>382</sup> Editors and producers must constantly determine which stories are newsworthy, what information is sufficiently reliable, and how to allocate limited publishing resources among different stories. Any governmental interference with those decisions, including judicial interference, threatens to undermine values central to the First Amendment. To say that a judge, in appropriate circumstances, may tell a property owner what activities it must tolerate or bar an employer from certain retaliatory actions is one thing. To say that she may tell an editor which stories to run or not to run is something else entirely. For the same reason, media entities, unlike nongovernmental institutions generally, should be able to raise First Amendment claims.<sup>383</sup>

Even so, the same sorts of pressures that may motivate a mall owner to exclude protestors or an employer to fire a political dissenter can lead to situations like news organizations' voluntary submission to restrictive

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<sup>380</sup> See *supra* notes 93-94 and accompanying text (discussing news media's public trust).

<sup>381</sup> See *supra* section I.B.1. (discussing media failures since 2001 terrorist attacks).

<sup>382</sup> See *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 674 (1998) (recognizing the TV broadcasters have "widest journalistic freedom"); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that publisher's treatment of public issues falls within its proper editorial control); *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 111 (1973) (plurality opinion) (recognizing necessity of substantial journalistic discretion for broadcasters).

<sup>383</sup> Although my discussion focuses on the news media, the entertainment media play a complementary role in fostering political discourse, a role undermined by consolidation of media ownership. See, e.g., Brent Staples, "The Trouble With Corporate Radio: The Day the Protest Music Died," *N.Y. TIMES*, Feb. 20, 2003, p. A30 (positing connection between consolidation of radio station ownership and absence from airwaves of politically provocative music); see also *supra* notes 130-39 and accompanying text (discussing censorship by entertainment corporations since September 11 terrorist attacks). Like the news media, the entertainment media require editorial freedom to perform their democratic function; thus, the approach proposed here for First Amendment oversight of news media ownership rules also encompasses the entertainment media.

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rules for battlefield reporting in Iraq<sup>384</sup> and their parroting of the government's dubious assertions about the extent of the Iraqi military threat.<sup>385</sup> The influence of owners and advertisers can make the media, in Ed Baker's sadly apt description, "too timid in exposing corruption and abuse both of public and especially of private power, insufficiently diverse in its presentations, relatively unresponsive to significant elements of society and more encouraging of political passivity than public involvement."<sup>386</sup> Media corporations in the United States may be more subject to intimidation by overt or subtle governmental influence than are state-owned media such as the BBC, because their "private" status leaves them vulnerable to regulatory rewards and punishments while preventing the sort of public accountability that state-owned media must face.<sup>387</sup> Pressure on the media intensifies during wartime, when the government can manipulate media behavior through selective access to battlefields and strategists and when the public, at least initially, demands a patriotic informational environment.<sup>388</sup> Media capitulation to such pressures exacts far greater First Amendment costs than suppression of debate in the private property or reprisal cases, because the media plays a central role in informing the public and fostering political dialogue.

Even though courts should not interfere in editorial decisions, they can encourage unfettered newsgathering and reporting by scrutinizing institutional arrangements that inhibit media competition.<sup>389</sup> The present climate of limited regulation has allowed a few corporations to acquire a large percentage of key American media outlets. In broadcasting, the five largest media companies – News Corp., Viacom, Disney, General

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<sup>384</sup> See *supra* notes 104-05 and accompanying text.

<sup>385</sup> See *supra* notes 108-10 and accompanying text.

<sup>386</sup> C. Edwin Baker, *Private Power, the Press, and the Constitution*, 10 CONST. COMM. 421, 426 (1993); see also MCCHESENEY & NICHOLS, *supra* note 94, at 60 (contending that "the preponderance of [corporate journalism] would be compatible with an authoritarian political regime").

