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Government Speech

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GOVERNMENT SPEECH*

Steven Shiffrin**

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* The term "government speech" is ordinarily used in this Article as shorthand for a much broader class of expressions than the reader might have anticipated. It includes all forms of state supported speech whether or not the speech is endorsed by government, or is perceived to carry government endorsement, or is perceived to be a government message. The Article deals, therefore, with state support of communications ranging from official government messages, to statements by public officials at publicly subsidized press conferences or in letters mailed at taxpayers' expense, to the speech of political candidates and artists supported by government political or artistic subsidies, to the publicly financed editorializing of broadcasters and public school newspapers, to the communications of public school teachers, and even to the speech supported by second class mail privileges that once operated as a generous subsidy to periodicals. Much speech is supported by government, therefore, without endorsement or with varying degrees of endorsement. The differences in levels of government involvement are undeniably important in some contexts, and attention will be paid to such differences; I simply do not incorporate those distinctions into the shorthand label for the subject at hand.

** Acting Professor of Law, University of California, Los Angeles. In addition to the detailed and constructive advice given by the editors of the Review (particularly David Dolinko, Laurie Levenson, Peter McAllen and John Stick), a number of individuals read a draft of the Article and offered important and wide-ranging suggestions: Michael Asimow, Drucilla Cornell, Michael Gendler, Kenneth Karst, Gary Schwartz, and Jonathan Varat. I have also benefitted from conversations with Charles Firestone (on broadcasting), Robert Gerstein (on the importance of the concepts of autonomy and dignity to compelled government support of ideologies), and Daniel Lowenstein (on government's role in the elections process). I am particularly grateful to Kenneth Karst who initially encouraged me to write about the government speech problem and who, with Jonathan Varat, led me away from various now unspeakable heresies, to Gary Schwartz who finally convinced me that an eclectic approach best captured the ultimate argument of the Article, and to the students in my government speech seminar for their patience, their enthusiasm, and their many substantive contributions.

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INTRODUCTION

In *West Virginia State Board of Education v. Barnette*,¹ the Supreme Court announced the sweeping principle that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."² It was a statement of principle that echoed the spirit of John Stuart Mill,³ a statement that retains powerful appeal today. That government should be powerless to promote its conception of the good life is a theme of such contemporary philosophers as Ronald Dworkin⁴ and John Rawls.⁵ Recently, the judiciary has again re-

1. 319 U.S. 624 (1943).

2. *Id.* at 642.

3. Mill, *On Liberty*, in *THE UTILITARIANS* 479 (Dolphin ed. 1961)

[T]here needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible prevent the formation, of any individuality not in harmony with its ways, and compels all characters to fashion themselves upon the model of its own.

Accordingly Mill was prepared to support compulsory education, but was unwilling to permit the "whole or any large part" of education to be in state hands. *Id.* at 586-87. Although Mill was concerned about the danger of government speech, he recognized the importance of the distinction between the government as censor and the government as speaker; and he remarked that the government should make greater use of its informing function. J. MILL, *PRINCIPLES OF POLITICAL ECONOMY*, Book V, xi, § 1, reprinted in *3 COLLECTED WORKS OF JOHN STUART MILL*, 937 (1965).

4. Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 127 (S. Hampshire ed. 1978). Specifically, Dworkin contends that such a principle is constitutive of liberalism. Although Dworkin defends liberalism against a number of possible objections in the essay, *id.* at 142-43, he does not explicitly endorse the principle. It seems clear, however, that Dworkin is one of the liberals he purports to describe. See note 449

turned to the principle. In *Southeastern Promotions, Ltd. v. Conrad*,⁶ the Court held that officials of a municipally-owned theatre could not limit access to the facility on the basis of judgments as to what was "culturally uplifting."⁷ The *Barnette* language does not appear in *Conrad*, but the congruity is clear. The government may not prescribe orthodoxy.⁸

The fragility of the *Barnette* principle, however, should have been evident from the beginning. *Barnette* itself had nothing to do with whether officials could prescribe orthodoxy. At issue were the rights of those who would not pay homage to the government's symbol of political community. The Court satisfied itself that national security would not be threatened by a constitutional system which recognized the right of young children to refuse to salute the flag.⁹ *Barnette* does not question the propriety of public officials using state resources to implement a flag salute ceremony—even one designed to foster allegiance to the state. Persuasion is

infra. Indeed, I hope to demonstrate in future writing that the descriptions offered by Dworkin are more descriptive of his views and those of John Rawls than they are of the political liberals he claims to be describing.

5. J. RAWLS, A THEORY OF JUSTICE § 50, at 328-29 (1971). Rawls would permit government to promote its conception of justice, but ordinarily not its conception of the good life. He would, however, permit government to promote a conception of the good life if the funding for such a project were voluntarily provided. *Id.* § 43, at 282-83.

6. 420 U.S. 546 (1975).

7. *Id.* at 549-50, 560-61. Content distinctions or judgments as to quality were held to be constitutionally proscribed: "[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship . . . is deep-written in our law." *Id.* at 553.

8. *Conrad* is read broadly in this Article, *see* text accompanying notes 87-123 *infra*, because the rationale of the opinion is sweeping. *Conrad* does not merely stand for the idea that if a municipality is to exclude material from its stage on obscenity grounds, prior restraint procedural safeguards must be employed. In order to get to that point, *Conrad* maintains that because a theatre is dedicated to expression, it is a public forum and that the line of cases involving streets and parks is apposite. 420 U.S. at 552-58. The city would have limited entertainment to matter which it considered to be culturally uplifting, *see* note 7 *supra*, but the Court denied the city's power to do so. Instead the Court considered the editorial process involved to be a prior restraint and tested the restraint by the substantive and procedural standards required by the prior case law. As will be argued below, *Conrad's* facts could have supported a narrower and more defensible justification and if the Court confronts the implications of its rationale, it might beat a hasty retreat. But the opinion itself resists a narrow construction. The fact that the deficiencies of the *Conrad* opinion are so obvious, *see* notes 84-123 & accompanying text *infra*, bears eloquent testimony to the rhetorical power of the *Barnette* principle and to the need for comprehensive examination of the government speech problem.

9. 319 U.S. 636, 640-42. Only three years prior to *Barnette*, the Court had reached the opposite conclusion in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). For an account of the historical pressures existent in *Gobitis* and for a comment on the way in which the Court then posed the issue (understandably with different emphasis from that in *Barnette*), *see* Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion*, 1977 SUP. CT. REV. 257.

permitted under *Barnette*;¹⁰ coercion is not.

Nor is it unusual for the state to support one opinion over another. State-operated schools prescribe curriculum, textbooks, even the specific point of view that must be taught.¹¹ Indeed, it is often contended that a basic goal of public elementary education is to instill values.¹² When the ship to be steered is the public school, our fixed star is that officials high and petty *can* prescribe what shall be orthodox in politics, nationalism, and other matters of opinion. Indeed, when one considers compulsory education, the inability of millions of families to finance private alternatives to public education, and the practical inability of pluralistic taxpayers, parents, and children to resist objectionable instruction,¹³ only one conclusion can be reached: the state commands powerful machinery to prescribe and to instill basic values in politics, nationalism, and other matters of opinion.

10. *Id.* at 640. The point was reaffirmed in *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) ("The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways."). See also notes 422-23 *infra*.

11. For example, California requires that instruction in the social sciences shall include a study of the contributions of men, women, "black Americans, American Indians, Mexicans, Asians, Pacific Island people, and other ethnic groups to the economic, political, and social development of California and the United States of America." CAL. EDUC. CODE § 51213 (West Supp. 1980). But California prohibits any instruction "which reflects adversely upon persons because of their race, sex, color, creed, national origin or ancestry." CAL. EDUC. CODE § 51500 (West 1978). Nor can any textbook or other materials be used which contain "any matter reflecting adversely upon" such groups. *Id.* § 5105. And, of course, patriotism and a belief in the government of the United States and of California is to be favored over communism. *Id.* § 51530.

In Alabama, instruction must contrast the government of the United States with that of the Soviet Union and

shall emphasize the free-enterprise-competitive economy of the United States of America as the one which produces higher wages, higher standards of living, greater personal freedom and liberty than any other system of economics on earth. It shall lay particular emphasis upon the dangers of communism, the ways to fight communism, the evils of communism, the fallacies of communism and the false doctrines of communism.

ALA. CODE § 16-40-3(c) (1975). Presumably a portion of the instruction will condemn the Soviet Union for indoctrinating its children while hailing Alabama for eschewing indoctrination and teaching the truth.

12. See, e.g., Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1350-51 (1976); Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1032-33 (1971). See also note 422 *infra*.

13. For a thorough discussion of the problem and a proposal to extend precedent in the area, see Hirschhoff, *Parents and the Public School Curriculum: Is There a Right To Have One's Child Excused From Objectionable Instruction?* 50 S. CAL. L. REV. 871 (1977). With respect to some of the difficulties involved in resisting such instruction, see Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515 (1978).

The public school example, powerful as it may be, is not the only example of governmental power to shape ideological values. One need only notice the ready access of government officials to the mass media,¹⁴ the franking privilege,¹⁵ the constant stream of legislative and executive reports and publications,¹⁶ and the massive system of direct grants and indirect subsidies to the communications process¹⁷ (including federal financing of elections)¹⁸ to recognize that speech financed or controlled by government plays an enormous role in the marketplace of ideas. Sometimes the government speaks as government; sometimes it subsidizes speech without purporting to claim that the resulting message is its own. Both types of state-supported speech are important.

As Mark Yudof¹⁹ and Lawrence Tribe²⁰ have recently, but separately, pointed out, free speech theory has focused on the gov-

14. See notes 196-97 & accompanying text *infra*.

15. See notes 326-55 & accompanying text *infra*.

16. See notes 356-78 & accompanying text *infra*.

17. See notes 279-83 & accompanying text *infra*.

18. See notes 287-325 & accompanying text *infra*.

19. Professor Yudof has been concerned with the subject for some time. His address at the Southwestern Conference on Constitutional Law, September 17, 1977 [hereinafter cited as Yudof, Address], was devoted to the subject, and a book is forthcoming.

In his address, Yudof gave a historical perspective to the dangers associated with government speech, adroitly discussed the present dangers of government speech from the vantage of political and communication theory, and skillfully explored the line-drawing problems involved in formulating judicial approaches to curbing abusive government speech. Yudof's tentative view then was to confine judicial remedies to those which strengthened private centers of power or to those implementing findings that particular speech had been legislatively unauthorized. I was unsatisfied with giving legislatures carte blanche, but was equally concerned with the question of how to treat the line-drawing problems. I have taken as my task the formulation of an approach to the problem that makes judicial intervention manageable. This Article is then a general response to Yudof's challenge.