<sup>387</sup> Paul Krugman, *The China Syndrome*, N.Y. TIMES, May 13, 2003, p. A31. Krugman contends that the primary threat to media independence arises not from direct government censorship but from "a system in which the major media companies have strong incentives to present the news in a way that pleases the party in power, and no incentive not to." *Id.*

<sup>388</sup> According to CBS anchor Dan Rather, discussing coverage of the Iraq war, diminished journalistic independence results from "fear among journalists – fear that if we don't dumb it down, sleaze it up, tart it up, that some competitor will beat us in circulation and ratings." *Did We See the Real War?*, *supra* note 106, at 44. Harvard media analyst Marvin Kalb concurred: "There may be serious economic consequences for American broadcast-news outlets that are inadequately patriotic in appearance." *Id.* at 43. *Time's* James Poniewozik, also reflecting on the Iraq war, put the point more bluntly: "Patriotism pays. So Fox and NBC dueled over who was the greater quisling." Poniewozik, *supra* note 118, at 71.

<sup>389</sup> See Baker, *supra* note 384, at 431 (contending that "concern with [media] ownership discretion is intensified because the structure of the media market routinely places the interest in profits in tension with journalistic professionalism and democratic service"); Netanel, *Mass Media*, *supra* note 93, at 338 (advocating, to ensure that media serves democratic interests, "partial solutions, most involving efforts to balance one power center against one or more others").

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Electric, and AOL Time-Warner – own stations that account for 70 percent of the nation’s prime time television viewership.<sup>390</sup> Six cable television companies boast 80 percent of cable subscribers.<sup>391</sup> Clear Channel, the largest U.S. radio corporation, owns stations that draw 25 percent of all listeners.<sup>392</sup> Media consolidation has even affected the notoriously heterogeneous Internet: 16 large companies own the top 20 news sites on the World Wide Web, but the top five receive more traffic than the next 15 combined.<sup>393</sup> Large media corporations’ influence over the agencies that regulate the media business<sup>394</sup> makes judicial oversight in this area essential.

Concentration of ownership of major media outlets reduces the diversity and originality of information the media presents. The massive consolidation of the radio industry prompted by the 1996 Telecommunications Act<sup>395</sup> has led to a reduction in radio newsgathering operations, with many local reporting staffs gutted.<sup>396</sup> Conversely, diffusion of ownership facilitates a vigorous and inclusive exchange of information and ideas and ensures that the media present diverse information and varied perspectives.<sup>397</sup> Although government regulation to prevent concentration of media ownership arguably offends a private rights vision of the First Amendment, the Supreme Court has long held

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<sup>390</sup> See Jeff Gelles, *FCC Quiet on Media-Ownership Vote*, PHILA. INQUIRER, May 11, 2003, p. E1; David D. Kirkpatrick, *From Some Boardrooms, Nostalgia for Regulation*, N.Y. TIMES, June 2, 2003, p. C9 (hereinafter Kirkpatrick, *Boardrooms*).

<sup>391</sup> Kirkpatrick, *Boardrooms*, *supra* note 388, at C9.

<sup>392</sup> *Id.* Clear Channel owns over 1,200 radio stations, 37 television stations, and more than 775,000 billboards and is also the world’s largest concert producer. Andrew Ratner, *War Coverage Could Alter U.S. Media Policy*, BALT. SUN, Mar. 30, 2003, p. 1D.

<sup>393</sup> Matthew Hindman & Kenneth Neil Cukier, *More News, Less Diversity*, N.Y. TIMES, June 2, 2003, p. A17. Despite the Internet’s decentralized technology, established media titans enjoy advantages in cyberspace, because they can adapt existing content and advertising relationships to the new medium. See MCCHESENEY & NICHOLS, *supra* note 94, at 77-78 (discussing reasons for corporate primacy on Internet).

<sup>394</sup> A recent report by the Center for Public Integrity found that, during the past eight years, broadcast and telecommunications interests provided the primary financial backing for 2,500 trips, costing \$2.8 million, by FCC commissioners and employees. Bob Herbert, *Cozy With the F.C.C.*, N.Y. TIMES, June 5, 2003, p. A35. The Center also reported that, during their consideration of the new regulations, FCC officials met more than 70 times with media industry representatives, compared to five meetings with consumer advocates. *Id.*; see also MCCHESENEY & NICHOLS, *supra* note 94, at 78-79 (documenting influence of corporate media lobbyists).

<sup>395</sup> See Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996).

<sup>396</sup> See MCCHESENEY & NICHOLS, *supra* note 94, at 53. Prior to the 1996 deregulation, no single entity could own more than 28 stations nationwide; today, Clear Channel owns 1,200 stations. *Id.*

<sup>397</sup> See generally ROBERT W. MCCHESENEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES (1999); Baker, *supra* note 384; Jerome A. Barron, *Structural Regulation of the Media and the Diversity Rationale*, 52 FED. COMM. L.J. 555 (2002).

that ownership controls advance important First Amendment values.<sup>398</sup> Ownership regulations, while not sufficient in an era of unprecedented technological change to guarantee robust democratic discourse, remain necessary for that goal.<sup>399</sup> The market alone will not produce a competitive, diverse media environment.<sup>400</sup> Accordingly, federal courts should emphasize First Amendment interests when evaluating government regulations that affect the distribution of media ownership.

Some commentators have argued that substantial concentration of media ownership benefits democracy by ensuring that media entities are large and powerful enough to function as forceful counterweights to government. In articulating the idea of a First Amendment defined by the institutional media's role in checking government misconduct, Vincent Blasi asserts "the need for well-organized, well-financed, professional critics to serve as a counterforce to government."<sup>401</sup> The argument is one of degree, and my proposal certainly does not contemplate a media environment bereft of large entities. Institutional media have undeniable value for democracy because of their distinct perspective and their newsgathering resources. In part, however, the argument that media concentration serves democracy reflects uncritical adherence to the traditional public-private distinction.<sup>402</sup> As I have contended, government requires checking not because it is "public" but because it is powerful. Large, powerful corporations are not natural enemies of government. They may share government's interests in many aspects of the status quo,

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<sup>398</sup> See *FCC v. National Citizens' Comm. for Broadcasting*, 436 U.S. 775, 798-802 (1978) (upholding against First Amendment challenge FCC rules barring cross-ownership of newspaper and broadcast station in same market).

<sup>399</sup> A complementary path to facilitating democratic discourse, advocated most vigorously by Yochai Benkler, lies in encouraging the development of decentralized forms of mass communication on the model of the Internet. See Yochai Benkler, *A Speakers' Corner Under the Sun*, in ELKIN-KOREN & NETANEL, *supra* note 93, at 291, 305-14 (positing superiority of an informational commons model in terms of democratic discourse and personal autonomy); Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 *FED. COMM. L.J.* 561, 568 (2000) (arguing for a regulatory structure designed to ensure "[a]n open, free, flat, peer-to-peer network").

<sup>400</sup> See Baker, *supra* note 384, at 426-31 (using economic analysis to refute argument that market produces what media consumers value or need). Even the Internet has produced only limited diversity in the information most people receive. See Matthew Hindman & Cukier, *supra* note 391, at A17 (summarizing findings that very small number of Web sites receive vast majority of traffic because of "winner take all" effect of search engines and hyperlinks).

<sup>401</sup> Blasi, *supra* note 93, at 541; see also Neil W. Netanel, *Taking Stock: The Law and Economics of Intellectual Property Rights*, 53 *VAND. L. REV.* 1879, 1885 (2000) (arguing that "some degree of hierarchy, some concentration of expressive power in media enterprises, is the price we must pay if the press is to be able to fulfill its vital watchdog and agenda-setting roles") (hereinafter Netanel, *Taking Stock*).

<sup>402</sup> Blasi vigorously defends the public-private distinction. See Blasi, *supra* note 93, at 538-41. In contrast, Netanel joins his nuanced defense of institutional media to an acknowledgement that they "serve as an important check on both government and private entity malfeasance." Netanel, *Taking Stock*, *supra* note 399, at 1923.

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and the two sorts of institutions may coopt one another in many circumstances. In addition, arguments for concentrated media power may reflect the fallacy, debunked by ontological critics of the public-private distinction,<sup>403</sup> that a climate dominated by large corporations reflects absence of government control.<sup>404</sup> Without doubt a healthy democracy requires a media environment with both large and small components,<sup>405</sup> but that need reflects the importance of diversity and competition more than the importance of concentrated “private” power. In any event, judicial review of congressional policy on media ownership could curb decentralization that undermined political debate as surely as it could curb centralization.