Unfortunately, it is not possible to respond specifically here to Yudof's major article which appeared while this Article was in the editing process. Yudof, *When Governments Speak: Toward A Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979) [hereinafter cited as Yudof, *When Governments Speak*]. Although he is now willing to leave the door open for direct judicial intervention against government expression (but only "a crack", *id.* at 906), his basic approach has remained constant. Thus this Article still generally responds to Yudof's challenge. For example, the franking privilege and government speech on the California ballot are discussed because they illustrate areas where judicial intervention is appropriate and manageable. A more specific response to Yudof will have to await a review of his book. In the final analysis, our disagreement, such as it is, may have more to do with the nature of the judicial process than with government speech.

Two other articles have recently appeared on the general subject of government speech. In one, Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979), Professor Kamenshine would invalidate much more government speech than would this Article's eclectic approach. He proceeds from the premise that any controversial government speech is suspect. This approach, albeit forcefully argued, underestimates the government's interest in defending its

ernment as censor; it has had little to say about the process by which the government adds its voice to the marketplace.²¹ Both agree that more needs to be said. The government speech problem is to determine when and by what means government may promote controversial values and when it may not. Decisions such as *Conrad* are not helpful in providing principles for decision making. If a municipal theatre may not make content distinctions as to what productions will or will not be shown in its theatre, why is it that municipalities can make such distinctions in their schools²² and libraries?²³ Can the government, as government,

programs. Yudof's cannons are directed precisely at conceptual approaches such as Kamenshine's. See also J. TUSSMAN, *GOVERNMENT AND THE MIND* (1977).

Finally, an excellent note on municipal advocacy in statewide referendum campaigns has appeared. Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535 (1980) [hereinafter cited as Note, *Municipal Advocacy*]. Its general conclusion about the constitutional impropriety of municipal intervention in the election process is supported here. On the other hand, there are some important differences between our two positions. This Article does not support the Note's conclusion that neutrality in elections is absolutely required (for example, this Article would permit municipal resolutions of support or opposition to statewide initiative proposals despite the deviations from neutrality and despite the use of public resources). This Article does not deny that public officials can use some public resources in supporting or opposing initiatives (for example, the funds used to hire speech writers, to send out press releases, or to hold press conferences). See text accompanying notes 224-49 *infra*.

20. Tribe, *Toward A Metatheory of Free Speech*, 10 SW. U.L. REV. 237, 244-45 (1978), reprinted in *CONSTITUTIONAL GOVERNMENT IN AMERICA* 1 (R. Collins ed. 1980).

21. As Yudof observed in his address, note 19 *supra*, the literature on the subject is sparse. The principal previous treatments are 2 Z. CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS* (1947); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 696-728 (1970); J. TUSSMAN, note 19 *supra*. See also Comment, *Unconstitutional Government Speech*, 15 SAN DIEGO L. REV. 815 (1978). Other useful and less general analysis is contained in Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123 (1974); Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad*, 37 OHIO ST. L.J. 247 (1976); Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 LAW & CONTEMP. PROB. 530 (1966) [hereinafter cited as Van Alstyne, *Suppression of Warmongering*]. Another important contribution to the literature recognizes that the broadcasting problem involves the question of how the government can manage its property. Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C.L. REV. 539 (1978) [hereinafter cited as Van Alstyne, *Möbius Strip*].

22. For helpful discussions of the process by which content distinctions are made by school officials, see Hirschoff, note 13 *supra*; Read, *Collective Bargaining and Academic Freedom in Lower Education: A Practical Inquiry*, 1 INDUS. REL. L.J. 249 (1976).

23. For the contention that professional librarians have first amendment rights to make content distinctions—that is, to select the books in government libraries—see O'Neil, *Libraries, Liberties and the First Amendment*, 42 U. CIN. L. REV. 209 (1973). The case law is divided. Compare *Presidents Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289 (2d Cir.) (book removal upheld), *cert. denied*, 409 U.S. 998 (1972); *Pico Bd. of Educ. v. Island Trees Union Free School Dist.*, 474 F. Supp. 387 (E.D.N.Y. 1979) (book removal upheld), with *Minarcini v. Strongsville City School*

finance communications designed to influence the outcome of initiative campaigns?²⁴ To what extent does the Constitution restrict governmental choices in artistic subsidy programs or in government attempts to instill particular attitudes through public education?

In attempting to resolve questions such as these, and thus limit the scope of the *Barnette* principle, I propose to examine in the first part of this Article a number of models which might be used to integrate government speech into our constitutional constellation: the *Mosley* model and other approaches derived from public forum doctrine;²⁵ the dissenting taxpayers model;²⁶ the drowning out private sources model;²⁷ the government functions model;²⁸ and models derived by analogy to the establishment clause.²⁹ None of these models is wholly satisfactory, but each of them contains ideas that are helpful in resolving the constitutional problems created when government proceeds to promote community values as speaker³⁰ rather than as censor.³¹

Dist., 541 F.2d 577 (6th Cir. 1976) (book removal set aside); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979) (magazine removal set aside).

24. The question is not hypothetical. In *Mountain States Legal Foundation v. Denver School Dist. 1*, 459 F. Supp. 357 (D. Colo. 1978), Judge Matsch ordered the board of education not to campaign in opposition to a particular initiative (by distributing literature or by permitting its telephones and facilities to be used by volunteers) partly on the ground that such partisan government speech would violate the first amendment. *Id.* at 360-61. In *Anderson v. City of Boston*, 380 N.E. 2d 628 (Mass. 1978), the Supreme Judicial Court avoided the same constitutional question by holding that Boston was not authorized to campaign for a statewide initiative. Boston, represented by Laurence Tribe, then persuaded the United States Supreme Court to stay the Massachusetts court's order, *City of Boston v. Anderson*, 439 U.S. 1389 (1978), by arguing that *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which held that a business corporation's political speech is protected by the first amendment, prevented the state from silencing the political voice of municipal corporations. Boston, therefore, conducted its campaign. But, after the election, the Supreme Court dismissed the case for lack of a substantial federal question, *City of Boston v. Anderson*, 439 U.S. 1060 (1979), thereby affirming the Massachusetts court. Thus some justices initially thought Boston was right, but on reflection concluded that Boston was not only wrong, but was so clearly wrong that no substantial federal question was involved. If free speech commentators had directed their attention to these questions previously, the Court might have approached the question with a steadier hand.

25. See Part I(A) *infra*.

26. See Part I(B) *infra*.

27. See Part I(C) *infra*.

28. See Part I(D) *infra*.

29. See notes 213-14 & accompanying text *infra*.

30. Government secrecy affects the political dialogue, but I do not regard it as a form of speech. But see Yudof, *When Governments Speak*, *supra* note 19, at 864, 899.

31. This Article discusses many of the problems associated with the *Barnette* principle. It does not address the separate and difficult question of the availability of defamation or privacy actions against government officials. See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976); *Doe v. McMillan*, 412 U.S. 306 (1973). Nor does it consider the problems created by government threats of jawboning. See, e.g., *Bantam Books, Inc.*

After examining these models and their deficiencies, and with attention to the problems involved in using them to regulate non-government speech, this Article proceeds to draw upon their strengths by suggesting a general and eclectic approach to the government speech question. The approach is then applied to several difficult areas including subsidies of politics, the arts, and education.

I. THE INADEQUACY OF GENERAL MODELS

A. *The Contribution of Public Forum Cases: The Mosley Model*

1. Introduction to the *Mosley* Equality Model

The government speech question has usually reached the Supreme Court in controversies concerning how public property should be used. The Court has dealt inadequately with such cases because it lacks a sufficiently broad conceptual framework to handle the problem intelligently. *Police Department of the City of Chicago v. Mosley*³² contains the Court's most significant attempt at a discursive approach. The root idea of that approach—the *Mosley* model—is that there is a constitutional equality of status in the field of ideas and that government may not use public facilities to favor one idea over another:

[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.³³

v. Sullivan, 372 U.S. 58 (1963). It also does not discuss the extent to which the government function of informing the public can justify compelled testimony. See, e.g., *Watkins v. United States*, 354 U.S. 178 (1957). Finally, this Article does not purport to address in any comprehensive way the constitutional rights to free expression held by government officials or entities. See notes 147, 197 *infra*. The burden of the Article is to suggest, however, that some limits on government expression are required by the first amendment, and that the speech of some government officials (state university professors) and entities (public broadcasters) must be constitutionally protected. Yudof's discussion of the general issue denies personal first amendment rights of governments and of government officials acting in their official capacity. See Yudof, *When Governments Speak*, *supra* note 19, at 865-71, 868 n.18. But one must consider Yudof's discussion in connection with his endorsement of academic freedom. *Id.* at 876.

32. 408 U.S. 92 (1972).

33. *Id.* at 96 (footnote omitted).

This is powerful language, invoked to serve an admirable result. By ordinance, the City of Chicago had selectively permitted picketing near school buildings. Labor picketing was permitted; any other picketing was not. Applying the traditional vision of a content-neutral government, the Court held Chicago's ordinance constitutionally defective because it detoured " 'from the neutrality of time, place and circumstances into a concern about content.' This is never permitted."³⁴

Moreover, the Court's approach draws upon rich first amendment conceptions.³⁵ It rings of the *Barnette* principle that government officials may not prescribe orthodoxy.³⁶ Indeed Kenneth Karst has used the *Mosley* language as a vehicle for tracing the idea of equality in first amendment doctrine, persuasively arguing that equality deserves recognition as part of the central meaning of the first amendment.³⁷ *Mosley* deserves its praise as a landmark expression of the equality principle.³⁸

But the *Mosley* model is a patently inadequate framework for treating the government speech question even if the analysis is confined to how public property may be used. To score an easy point first, it is quite obvious that government may often decide which issues are worth discussing in public facilities. The President, for example, may decide what will be discussed in the Oval Office of the White House tomorrow and may decide to invite some private groups and exclude others. No one doubts his constitutional power to do so. The same point applies to countless government offices controlled by other decision makers. In short, tax dollars properly support millions of daily conversations where government officials decide that some issues are worth debating and others are not, that some people are worth talking to and others are not.

Mosley, therefore, cannot be meant literally. The language, however, is not merely an interesting bit of rhetorical excess. This section will argue that it is symptomatic of the Court's general confusion about government speech. In exploring that confusion it will be necessary to distinguish two lines of cases. In both, individuals assert a right of access to public property for communicative purposes. In the first line of cases they assert that all members

34. *Id.* at 99 (quoting Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 29) (footnote omitted).