The ongoing controversy over recent FCC regulations that would ease restrictions on ownership of multiple media outlets exemplifies the opportunity for indirect First Amendment oversight of the news media. In June 2003 the FCC voted 3-2 to ease restrictions on cross-ownership within a single media market of newspapers and broadcast stations; to allow a single company to own up to three television stations in the largest media markets; and to allow a single television network to own stations that effectively reach up to 90 percent of the national audience.<sup>406</sup> Advocates and opponents alike agreed that the new rules would spur further concentration of media ownership.<sup>407</sup> An ideologically diverse coalition of political, religious, and consumer organizations opposed the FCC’s action, charging that the new rules would produce a greater uniformity of viewpoints on the airwaves.<sup>408</sup> Even some media executives decried the FCC’s deregulatory fervor as damaging to media

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<sup>403</sup> See *supra* section II.B.1. and accompanying text.

<sup>404</sup> See Blasi, *supra* note 93, at 542 (warning, in course of argument supportive of large institutional media, of dangers “if modern government were ever to gain complete control of the channels of mass communication”); Netanel, *Taking Stock*, *supra* note 399, at 1885 (asserting that “liberal democracy requires media enterprises that are independent from state support”).

<sup>405</sup> See Netanel, *Taking Stock*, *supra* note 399, at 1886 (advocating media policy that balances need for diverse perspectives with need for powerful institutional media). Netanel ultimately advocates a government media policy that includes “cross-ownership and consolidation restrictions, subsidizing non-commercial media outlets, and other measures designed to support a multiplicity of expressive sources.” *Id.* at 1925.

<sup>406</sup> See Stephen Labaton, *F.C.C. Votes to Relax Rules Limiting Media Ownership*, N.Y. TIMES, June 3, 2003, p. A1, C9. The regulations expressly allow a network to own stations that reach 45% of the national audience – up from the previous rule’s 35% – but the commission retained a formula that excludes UHF viewers from the calculation, making the actual limit much higher.

<sup>407</sup> See David D. Kirkpatrick, *New Rules Give Big Media Chance to Get Even Bigger*, N.Y. TIMES, June 3, 2003, p. C1 (hereinafter Kirkpatrick, *New Rules*).

<sup>408</sup> See *id.* at C9 (identifying coalition of opponents as including National Rifle Association, National Organization for Women, Common Cause, United States Conference of Catholic Bishops, Leadership Conference on Civil Rights, Writers Guild of America, and Parents Television Council).

diversity.<sup>409</sup> Perhaps most significant, although little noted in the United States, was the criticism by a leading international rights monitor. On the eve of the FCC's vote, Freimut Duve, representative for media freedom of the Organization for Security and Cooperation in Europe, warned that the new regulations "may affect the pluralism of opinion that characterizes the media scene in the U.S."<sup>410</sup> Calling the U.S. "the most symbolically important country for the culture of press freedom," Duve expressed particular concern with the negative example the regulations' constriction of opinion might set "for other OSCE-participating states where democratic counterbalances to authoritarian rule, including free media, are still weak."<sup>411</sup>

A federal appellate court already has issued a preliminary injunction against the new rules.<sup>412</sup> The Senate has voted to repeal them, but the House may not follow suit, and President Bush has promised to defend the rules with his veto pen.<sup>413</sup> Should Congress fail to block the regulations, this article's First Amendment analysis provides a solid First Amendment ground on which a federal court could do so. Under the public rights theory, a court could sustain a First Amendment challenge to the FCC rules based on a showing that their promotion of media concentration undermined the media's facilitation of informed political debate. Such an injunction would cure a governmental effort to undermine First Amendment interests. Focusing on assertive oversight of media regulations would allow courts to enforce First Amendment values without undermining those same values by imposing substantive judgments on particular editorial decisions. Judicial intervention against concentration of media ownership would not have directly improved major media outlets' lackluster performance before, during, and after the Iraq war. But consistent judicial pressure on Congress to promote a diverse, independent media should encourage vigorous newsgathering and reporting in good times and, more importantly, in bad.

### *C. Why the Court?*

Aside from the substantive novelty of extending the First Amendment to prevent nongovernmental institutions from censoring political debate, such a doctrinal shift would require federal courts to make numerous difficult judgments. Courts would have to determine whether a

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<sup>409</sup> See Kirkpatrick, *New Rules*, *supra* note 405, at C9 (discussing opposition of Ted Turner and Barry Diller to new FCC regulations).

<sup>410</sup> Marcus Kabel, *Rights Monitor Critical of U.S. Media Ownership*, IRISH TIMES, May 30, 2003, p. 11.

<sup>411</sup> *Id.*

<sup>412</sup> See *Prometheus Radio Project v. FCC*, 2003 U.S. App. Lexis 18390 (3d Cir. Sept. 3, 2003).

<sup>413</sup> See Stephen Labaton, *F.C.C. Plan to Ease Curbs on Big Media Hits Senate Snag*, N.Y. TIMES, Sep. 17, 2003, p. A1.

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challenged action seriously undermined political debate; if it did, whether the First Amendment nonetheless gave the defendant some basis to claim sanctuary from judicial oversight; and, if no such basis existed, what sort of First Amendment test should control the case. In addition, courts would have to determine when institutions' instrumental contributions to fostering political debate entitled them to advance First Amendment claims against constraints on their own actions. Those inquiries would require complex, multifaceted analyses, and our legal culture tends to resist expansion of the judicial role on grounds of both institutional competence and the separation of powers.<sup>414</sup> Consideration of available alternatives, however, leaves little room to doubt that when nongovernmental institutions pose a serious threat to political debate, only federal courts stand in a strong position to stop them.

One alternative to the sort of judicial review I propose would be to give Congress primary responsibility for ensuring that nongovernmental institutions respect First Amendment norms. Notwithstanding the Supreme Court's recent protectiveness of its authority to interpret constitutional provisions,<sup>415</sup> Congress as well as courts can safeguard constitutional values.<sup>416</sup> Indeed, recognition of nongovernmental threats to individual rights sometimes leads courts to ease constitutional constraints on state action in order to allow legislatures to solve the problem.<sup>417</sup> Statutes have normative and practical advantages over the judicial process because Congress is a politically accountable institution with the mandate and resources to make difficult policy decisions.<sup>418</sup> Moreover, the Supreme Court has indicated that Congress appropriately may safeguard expressive interests the First Amendment does not ensure.

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<sup>414</sup> See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (advocating alternative means of vindicating constitutional values where institutional concerns counsel against judicial enforcement).

<sup>415</sup> See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down federal Religious Freedom Restoration Act on ground that only Court had proper authority to define constitutional constraints on states).

<sup>416</sup> See Chemerinsky, *Rethinking*, *supra* note 194, at 507 (noting that state and federal statutes and state common law can protect against nongovernmental infringements on rights); Eule & Varat, *supra* note 205, at 1580-1600 (discussing statutory efforts to hold nongovernmental actors to First Amendment norms).

<sup>417</sup> See Baker, *supra* note 384, at 422-23 (explaining that "the societal need to rein in private power" may incline courts "toward restricting or sculpting constitutional protections of private power in order to leave that power subject to legislative control"); Strauss, *Persuasion*, *supra* note 329, at 368-70 (discussing circumstances under which easing of constitutional constraints on government regulation of speech might be justified).

<sup>418</sup> See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (1962) (advancing classic argument that majoritarian decisionmaking is preferable to lawmaking by unelected judges).

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In *CBS, Inc. v. Federal Communications Commission*,<sup>419</sup> the Court upheld an FCC order that broadcast television networks sell extensive time to the Carter presidential campaign, pursuant to a federal statute that mandated “reasonable access” to the airwaves for federal political candidates.<sup>420</sup> Although the Court in an earlier case had held that the First Amendment did not require broadcasters to sell advertising space for political messages,<sup>421</sup> the majority in *CBS v. FCC* concluded that Congress properly had created an affirmative right of access to the airwaves for political candidates.<sup>422</sup> In some circumstances, as the public rights theory of expressive freedom recognizes, Congress should and does protect expressive freedom.

In the context of wartime dissent, however, reliance on congressional action is dangerous, because Congress in wartime is likely to welcome the efforts of nongovernmental censors. Nongovernmental suppression of wartime dissent usually reflects genuine or calculated sympathy with government policies; thus, even when the government itself is not the censor, suppression of dissent tends to serve government interests.<sup>423</sup> Expecting the government to restrict actions that both serve its own interests and relieve it of the political costs of curbing speech is unrealistic. Even if Congress enacted forceful statutory restrictions on nongovernmental censorship during times of national calm, enforcement of such restrictions during wartime would depend on the politically motivated decisions of Executive Branch officials. If some institution within government must guard against rights violations that advance government policies, the principle of representation-reinforcing judicial review<sup>424</sup> indicates that the judiciary is the best candidate.