35. "[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978) (plurality) (Stevens, J.) (footnote omitted).

36. See text accompanying note 2 *supra*.

37. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

38. *Id.*

of the public have a first amendment right to communicate on the particular public property involved. In the second, which includes *Mosley*, a more limited claim is made: once government grants access to some private groups or permits some views to be expressed on the property, it forfeits any power it might otherwise have to exclude those ideas with which it does not agree. Petitioners in the first line of cases claim a general first amendment easement.³⁹ In the second line of cases, petitioners add an alternative argument—the *Mosley* model.

It is important to explore the first line of cases not only because the analysis in the second borrows from the first, but also because the first line of cases relates independently to the government speech question. Through these cases the Court commits itself to the proposition that in some contexts government must support speech no matter how controversial it may be.

2. The General Claim of Easement

For many years the Court dealt with general claims of access to public facilities by guaranteeing the right of access to traditional public forums (parks and streets) and denying a right of access to non-traditional gathering places (such as the grounds of a prison).⁴⁰ This approach, albeit easy to administer, was criticized as not affording disadvantaged groups sufficient opportunities to communicate their political grievances.⁴¹ In light of that criticism, the approach employed in *Mosley*'s companion case, *Grayned v. City of Rockford*,⁴² has been rightly celebrated as a first amendment breakthrough.⁴³

The Court stated in *Grayned* that the decision as to whether a private group had a constitutional right to speak on public property depended, not on history or tradition, but rather upon an ad hoc determination of whether its desired "manner of expression is basically incompatible with the normal activity of a particular place at a particular time."⁴⁴ The Court observed that the state could not constitutionally proscribe a silent demonstration in a library but could properly refuse to permit a speech in the same facility.⁴⁵ In applying its standard, the Court upheld a statute interpreted to proscribe only that conduct which disrupted or which

39. Kalven, *supra* note 34, at 13.

40. See generally Kalven, note 34 *supra*.

41. See, e.g., Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233.

42. 408 U.S. 104 (1972).

43. Stone, *supra* note 41, at 251.

44. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

45. *Id.*

was about to disrupt, normal school activities.⁴⁶

The major surprise of *Grayned* was not its result, but the Justices' broad consensus in support of its new speech protective approach.⁴⁷ In his opinion, Justice Marshall reread the prior less expansive public forum cases⁴⁸ to support his "incompatibility" test without drawing so much as a whimper from the Court's conservative⁴⁹ majority. One suspects that *Grayned* slipped by in the June rush. The conservatives struck back four years later in *Greer v. Spock*.⁵⁰

In *Greer*, political speakers and leafletters sought access to a military reservation.⁵¹ If the *Grayned* question had been asked, the right of the speakers would have been hard to deny. If the inquiry was whether their manner⁵² of expression was incompatible with the normal activity of the military reservation, the answer would have been no, since other such facilities had permitted access without compromising any government functions.⁵³ But the

46. *Id.* at 119.

47. Appellant and approximately two hundred others were convicted of violating an anti-noise ordinance. They participated in an apparently loud demonstration approximately one hundred feet from the school sidewalk. The demonstration was designed to protest the Administration's failure to act upon grievances of black students. Although the Court reversed a conviction based on an anti-picketing ordinance, it upheld the conviction on the anti-noise ordinance. *Id.* at 105-06.

48. In *Brown v. Louisiana*, 383 U.S. 131 (1966), only three justices (Fortas, Warren, and Douglas) held that there was a constitutional right to demonstrate in the library. *Id.* at 141-42 (plurality) (Fortas, J.). Justice Brennan found the statute involved to be overbroad and found it unnecessary to decide whether the actual conduct was constitutionally protected. *Id.* at 147 (Brennan, J., concurring). Justice White concluded that the petitioners had been punished because of their race and, therefore, grounded his concurring opinion on equal protection grounds. *Id.* at 151 (White, J., concurring). In *Grayned*, Justice Marshall transformed these fragmented views into the incompatibility doctrine. He also narrowly construed *Adderly v. Florida*, 385 U.S. 39 (1966). 408 U.S. at 121 n.49. There the emphasis had been on whether the jail grounds were a public forum. Karst, *supra* note 21, at 249. For a skillful and detailed exposition of the "revisionism" of *Grayned*, see Stone, *supra* note 41, at 250-52. As Professor Stone puts it, when Justice Marshall produced the incompatibility test, "[t]he right to a public forum came of age." *Id.* at 251.

49. The term conservative is used here in the popular sense to mean speech-restrictive. Its usage is admittedly problematic. Justice Stewart, for example, is the author of *Greer v. Spock*, discussed at notes 50-64 *infra*, yet he can hardly be called a conservative on free speech issues. See *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) (Stewart, J., joining Brennan, J., dissenting).

50. 424 U.S. 828 (1976).

51. *Id.* at 832.

52. Justice Powell's concurring opinion attempts to reconcile the *Greer* result with the *Grayned* test but addresses the content of the proposed speech, not its manner. *Id.* at 842-49 (Powell J., concurring).

53. See, e.g., *Flower v. United States*, 407 U.S. 197 (1972) (invalidating conviction of American Friends Service Committee official for distributing leaflets on street in military bases). The Court in *Greer* attempted to distinguish *Flower* on the ground that in *Flower* the military had abandoned its claim to control the property. 424 U.S.

Court in *Greer* asked a different question—whether a military reservation was a traditional public forum.⁵⁴ It then answered that it was not,⁵⁵ and unceremoniously concluded that the speaker therefore had no right of access.⁵⁶

Even if one preferred the “public forum” test (which prefers values of judicial administration and legal precision over values of self-expression and cathartic effect⁵⁷) over the “incompatibility test,” the *Greer* opinion certainly presents no occasion to celebrate the integrity of the judicial process. To be sure, there was no easy way to handle the *Grayned* hot potato,⁵⁸ but the course the majority took is indefensible. *Grayned* was not cited at all.⁵⁹ Whether *Greer* is now to be viewed as an aberrant exception to the incompatibility test, a qualification of it, or an implicit but total disapproval of that test is a matter upon which the Court has offered little guidance.

at 837. But Justice Brennan noted in dissent that the purported lack of abandonment in *Greer* was difficult to reconcile with a prior “history of unimpeded civilian access” to the military post. 424 U.S. at 850 n.1. For the argument that the public forum cases stand for an openness test, *but see* note 94 *infra*, and that *Greer* retreats from the purported adoption of that test in *Adderly* and *Flower*, see Zillman & Imwinkelried, *The Legacy of Greer v. Spock: The Public Forum Doctrine and the Principle of the Military's Political Neutrality*, 65 GEO. L.J. 773 (1977).

54. 424 U.S. at 836.

55. *Id.* at 837-38.

56. *Id.* at 838.

57. Strong arguments for more speech-protective approaches are made in L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-21, at 688-92 (1978); Karst, *supra* note 37, at 35-43; Karst, *supra* note 21, at 252-63; Stone, note 41 *supra*; Comment, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117, 132-48 (1975).

58. The Court might have exploited factual distinctions between the two cases. *Grayned* involved a traditional public forum, that is, public streets, albeit next to a school. *Greer* involved a military reservation, albeit with state streets running through it. The Court might have read *Grayned* to stand for the proposition that the mere existence of a public forum was a necessary, but not sufficient, condition to trigger access rights. If the manner of expression were incompatible with the normal activities of the facility, there would be no right of access despite the public forum finding. Indeed the Court held in *Grayned* that a statute limiting speech in a traditional public forum was constitutional because such speech would interfere with the functioning of the adjacent school. *Greer* on this reading would be consistent with *Grayned* because the incompatibility test would be regarded as the appropriate test only after a public forum had been identified. Having found that streets inside a reservation did not constitute a public forum, no access rights would have obtained, whether or not the manner of expression was deemed compatible with the normal activities of the facility.

Such a reading would have been disingenuous. The *Grayned* test was expressly designed for application to non-traditional public forums. *Grayned* suggested that a silent demonstration in a public library (hardly a garden variety public forum) was immune from state prohibition. Thus, *Greer-Grayned* factual differences cannot disguise the fact that fundamentally different constitutional tests are applied.

59. Justice Powell's concurring opinion purported to follow *Grayned* but changed the test in the process. *See* note 52 and accompanying text *supra*.

There are, however, legitimate grounds for believing that *Grayned* survives *Greer*.⁶⁰ The *Greer* court, as the concurring opinions stress,⁶¹ was influenced by the fear that political campaigning on military bases would undercut the tradition of a politically neutral military.⁶² Indeed, the Chief Justice wondered whether the exclusion of political campaigns from military bases might not be constitutionally required.⁶³ Given these special concerns, *Greer* can and should be read narrowly.⁶⁴ If the general analytical approach to public forum cases set out in *Grayned* is to be rejected, the Court should be forced to say so.

Whatever the differences between the competing approaches, however, there is an important common ground. There is a first amendment right to use some public property for communicative purposes. Put another way, the government is obligated to permit some of its property to be used for communicative purposes without regard to the content of the communications. In some limited circumstances, then, government and its taxpayers are required to support speech (by providing property of economic value for it) independent of how controversial or disagreeable the speech may be.

3. The Limits of the *Mosley* Equality Claim

The more difficult question is whether facilities to which access might otherwise not be available become open once government has used them or permitted their use in support of a particular point of view. The *Mosley* equality model would provide that whenever government uses public facilities to favor one point of view, it must permit access to those facilities to proponents of all competing points of view. Although *Mosley* seems correctly decided on its facts, *Greer* makes it clear that *Mosley* does not apply without limits.

The *Greer* petitioners asserted that their access was mandated

60. The lower courts have continued to apply *Grayned* or its style of balancing in the post-*Greer* context. See, e.g., *United States v. Douglass*, 579 F.2d 545, 548-49 (9th Cir. 1978); *Knights of Ku Klux Klan v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122, 1124 (5th Cir. 1978); *Connecticut State Fed. of Teachers v. Board of Educ. Members*, 538 F.2d 471, 480 (2d Cir. 1976).

61. 424 U.S. at 840-42 (Burger, C.J., concurring); *id.* at 842-48 (Powell, J., concurring).

62. *Id.* at 839. Some commentators have criticized the Court for not going far enough in supporting the value of military neutrality. Zillman & Imwinkelried, *supra* note 53, at 800-06.

63. 424 U.S. at 841 (Burger, C.J., concurring).