Another possible method of protecting expression against private censorship would be for courts to create a common law tort, or a set of torts, for censorship of speech.<sup>425</sup> This would create a similar structure to the law’s protection of privacy interests, which has separate constitutional and common law tort schemes.<sup>426</sup> A tort approach to protection of

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<sup>419</sup> 453 U.S. 367 (1981).

<sup>420</sup> See 42 U.S.C. sec. 312 (a) (7).

<sup>421</sup> See *CBS, Inc. v. Democratic National Comm.*, 412 U.S. 94 (1973). For a discussion of *CBS v. DNC*, see *supra* notes 353-58 and accompanying text.

<sup>422</sup> See *CBS v. FCC*, 453 U.S. at 379 (holding that Congress had “created a right of access that enlarged the political broadcasting responsibilities of licensees”).

<sup>423</sup> See *supra* note 17 and accompanying text.

<sup>424</sup> See *United States v. Carolene Products Corp.*, 304 U.S. 144, 153 n.4 (1938) (defining limited circumstances in which Court properly may submit legislation to more searching review in order to ensure proper political representation); JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980) (elaborating representation reinforcement theory).

<sup>425</sup> For a proposal along these lines, see Rory Lancman, *Protecting Speech From Private Abridgement: Introducing the Tort of Suppression*, 25 S.W.U. L. REV. 223 (1996).

<sup>426</sup> See generally RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES AND MATERIALS* 22-24 (2d ed. 2002) (describing origins of privacy rights in common law and constitutional contexts).

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expressive freedom, however, would contravene the public rights theory of expressive freedom by making speech protection against private parties a matter of individual initiative and interest rather than the common good. Legal protection of dissent would depend on the willingness of the aggrieved speaker to litigate and establish both liability and damages. Under the constitutional approach I propose, the entire political community shares the legal interest in unfettered receipt of ideas.<sup>427</sup> In addition, reliance on state tort law to protect political debate would inappropriately consign a central national interest to fifty different locally determined and potentially inconsistent tort regimes.

A more promising alternative method of safeguarding political debate against nongovernmental censorship would be reliance on state constitutional or statutory law. In *PruneYard Shopping Center v. Robins*,<sup>428</sup> the Supreme Court upheld against First and Fifth Amendment challenges a California constitutional requirement that shopping center owners must permit expressive activities on their premises. The Court rejected the argument that its denial in *Lloyd Corp. v. Tanner*<sup>429</sup> of a federal constitutional mandate of expressive access to shopping centers implied a federal constitutional bar on state mandates.<sup>430</sup> Instead, the Court assessed the state rule *de novo* and deferred substantially to the state's regulatory prerogatives in rejecting the federal constitutional challenges.<sup>431</sup> State provisions of the sort upheld in *PruneYard* perform a valuable service in the absence of federal constitutional protection, but they fall far short of extending the First Amendment in the manner I have suggested. First, the necessity for national protection of a nationally significant value should discourage reliance on state constitutions or statutes as much as on state common law. Second, attempted state statutory solutions leave reviewing courts free to reimpose the public-private distinction, at least in cases that arguably involve clashing expressive interests, by reference to the supposed state action requirement

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<sup>427</sup> In this respect, as in many others, adoption of the public rights theory to adjudicate First Amendment disputes would require the Court to liberalize its cramped standing doctrine, starting with the denial of standing for so-called "generalized grievances." See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (denying standing to challenge reserve membership of Members of Congress on ground that asserted grievance was held in common by the general public). Alternatively, the Court could preserve present standing requirements by treating aggrieved speakers as trustees for the public interest in access to information. But even that approach to standing would differ from a tort regime, which would divert judicial attention from societal to personal injuries.

<sup>428</sup> 447 U.S. 74 (1980).

<sup>429</sup> 407 U.S. 551 (1972); see *supra* notes 344-51 and accompanying text.

<sup>430</sup> See *PruneYard*, 447 U.S. at 80-81.

<sup>431</sup> See *id.* at 83-85 (rejecting Fifth Amendment Takings Clause and substantive due process challenges), 85-88 (rejecting First Amendment compelled speech challenge).

of the First Amendment.<sup>432</sup> Finally, California-style protections against nongovernmental censorship are rare and limited in scope,<sup>433</sup> suggesting a level of political resistance that advocates of expressive freedom would struggle to overcome one state at a time.

The conclusion that the federal judiciary is best positioned to restrict nongovernmental censorship of wartime dissent would require the Supreme Court to identify a legal basis for injunctions against nongovernmental suppression of political debate. United States Code Chapter 42, section 1983, which authorizes suits to enjoin violations of constitutional rights, applies only to state actors.<sup>434</sup> The Court could clear this hurdle in a manner parallel to its approach in *Bivens v. Six Unknown Federal Agents*.<sup>435</sup> In *Bivens*, the Court confronted the problem that no federal statute gave courts explicit authority to award damages against federal officials for constitutional violations. The majority created a cause of action. It concluded that, although “the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages,”<sup>436</sup> such a remedy was appropriate because “[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”<sup>437</sup> Just as the Court in *Bivens* decreed that a defendant’s federal character should not bar a remedy typically available for the sort of violation at issue, it could decree that the nongovernmental character of a defendant should not bar the availability of all relief for First Amendment violations.

Professors Alexander and Sunstein, both ontological critics of the public-private distinction, raise substantive objections to allowing constitutional injunctions against nongovernmental actors.<sup>438</sup> Alexander maintains that because “all exercises of private power take place against a background of laws that are paradigmatic state action . . . any

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<sup>432</sup> See *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 904 (1st Cir. 1988) (rejecting free speech claim under Massachusetts statute because both parties in dispute presented expressive interests and “the . . . ‘right’ to free speech . . . traditionally has content only in relation to state action”). The First Circuit in *Redgrave* avoided directly subordinating the Massachusetts statute to the First Amendment by characterizing the Massachusetts Supreme Judicial Court’s responses to certified questions as having relied on the interpretive canon of constitutional doubt to establish a statutory defense based on competing expressive interests. See *id.* at 910-11.

<sup>433</sup> In fact, the California Supreme Court recently held that the state’s Constitution protects expressive freedom only against state action, reading *PruneYard* to depend on the “functional equivalence” of shopping centers with traditional public forums. See *Golden Gateway Center v. Golden Gateway Tenants Ass’n*, 26 Cal. 4th 1013 (2001) (rejecting state constitutional challenge to apartment building’s bar on leafleting).

<sup>434</sup> See 42 U.S.C. sec. 1983.

<sup>435</sup> 403 U.S. 388 (1971).

<sup>436</sup> *Id.* at 396.

<sup>437</sup> *Id.* at 395.

<sup>438</sup> Textual objections to the idea of injunctions against nongovernmental actions replicate the defects of the supposed textual basis for the public-private distinction. See *supra* notes 232-36 and accompanying text.

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constitutional challenge to the exercise of private power can and should be recharacterized as a constitutional challenge to those background laws.”<sup>439</sup> Per Sunstein, “there should be enthusiastic agreement – for reasons of both text and principle – that . . . private conduct raises no constitutional question.”<sup>440</sup> Their arguments appears to reflect a concern that allowing constitutionally based injunctions against private actors would destroy the boundary, essential to liberal democracy, between entities who possess rights and entities bound to honor rights.<sup>441</sup> Reconceptualizing the constitutional public-private distinction as a personal integrity principle obviates that concern, however,<sup>442</sup> and the public rights theory of expressive freedom provides a basis for distinguishing between entities the First Amendment protects and those it obligates.<sup>443</sup> Insistence on a government defendant reflects the logic of the state action doctrine, under which the only basis for holding shopping mall owners constitutionally obligated to accommodate protestors is the formal claim that the owners’ property rights depend on privileges the government has accorded. In contrast, the approach I have outlined allows a court to subject the mall’s owners to the First Amendment because their actions significantly undermine political discourse. It avoids the contrivance of requiring people whose rights nongovernmental institutions abridge to cast about for some governmental action – perhaps a broad-based policy that only facilitates denials of rights in rare circumstances – to challenge. Under present doctrine, even if mall protestors convinced a court that their exclusion by the mall’s owners was “state action,” they would need to vindicate their rights indirectly, perhaps by suing the local zoning board.<sup>444</sup> That suit, however, would be impractical and misdirected, probably to the point of failing the Court’s present Article III standing tests for causation and redressability.<sup>445</sup> We should not trap expressive freedom between a rock and a hard place.