64. The Ninth Circuit Court of Appeals has treated *Greer* as a military case rather than as a case enunciating general public forum doctrine. *United States v. Douglass*, 579 F.2d 545, 549 (9th Cir. 1978).

because other speakers had been afforded access to the facility.⁶⁵ Specifically, speakers had been permitted access to the military base for a variety of purposes, such as warning of the dangers of drugs, preaching in the chapel, and entertaining the troops.⁶⁶ *Mosley's* language strongly supported the petitioners' position. If, in fact, the government could not decide what issues were worth discussing in public facilities it would have lost its privilege to deny access.

But the facts in *Greer* highlighted the over-generality of the *Mosley* language. Indeed, the petitioners' argument was disposed of in a telling footnote:

The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum or to confer upon political candidates a First or Fifth Amendment right to conduct their campaigns there. The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel, or a rock musical concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatsoever.⁶⁷

Certainly on this point the *Greer* Court is correct. The military is entitled to train soldiers and to instruct them in the perils of drug abuse. Whether the military relies upon its own speakers or invites civilians to promote its point of view should have no bearing on whether political candidates may have access to the base. Indeed, elementary considerations of orderly administration and military discipline suggest that a speaker wanting classroom access to speak about the merits of drug use would properly be given short shrift.⁶⁸ It is frivolous to posit any general "fairness doc-

65. See 424 U.S. at 838 n.10.

66. *Id.*

67. *Id.*

68. Even if one thought that pro-drug speakers should be given access to the military classroom, it is improbable, however, that the same stance should be used for allowing differing views of military strategy (for example, the proper way to use the M-16 rifle). Surely some discrimination among points of view is acceptable, and the distinction between government as censor and government as speaker properly permits greater latitude in the latter context. *But cf. Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 95-96 (1978). Stone argues that discrimination among points of view should trigger *Mosley* analysis even in the government speech context. *Id.* at 95 n.75.

Whatever the permissible scope of discrimination among points of view might be, the values of orderly administration and military discipline should not be stretched to permit soldiers to be hermetically sealed off from the rest of civilization. Dr. Spock may have no right to enter the military classroom, but it is unworthy of the Court to have approved his exclusion from the military base. See also Yudof, *When Governments Speak*, *supra* note 19, at 887-88.

trine" with regard to military training. In short, the government, that is, the military, may grant the use of its forum "to people whose views it finds acceptable."⁶⁹

Putting aside for the moment the question of the limits to which that discretion is subject, it is worthwhile to reflect on the significance of the principle. Notwithstanding *Mosley*, government may, on many occasions, decide which issues are worth discussing or debating in public facilities. Indeed, even in the *Mosley* factual context, the fact that the government had selected textbooks and curriculum for the school and had thereby determined which issues were worth discussing or debating in public facilities would not in the ordinary case⁷⁰ trigger a first amendment right of access. It was the government decision to regulate the content of the picketer communications in a traditional public forum, the streets outside the school, that produced the Courts' equality encomium. The *Mosley* language is ill-suited for application to schools, to libraries, and as *Greer* suggests, to military training classrooms.

The *Mosley* language fits perfectly, however, in situations where the government itself has no communicative interest at stake. Unfortunately this simple point was not recognized by the plurality in *Lehman v. City of Shaker Heights*.⁷¹ There the government permitted private groups and individuals to use bus space for commercial advertising, but refused to permit the space to be used for political speech.⁷² Justice Blackmun, speaking for a plurality,⁷³ upheld the discrimination, contending that any other decision would mean that "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would be pamphleteer and politician. This the Constitution does not require."⁷⁴

But Blackmun's argument is dead wrong because it confuses *Grayned* with *Mosley*.⁷⁵ If the bus space in *Lehman* had been used for messages about the operation of the bus service, an analogy could have properly been made to display cases in other public facilities. And if the politician sought access to displace the

69. See text following note 38 *supra*.

70. Difficult problems can and do arise, however. See text accompanying notes 413-38 *infra*.

71. 418 U.S. 298 (1974).

72. *Id.* at 299-300.

73. Chief Justice Burger and Justices White and Rehnquist joined Justice Blackmun's opinion.

74. 418 U.S. at 304.

75. That is, it confuses a claim to a general first amendment easement (*Grayned*) with a demand for access equal to that granted other private individuals or groups (*Mosley*).

government message, the claim might rightly (although there is room for argument⁷⁶) have been rejected under the *Grayned* test. Such access would have been incompatible with the government's attempt to communicate with passengers about the bus service.

But the public facilities in *Lehman* were not being used to convey a government message.⁷⁷ By letting out the space to private groups for their own messages, the government had admitted that the space was not needed for government purposes. To grant access for political messages would have reaffirmed *Mosley's* equality principle without implying any right of access to every government bulletin board.

Thus, in order to sustain the discrimination, the government needed some convincing basis for its scheme of limited access. Indeed, the plurality purported to find some basis for the discrimination. Specifically, it drew a false analogy to the editorial function of radio and television licensees (forgetting that the Court had permitted such discrimination there only on the dubious premise that overall content balance in the forum had been enhanced);⁷⁸ it sought solace in the fact that the government was not exercising an editorial function (it equally and non-arbitrarily permitted house builders and butchers to get access,⁷⁹ but not environmental groups, consumer groups, vegetarians or animal lovers, unless they delivered their messages while selling something); it indulged the idiosyncratic premise that people, in a society committed to robust political speech, are offended by political messages but enjoy or are at least sanguine about commercial hucksters;⁸⁰ it supposed that paranoia about the processes of political access would run rampant⁸¹ (as if, either first come, first served or a lottery would be a suspicious or difficult policy to ad-

76. See text accompanying notes 97-107 *infra*.

77. Stone, *supra* note 68, at 95 n.75, suggests that Justice Stewart was being inconsistent by applying *Mosley* principles in *Lehman* and ignoring them in *Greer*. It is the absence of a government speech interest in *Lehman* and its presence in *Greer* that reconciles the Stewart votes.

78. In *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 123-24 (1973), the Court permitted broadcasters to reject political advertisements partly because it felt that the wealthy, rather than the accountable licensees, would select the issues to be discussed on television. It is routinely acknowledged, however, by almost everyone but the Court that the fairness doctrine (despite its provisions) has caused the licensee to avoid controversial programming. See, e.g., F. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT* (1975); H. GELLER, *THE FAIRNESS DOCTRINE IN BROADCASTING* (1973); S. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* (1978); Price, *Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation*, 31 *FED. COM. L.J.* 215, 217 n.13 (1979).

79. 418 U.S. at 303-04.

80. *Id.* at 304. My wording is loaded, to be sure, yet it is a fitting counterpart to the plurality's characterization of political speech as political propaganda. *Id.*

81. *Id.*

minister); and it capped off the undertaking with the singularly unpalatable premise that the government can depart from equality as long as it is out to make a buck.⁸² It was a sorry day for freedom of speech.

It was a particularly sad spectacle because *Lehman's* insensitive posturing about the need to avoid turning government bulletin boards into Hyde Parks demonstrates that the Court does not know how to think about government speech issues. In *Mosley* the Court produced what purported to be a general approach. The over-generality of the approach was acknowledged in *Greer* and the *Mosley* model was unceremoniously disregarded. But no overall approach has ever governed, as illustrated by *Lehman*, "an easy case, wrongly decided."⁸³

To those who may think that *Lehman* is merely an example of the Court's insensitivity, *Southeastern Promotions, Ltd. v. Conrad*⁸⁴ is revealing. It clinches the case for believing that the Court is generally confused about government speech. After refusing to apply *Mosley* in *Lehman* where it was clearly appropriate, the Court in *Conrad* applied the *Mosley* principle⁸⁵ (without citing the case) in a situation where pure equality was out of place. As mentioned earlier,⁸⁶ the Court held in *Conrad* that the City of Chattanooga could not confine its Memorial Auditorium to uses that the city thought would be "clean and healthful and culturally uplifting."⁸⁷ Instead, the Court demanded the kind of content-neutral decisions expected in a public forum.⁸⁸

As Justice Rehnquist observed in dissent, the Court's opinion glosses over obvious distinctions: the distinction between government wrongly prohibiting productions in private theatres and government deciding what could be shown in its own theatre;⁸⁹ and the distinction between city parks and streets on the one hand and city-owned theatres⁹⁰ (and public schools and libraries) on the other.

The Court's response to this line of argument is cryptic and unpersuasive: "Respondents' action was no less a prior restraint because the public facilities under their control happened to be municipal theatres. The Municipal Auditorium and the Tivoli

82. See *id.* at 303, 304. More detailed criticisms of *Lehman* are to be found in Karst, note 37 *supra*; Stone, note 68 *supra*.

83. Karst, *supra* note 37, at 36.

84. 420 U.S. 546 (1975).

85. See note 8 *supra*.

86. See notes 7-8 & accompanying text *supra*.

87. 420 U.S. at 549, 554 n.7.

88. *Id.* at 554-55.

89. *Id.* at 571.

90. *Id.* at 570.

were public forums designed for and dedicated to expressive activities."⁹¹

But all governmentally owned school theatres and indeed military classrooms, are "dedicated to expressive activities"; yet (again putting aside the limits of the discretion involved) the Court would not say that governmental decision makers cannot make content distinctions as to what might or might not be shown in public school theatres or in military classrooms. Obviously as to those forums the Court will permit more discretion than that allowed by the content-neutral strictures of the time, place, and manner line of decisions.

Nonetheless, the failure of *Conrad* may be one of poor explanation and not bad result. Justice Rehnquist also glosses over obvious distinctions. At least with respect to one of the facilities in question, no conflicting engagement had yet been scheduled.⁹² Nor did the city claim that any other uses were contemplated.⁹³ Its position reduced to the contention that the theatre should be left dark. In this posture the claim for access under the *Grayned* test is strong indeed.⁹⁴ Assuming the content of the speech is otherwise protected, access could not appropriately be considered incompatible with any legitimate government function.⁹⁵

If, however, the government were sponsoring its own production or, less obviously, if it were choosing on a content basis between competing productions, the *Grayned* case would become much more difficult to make. Any access would then impinge upon the government speech function.⁹⁶ The *Grayned* question is

91. *Id.* at 555.

92. *Id.* at 548.

93. *Id.* at 555.