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<sup>439</sup> Alexander, *supra* note 278, at 371-72.

<sup>440</sup> Sunstein, *Free Speech*, *supra* note 65, at 267.

<sup>441</sup> See Alexander, *supra* note 278, at 368 (characterizing “the too hasty jump from bad private choices to shrinkage or eradication of the private sphere” as “the jump of every totalitarian”).

<sup>442</sup> See *supra* notes 307-09 and accompanying text.

<sup>443</sup> See *supra* notes 319-24 and accompanying text.

<sup>444</sup> The likelihood that nongovernmental institutions may censor dissent because of actual or tacit governmental influence creates a basis under existing doctrine for treating such self-censorship as state action, which would obviate the novel justification for judicial intervention presented here. See *TRIBE*, *supra* note 279, at 1715 (“[T]he more government gains (and the more it appears to gain) by the way in which a choice is made, the clearer is the case for treating the choice as one for which government bears responsibility.”).

<sup>445</sup> Cf. *Allen v. Wright*, 468 U.S. 737, 756-61 (1984) (denying standing to challengers of federal tax exemptions for racially discriminatory private schools because challengers’ diminished opportunity to secure racially integrated education for their children was not traceable to challenged tax exemptions).

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## CONCLUSION

The American ideal that sovereignty resides in the people means that the people must have access to ideas and opinions about matters of communal concern in order to ensure that our elected representatives make wise policy decisions. Popular engagement in policymaking serves an especially weighty purpose in times of war and national emergency. Unfortunately, the potency of wartime governments tends to discourage political debate at exactly the moments when it is most valuable to society. Courts have long applied the First Amendment to try to protect political debate from direct governmental interference, even in wartime. In contrast, nongovernmental suppression of wartime political debate has flourished. Since the 2001 terrorist attacks, merchants who use their real and intangible property to do business with the public have excluded political speakers; employers and other powerful institutions have imposed punishments against people who have opposed government policies; and the news media have suppressed information necessary for an informed political debate about matters of war and peace. That these assaults on essential public discourse have come from “private” rather than government sources should give us no comfort, because any assault on public discourse undermines democracy.

Our present constitutional understanding immunizes nongovernmental institutions from constitutional responsibilities by bestowing on them the title of “private actors.” If we accept democratic self-determination as a core value of the Constitution, that understanding must change. When we peel away the public-private distinction’s elaborate layers of formalism, we find a small but important kernel of truth: the Constitution should not interfere with the personal integrity of individuals. That principle has great importance in the First Amendment context, because it facilitates people’s engagement in the process of collective self-determination. But the principle’s limits reveal many fallacies in present First Amendment doctrine. Courts should not allow property owners to exclude political speakers from otherwise expansive invitations for the public to use shopping malls or buy advertising time simply because the property owners are not the government. Courts should not allow employers to fire employees for speaking out politically simply because the employers are not the government. Although the needs of public discourse compel courts to avoid interfering with the news media’s editorial decisions, they should not allow media corporations to consolidate control over people’s access to information. Because all of these actions degrade political debate, they all offend the First Amendment.

This article implicates numerous questions that require further examination. The task of defining the political expression to which I urge courts to extend special constitutional protection remains challenging, as does the task of determining the boundaries, if any, outside which my

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proposal should not operate. I have made no effort to address every practical question courts would need to confront when invoking the First Amendment against nongovernmental actors. Most broadly of all, my proposed reconceptualization of the public-private distinction in constitutional law would alter the outcomes of numerous disputes involving other constitutional rights. In the necessarily narrow sphere where I have situated my argument, however, altering the operation of the public-private distinction would make sense and bring important benefits. Absent some specific reason to limit the First Amendment's reach in a particular circumstance, the Court should enjoin nongovernmental interference with wartime political debate.