94. In the pre-*Grayned* era, the courts opined that there was no constitutional duty to open school building facilities for use by private groups. *East Meadow Community Concerts Ass'n v. Board of Educ.*, 18 N.Y.2d 129, 219 N.E.2d 172, 272 N.Y.S.2d 341 (1966); *ACLU v. Board of Educ.*, 55 Cal. 2d 167, 359 P.2d 45, 10 Cal. Rptr. 647, *cert. denied*, 368 U.S. 319 (1961). Since *Grayned*, the courts suggest, but do not hold, that *Grayned* will require previously unopened facilities to be opened. *Knights of Ku Klux Klan v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122, 1124-25 (5th Cir. 1978); *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973). All of the cases cited above hold that when facilities have been opened to private groups for communications not sponsored by the government, the state may not exclude those whose views it finds to be offensive, even if the views are racist in character.

95. "In a public place regularly used for the exercise of free speech and the exchange of ideas, we do not see how walls and a roof can insulate against the reach of the first amendment's commands." *National Socialist White People's Party v. Ringer*, 473 F.2d 1010, 1015 (4th Cir. 1973). Similarly, even if the school has not previously permitted the facilities to be opened, the fact that it could be regularly used for the exercise of free speech should weigh mightily in the *Grayned* balance.

96. Limitations on a school auditorium's "use as a forum to permit it to serve its prime function (school purposes) . . . may be sustained." *Id.*

whether it is incompatible. Whether or not one remains wedded to the *Grayned* formulation, the fact that access, in a particular case, would displace government-sponsored speech should not automatically be fatal to an access claim. When public facilities are committed to the editorial discretion of governmentally selected individuals, there is no reason to suppose that the government's need for the facilities used by government editors always outweighs the rights of those who would seek access to the facility.⁹⁷ The Court has recognized, in the contexts of the streets⁹⁸ and the classroom,⁹⁹ that private communicative rights may sometimes outweigh legitimate state interests. Nonetheless, as *Lehman's* offhand treatment of government bulletin boards suggests,¹⁰⁰ one may predict that courts will be reluctant to weigh the extent of the government's interest in communication against the interests of those who seek access to government facilities.¹⁰¹ Moreover, substantial difficulties commend judicial caution. Ad hoc approaches here may be judicially unmanageable. *Mosley's* injunction that "government must afford all points of view an equal opportunity to be heard" may provide the philosophical underpinnings of the ad hoc *Grayned* incompatibility test,¹⁰² but it will not and should not become the foundation for any wide-ranging fairness doctrine enforced by the judiciary on a case by case basis.¹⁰³ Rawls¹⁰⁴ and

97. See generally Comment, *Access to State-Owned Communications Media—The Public Forum Doctrine* 26 UCLA L. REV. 1410 (1979) [hereinafter cited as Comment, *Access*]. There should be no conceptual barrier to limited public forums. See Karst, note 21 *supra*. Clarity might be furthered if the term public forum were not used at all. Its rhetorical force has yielded speech protective results in the context of streets and parks, but the *Greer* approach demonstrates that the metaphor can lead to speech restrictive results which might not be reached if a careful balancing of the relevant interests were made.

98. See, e.g., *Schneider v. Town of Irvington*, 308 U.S. 147 (1939) (legitimate state interest in preventing littering insufficient to justify ban on leafleting in public places).

99. See, e.g., *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (state must run some risks of disruption and inattention by pupils in order to accommodate communicative interests).

100. 418 U.S. 298, 304. For a less offhand and more speech-protective treatment, albeit leading to the same result, see *Connecticut State Fed. of Teachers v. Board of Educ. Members*, 538 F.2d 471 (2d Cir. 1976), where a rival teachers union local could not use bulletin boards or mailboxes. The court, however, did not reach the equality issue raised by the collective bargaining agents' entitlement to use of the facilities.

101. But see notes 95-97 & accompanying text *supra*.

102. It certainly helps explain the Court's sympathy for the poor person's methods of communication in a variety of time, place, and manner contexts. See Karst, *supra* note 37, at 37.

103. The experience with the fairness doctrine has been less than happy. See Price, note 78 *supra*.

104. J. RAWLS, *supra* note 5, § 36, at 225-28. For an attack on market failure models, see Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 981-90 (1978), reprinted in Collins, *supra* note 20, at 45, 53-58.

Meiklejohn¹⁰⁵ to the contrary, equality interests would not be served if judges took upon themselves the ad hoc task of determining whether particular points of view had received sufficient play in the marketplace. If there is room for judicial activism¹⁰⁶ here (whether the particular forum is a municipal theatre, a school newspaper, or the broadcasting system), the remedies must be structurally based.¹⁰⁷

But, if it means what it says, *Conrad* does not appreciate the complicated relationship between public forum doctrine and government interests in speech. *Conrad* supposes that the government could not choose between competing applicants on a content basis. Yet such a supposition denies any legitimate government speech interest. Moreover, any distinction between government sponsorship of productions and government choice between competing applicants would be transparently formalistic. If *Conrad* stood for the principle that the government could not wholly dedicate its auditorium for uses dictated by government selection, it would be one thing. It is quite another thing to say that government cannot make any content distinctions in deciding how its own municipal auditoriums will be used.

Conrad presented an opportunity for the Court to undertake a major examination of public forum doctrine, and it bungled the chance. Even with regard to parks, it is too much to say that government can make no content distinctions. As Monroe Price has observed, Shakespeare festivals or exhibits could be set up in parks,¹⁰⁸ and presumably applicants could compete for places. The message of the public forum cases is that some significant opportunities must be made available for access on a basis other than content selection. The error which must be avoided, as Kenneth Karst has stressed, is the assumption that the necessary choice is between all or nothing.¹⁰⁹

Indeed, the failure of the Court in *Conrad* to proceed from any general understanding of the problem is perhaps best exposed when one contrasts the extraordinary power constitutionally con-

105. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 25 (1948). For a convincing retort, see Karst, *supra* note 37, at 39-40.

106. The constitutional obligations of legislators and executive officials should not be forgotten. See generally Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975). They can (with greater flexibility than the judiciary) take an activist role in assuring that facilities are open for communicative uses.

107. The broadcasting community has shunned content regulation and has instead become enamored with the idea of structural reform. *Broadcasting*, Feb. 5, 1979 at 29. Structural reform and content regulation are not necessarily distinct, however. See Price, note 78 *supra*.

108. Price, *supra* note 78, at 227.

109. Karst, note 21 *supra*.

ceded to government in its control of the "public" airwaves. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*¹¹⁰ (*CBS*), plaintiffs questioned the constitutional propriety of a government-appointed licensee's refusal to permit access to the airwaves to those who wished to broadcast political messages.¹¹¹ Although several justices were prepared to hold that the licensee's action was not government action for first amendment purposes,¹¹² a majority of the Court held that even on the assumption that the licensee action was government action, no first amendment violation had been committed.¹¹³ This conclusion was reached despite the fact that licensee decision-making was concededly based on considerations of content.¹¹⁴ Indeed, licensees are expressly required by statute to make content-laden value judgments.¹¹⁵ "For better or worse, editing is what editors [licensees] are for; and editing is selection and choice of material."¹¹⁶ Thus, *CBS* permitted the government to do precisely what was prohibited in *Conrad*: "[A]ppoint an agent not only with broad discretion to determine who shall and shall not get

110. 412 U.S. 94 (1973).

111. *Id.* at 97.

112. *Id.* at 114-21 (Burger, C.J.). This position was endorsed by the Chief Justice and Justices Stewart and Rehnquist. In a rare bow to precedent, Justice Douglas purported to be bound by Court decisions on state action that had restricted the reach of the concept more drastically than he had previously been willing to accept. *Id.* at 149-50 (Douglas, J., concurring).

113. *Id.* at 121-32 (majority). In addition to the Chief Justice, Justices Rehnquist, White, Powell, and Blackmun joined this section of the opinion. Justices Brennan, Marshall, and Douglas also recognized that even if state action were assumed, the kind of content neutrality assumed to be required in public parks would not be required in broadcasting. *Id.* at 170-204. (Brennan & Marshall, JJ., dissenting); *id.* at 150 (Douglas, J., concurring). Justice Stewart opined that if state action were present, broadcasters would have to be treated as common carriers. *Id.* at 139-40 (concurring). The Chief Justice and Justice Rehnquist, who, on the state action point, contended that a finding of state action would limit broadcasting editorial discretion so much as to imperil the entire system, proceeded in the next section to assume state action and held that broad discretion is constitutionally afforded to the licensee. However one counts the votes, it is difficult to credit the view that the *CBS* decision casts doubt on the propriety of editorial decision-making by government. *CBS*, on any reasonable count, amounts to a holding that a finding of state action does not preclude content judgments. *But see* Canby, *supra* note 21, at 1123 (*CBS* decision "has left public broadcasting under a cloud").

114. *Id.* at 103-14.

115. *Id.* In *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), the Court held that the Communications Act of 1934, 47 U.S.C. § 151 et seq. (1976 & Supp. II 1978) prevents the Commission from imposing access requirements amounting to common carrier obligations on broadcast systems or on cable systems. Although the Court suggested that common carrier obligations were those imposing a duty to hold out facilities indifferently for general public use, *id.* at 706 n.16, it inexplicably applied its analysis to invalidate not only required public and leased access channels, but also required government and education access channels.

116. 412 U.S. at 124.

access to a vital public medium . . . but also with the sanctioned power to make such decisions on the basis of the content and quality of the material"¹¹⁷

Moreover, the broadcasting forum is distinctly more powerful than municipal auditoriums, and the consequence of the denial of access correspondingly more severe. Those denied access to television have no ready method of communicating their message to the millions who would otherwise have been reached.¹¹⁸ From the standpoint of access to the marketplace of ideas, governmental power to determine what messages shall and shall not get access to television is demonstrably more serious than similar control over access rights to municipal auditoriums.

Nor is it clear that the proffered justifications for government control over broadcasting are invariably less applicable to municipal auditoriums. The traditional justification for government control over broadcasting is that the resources are scarce, that there is more demand for access than available supply, and that some rationing decisions must be made.¹¹⁹ The need for such decisions, however, does not require that they must be based on government decisions as to content, as many commentators have pointed out.¹²⁰ Access to broadcasting could be based on time, place, and manner decisions (a common carrier approach, as in *Conrad*) or

117. *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1132 (C.D. Cal. 1976), *vacated and remanded on other grounds sub nom. Writers Guild of America, West, Inc. v. American Broadcasting Co.*, 609 F.2d 355 (9th Cir. 1979). The point sheds light on the extent to which confusion over government's editorial role causes members of the Court to manipulate or to confuse state action concepts. In *Conrad*, the government appointed a board of directors to manage the auditoriums. Surely these appointees were acting as government officials in managing the auditoriums. In the broadcasting context, licensees are appointed (after they apply) to manage public resources, *see Price, supra* note 78, at 223-24, acting as public trustees. Their function or their duties are not changed because their payment comes from revenue earned rather than salary. If there is state action in *Conrad*, then, there is state action in *CBS*. *Cf. Derrington v. Plummer*, 240 F.2d 922 (5th Cir.) (lessee of county cafeteria is instrumentality of county), *cert. denied*, 353 U.S. 924 (1957). Justice Brennan purports to find that the licensee's action may be so intertwined with the government as to merit the state action label, 412 U.S. 94 at 180-81 (dissenting). He does not regard the licensee as the government, however. *Id.* n.12. My argument, however, is that the licensee is just as much the government as are the appointed officials in *Conrad*, and the characterization of the licensee as a government agent should not prevent the exercise of editorial judgment. It must be conceded, however, that most lower courts refuse to equate licensee action with government action. *See, e.g., Kuczo v. Western Conn. Broadcasting Co.*, 566 F.2d 384 (2d Cir. 1977).

118. Although there was some evidence in *Conrad* that comparable facilities were not available, 420 U.S. at 556, the Court expressly held that fact to be of no consequence. *Id.* The decision applies to municipal facilities whether or not comparable private facilities are available.

119. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 387-89 (1969).

120. *See, e.g., Coase, The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959) (allocation by the market system); Van Alstyne, *Möbius Strip*, note 21 *supra*.

indeed broadcast frequencies could be auctioned off to the highest bidder.¹²¹ Moreover, the government has been permitted to structure broadcast property rights (by the particular method of allocating frequencies) so that the economic incentives against diversity assure that the interests of millions of people will be ignored.¹²² The peculiar irony of the *CBS-Conrad* comparison is that in the area which matters most, government is permitted to use "its property"¹²³ in a way that ensures that content decisions will exclude millions from consideration; in an area that matters little, government decisions as to content are regarded as anathema.

Whether or not the *Conrad* opinion countenances too little government control of content and the structure of broadcasting

121. See, e.g., Note, *Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulation*, 28 STAN. L. REV. 563 (1976).

122. See generally B. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT* (1975). Putting aside the fact that more than half of the broadcast frequency spectrum is used for military purposes, the government, as Owen argues, could have established regional frequencies, which would probably have meant that most communities would have had six channels instead of three and the nation would have had six networks. If there were six networks, there would be economic incentives to program for smaller audiences. This would mean that it would be profitable to present a greater diversity of programming. (On the other hand, local but not national news would be discouraged and people would be forced to rely upon radio and newspapers to be apprised of local events.) Moreover, the commercial character of broadcasting inherently produces disincentives for programming to many audiences. See, e.g., Brenner, *Government Regulation of Radio Program Format Changes*, 127 U. PA. L. REV. 56, 86 (1978).

123. The property involved in broadcasting is the right to send particular impulses through particular air and to exclude others from doing so. If government can claim rights in land to build office buildings in order to facilitate communications among its workers, it can claim rights in some air to facilitate communications among its workers, for example, broadcasting by the military. Similarly, if government can claim rights in some paper in order to communicate messages to citizens (consider the Government Printing Office), it can properly claim rights in some air for the same purpose. But if the government nationalized the paper industry and purported to use all of it for its exclusive purposes, both the speech and press clauses would prohibit the monopolization ("You can write and publish—but you cannot use paper because we own it."). Similarly, it would be absurd if the government purported to nationalize the air and said that only government officials had rights to send sound waves through the air ("You can speak as long as you manage to do it without sending sound waves through the air which you cannot use because we have monopolized the rights to use it."). The broadcasting system raises the question (if state action is assumed, see note 117 *supra*) of whether the government can entirely monopolize the rights to use that portion of the air necessary for a crucial medium. Government attempts to promote diversified views may make its decision more palatable, but not, in the final analysis, defensible. To argue that government may not entirely monopolize a crucial medium does not require one to believe that the government may not claim a large portion of the medium to promote the public interest; nor, however, need it commit one to the position that it must do so. For an excellent discussion of the property concept in broadcasting, see Van Alstyne, note 21 *supra*. But see Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 151-53 (1967).

implicitly upheld in *CBS* permits too much, the decisions from *Mosley* to *Conrad* to *CBS* provide little by way of principle to determine how much or how little government control of content should be permitted.

It seems undeniable that government should be permitted to make content decisions as to the speech permitted in some of its facilities, the military classroom being the prototypical example. On the other hand, it seems equally clear that such discretion should not be absolute. For example, if the commander of the base in *Greer* had decided that the policies advocated by the Democratic party furthered the "military mission" and if the commander, therefore, permitted Democrats but not Republicans to speak in military classrooms, the *Greer* court would have turned to *Mosley* and perhaps to the *Barnette* principle itself. Surely the decision would be the same if the decision maker were a school board or a government appointed overseer of a municipal auditorium.

To recognize that some limits might appropriately be placed on the discretion afforded to government speakers necessitates the further recognition that the government speech question has not been fully addressed in public forum doctrine. *Mosley* and *Grayned* represent ways of thinking about who should get access to public property. Tests designed to determine whether dissenters can demonstrate in a public library, outside of schools, or inside military reservations do not help as models for deciding what limits, if any, are placed on government discretion in deciding upon the content of the libraries or of the instruction in public schools or of military education. To say, for example, that government has no business committing its resources in favor of Democrats as opposed to Republicans makes great sense, but not because of any principle about who should get access to public facilities. Conceivably some speech may be supported by government and some may not. Access is one method of countering feared excesses of government speech, but not the only method, and a general theory to deal with the question cannot be derived from public forum doctrine.

But the central failing of the access cases is that even on their own terms they are confused. The Court exhibits little understanding of when to apply *Mosley*. As the *CBS-Conrad* comparison suggests, any such understanding must depend upon a perception of how in general to approach the government speech question.

B. *The Dissenting Taxpayers Model*

Another candidate for delineating the contours of the *Bar-*

nette principle is a model based on the rights of dissenting taxpayers. It assumes in its largest compass that individuals have a first amendment right not to be forced to contribute to the propagation of ideologies they oppose.¹²⁴

The dissenting taxpayers' model is superficially similar to the *Mosley* model. It appears to mirror *Mosley* by directing attention to the rights of those forced to support speech they oppose. And proponents of both models can rally around the idea that officials should be unable to prescribe orthodoxy. But, if the *Mosley* model rests on the concept of equality, the dissenting taxpayers' model is grounded on the concept of liberty. The *Mosley* model is satisfied so long as government supports speech on an equal basis, but the dissenting taxpayers' model is cast aside whenever individuals are forced to support speech they despise. The favored remedy of the *Mosley* model is more speech; the favored remedy of the dissenting taxpayers' model is financial return. At bottom, the

124. "I can think of few plainer, more direct abridgments of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or causes that they are against." *Lathrop v. Donahue*, 367 U.S. 820, 873 (1961) (Black, J., dissenting).

Notice that the issue addressed in this section is whether government compulsion of financial support for speech by those whom that speech offends violates the first amendment. Whether government may properly refuse to support speech because of taxpayers' or constituents' objections is a quite different matter. Obviously, in most cases, the government may take the wishes of its constituents into account in deciding whether or not to support speech. For example, when a municipal government decides whether or not to sponsor lobbying efforts at the state or federal level, it is clearly entitled to take into account the current views of its constituency.

In many situations in which the government supports speech, however, its discretion to take such views into account is not unlimited. When the public forum doctrine requires the government to permit its facilities to be used for free speech purposes, objections by even most of the constituency to the content of such speech would not provide a sufficient basis for the government to withdraw its support (at least in the absence of a clear and present danger of violence or other basis for finding the speech unprotected). Indeed, government may be required to offer police protection to prevent violence from occurring. Even when the government is itself sponsoring the speech, the wishes of the majority may not be decisive in defending the government's decision. To take an easy example, government, even with overwhelming support, could not appropriately decide to support the speech of Democratic candidates without also supporting Republican candidates. The extent to which it would also be required to provide support for minority party candidates and independent candidates is explored in notes 287-325 & accompanying text *infra*. A major task of the eclectic approach described in section II *infra* is to identify the factors relevant to deciding when government may be disabled from supporting speech even when its constituents want it to do so or when government must support some speech that its constituents might not wish to support.

In summary, this section will argue that the fact of compelled financial support should not by itself furnish a sword to oust government speech or to require financial rebates. That conclusion does not control the question of whether or not taxpayer or constituent wishes properly provide a shield for government in defense of its decision to support or not support particular speech.

two models are philosophically incompatible.¹²⁵

The immediate source of the dissenters' rights model is the Supreme Court's decision in *Abood v. Detroit Board of Education*;¹²⁶ the ultimate source is *Barnette* itself. In *Abood*, the Court held that dissenting members of a public employee bargaining unit could not be compelled to finance some¹²⁷ union political expenditures to which they were opposed.¹²⁸ The Court held that such compelled contributions unreasonably invade the individual's freedom "to believe as he will,"¹²⁹ and invoked *Barnette*'s "fixed star in our constitutional constellation."¹³⁰ The link between compelled contributions and freedom of belief or expression, however, is tenuous. And the invalidation of compelled contributions is surely a long step from *Barnette*, where the state sought to compel individuals publicly to profess beliefs they did not share.¹³¹ To establish the link, the Court relied upon its holding in *Buckley v. Valeo*¹³² that prohibitions or limits upon the spending of money for political purposes directly infringed first amendment rights.¹³³

The *Buckley* conclusion, albeit controversial, is understandable. An individual who wished to purchase one page in the *New York Times* for a political message could not have done so under

125. Compare J. RAWLS, note 5 *supra* (equality theory), with R. NOZICK, ANARCHY, STATE AND UTOPIA (1974) (liberty theory).

126. 431 U.S. 209 (1977). The Court had engaged in some imaginative statutory interpretation in order to avoid constitutional questions in the earlier cases of *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956), and *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961). Other avoidance techniques were employed in *Lathrop v. Donahue*, 367 U.S. 820 (1961).

127. The Court upheld support of the public employee collective bargaining expenses, 431 U.S. at 222-23, despite the fact that the support might properly be denominated "political." *Id.* at 227-32.

128. Compelled support of union political and ideological expenditures unrelated to collective bargaining was struck down. *Id.* at 232-37.

129. *Id.* at 235.

130. *Id.* (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). See text accompanying note 2 *supra*.

131. There is substantial degradation involved in compelling one to affirm in public ceremonies beliefs that he or she does not hold. That degradation is perhaps even more acute when others are aware that the beliefs are not held by the person forced to participate. Thus the degradation exists even if the individual's beliefs are not put in a false light in the public eye. Similarly it is degrading to be forced to carry around signs professing beliefs one does not share. *Wooley v. Maynard*, 430 U.S. 705 (1977). The concept of degradation is relevant in distinguishing compelled commercial disclosure in advertising, even though such disclosures may in some circumstances be unconstitutional on other grounds. Moreover, degradation is minimized when the personal involvement in the advancement of an ideology is reduced to forced financial contributions.

132. 424 U.S. 1 (1976).

133. *Id.* at 23, 39-59.

the statutory framework challenged there.¹³⁴ Whatever the strength of the state interests there asserted, and whether or not the state interest outweighed the constitutional interests implicated, the statute clearly limited an individual's freedom to engage in political dialogue.

But the difference between compelled contributions and prohibited contributions should have been clear. Requiring individuals to make contributions to a union, which in turn spends a portion for political purposes, does not compel them to believe anything or to express anything, nor does it prohibit them from believing or expressing anything.¹³⁵ Indeed, their right to disagree is affirmatively protected.¹³⁶ It is true that because some of their income has been taken, fewer funds are available for political expression, but this could be said of any compelled financial contribution, from social security, to the income tax,¹³⁷ to funds for the collective bargaining process itself. The Court's failure to justify a distinction between compelled contributions to the collective bargaining process and compelled contributions to the union's election efforts fatally compromises its reasoning. As the Court recognizes, an individual may have sincere ideological objections to the use of compelled extractions for collective bargaining purposes:

His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective bargaining agreement proscribing racial discrimination. The examples could be multiplied.¹³⁸

Nonetheless, the Court upholds these compelled contributions, which might be as offensive or even more offensive than those struck down, because the union's leadership uses them "to promote the cause which justified bringing the group together."¹³⁹ The Court fails to note that union expenditures in the political

134. *Id.* at 20 n.20.

135. *Lathrop v. Donohue*, 367 U.S. at 861 (Harlan, J., concurring); *DeMille v. American Fed'n of Radio Artists*, 31 Cal. 2d 139, 187 P.2d 769 (1947), *cert. denied*, 333 U.S. 876 (1948). See generally Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO ST. L.J. 39, 59-61 (1961).

136. In addition to those protections afforded by the Constitution, workers' rights of freedom of speech are protected by statute. 29 U.S.C. § 411 (1976).

137. *Lathrop v. Donohue*, 367 U.S. at 852 (Harlan, J., concurring).

138. 431 U.S. at 222.

139. *Id.* at 223.

process are made precisely because the union perceives them as promoting the union cause no less than any other expenditures.¹⁴⁰ If individuals who benefit from collective bargaining expenditures are "free riders" when they fail to contribute to the cause, they can be no less "free riders" when they participate in the benefits derived from "political" expenditures.

The same difficulties confront any attempt to apply *Abood* principles to the government speech context. The recent case of *Anderson v. City of Boston*¹⁴¹ offers an excellent example of the problem. There the City of Boston appropriated \$975,000 to conduct a campaign supporting passage of a statewide tax referendum.¹⁴² Dissenting taxpayers sought to enjoin the expenditures on a variety of grounds.¹⁴³ The analogy to *Abood* is ready. If being forced to contribute to political campaigns violates union members' rights, it is easy to argue that being forced to contribute to a city's political campaign favoring a statewide initiative or referendum violates taxpayers' rights. But just as *Abood* could not reasonably justify a distinction between some ideologically offensive uses of union members' money and other such uses, no such distinction avails in the *Anderson* situation. Boston, like most other major cities, regularly finances lobbying activities at the state and federal levels designed to influence the passage or defeat of legislation.¹⁴⁴ Although the city's lobbying activities are calculated to advance its perception of its best interests, there can be no doubt that some Boston taxpayers disagree with each of the political stands taken by the city. If the city's use of dissenting taxpayers' funds to influence legislation passed by legislators does not violate the taxpayers' first amendment rights, it is hard to see, if freedom of belief is the worry,¹⁴⁵ why the use of dissenting taxpayers' money to influence legislation passed by the people of Massachusetts acting in their legislative capacity is any more offensive. In both cases, individuals are forced to contribute to ideological causes they oppose.

140. Aaron, *supra* note 135, at 62.

141. 380 N.E.2d 628 (Mass. 1978), *appeal dismissed*, 439 U.S. 1060 (1979). For further discussion see note 24 *supra*.

142. 380 N.E.2d at 631. The referendum proposed classifying property according to its uses and was thought to favor residential property users. Although the court found no indication that the expenditures were calculated to perpetuate any individual in office, it would be surprising if that were not a partial purpose. The point should not be exaggerated, however, for the casting of legislative votes of all types is commonly motivated by the popularity of the legislation at stake either to the constituency at large or to campaign contributors.

143. The principal ground was that the city was not authorized by the state to make the expenditure. See note 24 *supra*.

144. 380 N.E.2d at 635 n.11.

145. There are more relevant concerns which are not based on the fact of tax payments. See text accompanying notes 199-249 *infra*.

Indeed, compelled contributions to ideological causes with which some taxpayers violently disagree are the norm, not the exception. Even when opposition to such causes is sincerely founded on religious grounds, it is without free speech force. The Christian Scientists, for example, have serious and sincere objections to the use of their tax funds to support government hospitals and government funding of medical care; the Quakers oppose military funding; Catholics oppose public funding of abortions; fundamentalists oppose the teaching of evolution. No case law supports their "right" to enjoin such programs or a right to refund to a pro rata portion of their tax dollars.¹⁴⁶ The fact that contributions are compelled cannot be considered sufficient to justify restrictions on government activities or government speech. Thus something beyond the fact of financial compulsion would be necessary to prove that the municipal speech in *Anderson* violates the first amendment.

The Massachusetts Supreme Judicial Court in *Anderson* was able to avoid the question by holding that the state had prohibited its municipal corporations from making such expenditures and that this prohibition did not violate any first amendment rights of the City of Boston or its inhabitants.¹⁴⁷ The case illustrates, how-

146. Thus, the inquiry in such cases is whether the government has violated the establishment clause. If it has not (even if standing problems can be overcome, see *L. TRIBE*, *supra* note 57, § 12-4 at 590 nn.7 & 8), the government program is upheld. The court's treatment of taxpayers' and parents' challenge to the use of an offensive textbook in *Williams v. Board of Educ.*, 388 F. Supp. 93, 96 (S.D.W. Va.), *aff'd*, 530 F.2d 972 (4th Cir. 1975) is typical: "[M]aterials in some of the controversial textbooks . . . are offensive to plaintiffs' beliefs However, the Court cannot find in the defendant's actions . . . any establishment of religion." Of major importance is that the definition of religion for establishment clause purposes is necessarily different than the definition for free exercise purposes. While commentators disagree about how religion is defined for establishment clause purposes, they agree that the definition does not turn upon the sensibilities of the person bringing the complaint. *L. TRIBE*, *supra* note 57, § 14-6, at 828-29; Galanter, *Religious Freedoms in the United States: A Turning Point?* 1966 WIS. L. REV. 217, 266-67. This has been true even in those cases where a relatively expansive concept of religion has been employed under the establishment clause. See *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979). For the contention that religion should be defined consistently in the two clauses, see Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978).

147. 380 N.E.2d 628, 632, 634-38. Other courts have employed the same dodge. See, e.g., *Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976).

The court's problem, of course, was to distinguish *Bellotti*. See note 24 *supra*; text accompanying notes 178-90 *infra*. In *Bellotti*, the Supreme Court held it unconstitutional for Massachusetts to prohibit business corporations from spending funds in referendum campaigns on matters unrelated to the corporation's business. As is discussed *supra*, the threat to the integrity of elections is substantially greater when governments subsidize speech. See Yudof, *When Governments Speak*, *supra* note 19, at 865-71; Note, *Municipal Advocacy*, note 19 *supra*. *Bellotti* for example, would not prevent the government from withdrawing the franking privilege from all legislative representatives during election campaigns. It seems equally legitimate for it to pre-

ever, the flaws of the dissenters' rights model: had Boston been authorized to make the challenged expenditures, that model would provide an insufficient foundation for a first amendment attack. The foundation is weak precisely because *Abood's* reasoning is itself seriously flawed.

This is not to say that *Abood* was wrongly decided. When the government forces individuals to provide monetary support for a union, their position becomes significantly similar to that of taxpayers.¹⁴⁸ The government has decided that the existence of strong unions serves the public interest in general and that of bargaining units in particular. It has therefore decided to subsidize unions by "taxing" members of bargaining unit. Instead of collecting the "taxes" and giving them to the union, the funds go directly to the union. The mechanics are different; in substance, compelled contributions and government taxes are much the same.¹⁴⁹ It is hard to believe that the outcome would be changed in *Abood* if the government called its compelled contribution a tax and labeled its legislation a program.¹⁵⁰

The questions in *Abood* therefore come to when, if ever, it is constitutional for the government to subsidize the political expenditures of an association and whether it is constitutional for the government to subsidize the collective bargaining activities of an association.¹⁵¹ The latter question seems easy¹⁵² and the for-

vent municipalities from directly entering into election campaigns. Indeed it will later be argued that municipalities are constitutionally prohibited from such entry, albeit not on a dissenters' rights model. See text accompanying notes 224-49 *infra*.

148. See note 272 *infra*.

149. Indeed one court has specifically made the link: "[T]he union dues exacted from all employees as a condition of employment under union shop agreements simply constitute a 'tax' in support of the collective bargaining efforts of the union." *Gray v. Gulf, M. & O. R.R.*, 429 F.2d 1064, 1071-72 (5th Cir.), *cert. denied*, 400 U.S. 1001 (1970).

150. See notes 272-78 & accompanying text *infra*.

151. Placing the emphasis on the legitimacy of the governmental program would make the principled resolution of cases such as *Young Americans for Freedom v. Gorton*, 91 Wash. 2d 204, 588 P.2d 195 (1978), an easy task. There taxpayers sought to block their state's filing of an amicus brief on the ground that their taxes were being used to fund the advocacy of ideas they did not support. The court distinguished *Street*, see note 126 *supra* on the ground that it was statutorily based, and did not cite *Abood*. Moreover it did not "deem it apposite to equate organizational dues, fees, or assessments with taxes in general." *Id.* at 200. The analysis presented here would allow the court to equate the two and still justify the state's actions. It will be interesting to see what impact *Abood* will have on student fees for newspapers and compulsory bar fees, to name but two areas in which these arguments are frequently made. Of greater pragmatic moment is the question whether it remains constitutional for compelled union dues to be spent on the solicitation of voluntary contributions to an independent and segregated political fund. See 2 U.S.C. § 441b(b)(2)(C) (1976) (allowing such expenditures). See generally Comment, *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies*, 126 U. PA. L. REV. 386 (1977) [hereinafter cited as Comment, *Regulation of Union Political Activity*].

152. The commerce power obviously supports the subsidy, and the dues payer

mer question difficult, and the difference in difficulty has little to do with the ideology of the contributors or the relative free rider effects. Focusing on the rights of dissenting taxpayers does not carry the analysis of government speech very far.

C. *The Drowning Out Private Sources Model*

An alternative approach to limiting government speech is to focus not on the right of the dissenters but rather on the role such speech plays in the marketplace of ideas.¹⁵³ Distinguished commentators have argued that government can "add its own voice to the many that it must tolerate, provided it does not drown out private communication."¹⁵⁴ The practicality and explanatory power of this approach, however, is subject to serious question. In that connection, it is helpful to examine the inconsistent path the

should stand in no better position than a taxpayer who objects to a government program. The courts have upheld the "tax" even when the objector has refused to pay because of sincere religious grounds. *Linscott v. Millers Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971); *Gray v. Gulf, M. & O. R.R.*, 429 F.2d 1064 (5th Cir.), *cert. denied*, 400 U.S. 1001 (1970). Although attempts to distinguish *Sherbert v. Verner*, 374 U.S. 398 (1963), are unconvincing, the strongest argument for upholding the distinction is that fraudulent invocations of religious beliefs would undermine the congressional purpose. To permit non-religious objections, of course, would wholly thwart the congressional objective.

153. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969), the Court declared that the first amendment could not countenance monopolization of the ideological market by government or by private licensees. The dictum is not discussed in the text of this section for two reasons. First, its analysis would require extended commentary on the much discussed question of whether broadcasting is in fact "special," which would distract from the principal theme of the section. Second, the concept of monopolizing the ideological marketplace is not the same as drowning out private sources. One can drown out private sources for some captive audiences without monopolizing the ideological marketplace. On the other hand, those commentators who have used the "drowning out" language may have intended that the drowning out occur in the ideological marketplace generally. With that understanding, the concept would be equivalent to monopolization of the ideological marketplace. Compare Tribe, note 20 *supra*, with L. TRIBE, *supra* note 57, § 12-4, at 590. The concern of the section is not to explicate the intentions of the commentators who have mentioned the theme, but rather to suggest that analysis of the model is helpful in thinking about the government speech problem.

154. L. TRIBE, *supra* note 57, § 12-4, at 590 (citing T. EMERSON, *supra* note 21, at 697-716). Cf. Z. CHAFEE, *supra* note 21, at 796 ("An ambitious official with enormous public funds at his disposal might be tempted to drown out the private press.") Yudof makes the nice point that this factor should be taken into account in strengthening private centers of power. Yudof, *When Governments Speak*, *supra* note 19, at 872. Compare text accompanying notes 250-55 with text accompanying notes 395-407. It is doubtful that the commentators intend the principle to be applied on an ad hoc basis. It is helpful to understand why it should not be, however. The section below considers the defects inevitably implicated in an ad hoc approach. In later sections, the argument is made that the drowning out sources model, while relevant, needs to be considered as a principle together with other considerations. See text accompanying notes 199-249 *supra*.

Court has taken in considering such arguments in the domain of private speech.¹⁵⁵

In two major cases, the Court has flatly rejected the idea that the judiciary should mandate access for "sellers" to the marketplace of ideas or otherwise limit excessively powerful sources of speech. In *Miami Herald Publishing Co. v. Tornillo*,¹⁵⁶ the Court was presented with the opportunity to provide access to the marketplace for ideas screened out by powerful forces. The plaintiff Tornillo, a candidate for the local Board of Education, had been personally attacked by the *Miami Herald*;¹⁵⁷ state law guaranteed him a right of reply,¹⁵⁸ but the *Herald* refused to comply.¹⁵⁹ Tornillo argued that the state law provided a limit on the power of the modern media empire "to manipulate popular opinion and change the course of events."¹⁶⁰ Viewed superficially, it would be difficult to construct a more powerful case for media access: a powerful newspaper had attacked a minor candidate for office; the candidate sought no censorship, no damages, and no retraction, only the limited remedy of reply. His argument rested on the undeniable premise that truth cannot emerge in the marketplace if it cannot get in.

Tornillo lost. The Court trotted out the language of prior restraint,¹⁶¹ invoked the spectre of a chilling effect on newspapers,¹⁶²

155. It would be less instructive if the model were based on the assumption that government domination of the marketplace was especially evil, by comparison, for example, with corporate, union, or media domination. That is not the point of this model, however. It proceeds from the perspective that domination of the marketplace is an evil regardless of source. The claim that government intervention in the marketplace is uniquely offensive is considered in section D *infra*.

156. 418 U.S. 241 (1974).

157. *Id.* at 243 n.1.

158. *Id.* at 244.

159. *Id.*

160. *Id.* at 249.

161. *Id.* at 255-56. The statute was not a licensing system or anything of the kind. Subsequent sanctions were proposed.

162. *Id.* at 257. Faced with the same type of regulations in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), Justice White, for the Court, claimed that in the broadcasting realm the likelihood of a chilling effect was "speculative" and that the affirmative requirements of the fairness doctrine backed up by the enforcement powers of the Commission ensured that broadcasters would not steer away from controversial issues. The affirmative aspects of the fairness doctrine are notoriously unenforced, however, and the spectre of a Commission order that broadcasters must cover particular issues and individuals would surely raise grave constitutional questions. Indeed the economic differences between free time in broadcasting (which would ordinarily replace time for which broadcasters would otherwise be paid) and free space in newspapers (with the exception of advertising, newspapers are not paid for space) suggest that if the fear of a chilling effect were the sole consideration, the reply doctrine would be more justifiable in the newspaper context than in the broadcast context. The *Red Lion-Tornillo* comparison has produced a stimulating literature. See, e.g., Bollinger, *Freedom of the Press and Public Access: Toward a Theory of*

glorified the value of editorial judgment,¹⁶³ sermonized against the imposition of penalties based upon newspaper content,¹⁶⁴ endorsed the view that virtue cannot be legislated,¹⁶⁵ and concluded that the government cannot tell a newspaper in advance what it can print and what it cannot.¹⁶⁶ The Court did not deny the existence of excessive power in the print media. It nonetheless ruled that the Constitution did not permit the regulation of that power via the route of access. Pleas for press responsibility were substituted for constitutionally enforceable remedies.

The point is not that *Tornillo* was wrongly decided. Rather, the arguments relied upon by the Court were too general and begged important issues.¹⁶⁷ There are troubling difficulties inherent in general access legislation.¹⁶⁸ The statute in *Tornillo*, for example, would apparently have applied to any newspaper from the powerful *Miami Herald* to less imposing suburban sheets and possibly even to such publications as *I.F. Stone's Weekly*.¹⁶⁹ Even if confined to arguably monopolistic dailies like the *Herald*, the statute relies upon controversial assumptions. If in 1972 the paper carried articles critical of George McGovern or Richard Nixon, equal space would have been required for a response to each article. The implicit assumption of the statute that newspaper space (indeed front page newspaper space) is best used for responses by candidates, even those with ready access through other channels, is doubtful. The point is that the Court's opinion was not fashioned to assess the particular difficulties of the particular statute (still less was it willing to apply the statute on an ad hoc basis), but reads as if it were designed to discourage all access to legislation however finely drawn.¹⁷⁰

If concern about excessive power could not justify a limited

Partial Regulation of the Mass Media, 75 MICH. L. REV. 1 (1976); Van Alstyne, *Möbius Strip*, note 21 *supra*.

163. 418 U.S. at 256. The editorial judgment argument depends heavily upon the chilling effect argument except to the extent that one would place high value on the last items put into the paper.

164. *Id.* Clearly the statute was not intended to regard contingent access as a penalty any more than the equal time doctrine in broadcasting is so intended or perceived.

165. *Id.* Presumably no one thought that the legislation assured press responsibility, virtue, or anything other than limited access.

166. *Id.* at 255-56. The language inspires visions of prior restraint, censorship boards, and the like, none of which were present.

167. See notes 147-52 & accompanying text *supra*. For the contention that the statute in *Tornillo* was unconstitutionally vague, see Karst, *supra* note 37, at 50.

168. The literature on the access question is voluminous. Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. REV. 1 (1973), is among the best.

169. The definition of newspapers in the Florida statute appears to be quite broad. See FLA. STAT. ANN. § 50.011 (West 1969).

170. See Karst, *supra* note 37, at 50: "[I]t is hard to believe the Court could possi-

remedy of access, it was unlikely to provide acceptable support for legislation directly designed to restrict powerful speech, and it did not. In *Buckley v. Valeo*,¹⁷¹ the Court struck down key provisions of the Federal Election Campaign Act of 1971. The Act was designed in part "to equalize . . . the relative ability of all voters to affect electoral outcomes"¹⁷² by placing a ceiling on expenditures for political expression by citizens and groups. In short, the Congress had sought to prohibit the buying of elections.¹⁷³ It had reacted to the widespread impression that the American political process was dominated by the wealthy and that public confidence in the integrity of the electoral process needed to be restored.¹⁷⁴

Once again the drowning out other private sources rationale was rejected: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"¹⁷⁵ And again the Court did not deny the existence of excessive power; it held that the Constitution prohibited the government from exalting equality by abridging speech.¹⁷⁶

But if *Tornillo* and *Buckley*¹⁷⁷ slammed the door on excessive

bly mean what it said." Query: Would a statute requiring the publication of legal notices be unconstitutional?

171. 424 U.S. 1 (1976).

172. *Buckley v. Valeo*, 519 F.2d 821, 841 (D.C. Cir. 1975) *aff'd in part and rev'd in part*, 424 U.S. 1 (1976).

173. H.R. REP. NO. 1239, 93d Cong., 2d Sess. 3 (1974).

174. 519 F.2d at 835-41.

175. 424 U.S. at 48-49. Judge J. Skelly Wright argues that "the effectiveness of political speakers is not necessarily diminished by reasonable contribution and expenditure ceilings." Wright, *Politics and the Constitution: Is Money Speech?* 85 YALE L.J. 1001, 1012 (1976). This conclusion hinges on the premise that candidates "may" rely more on local organizing than on television spot commercials, and thus "may well . . . generate deeper exploration of the issues raised." *Id.* The opposite result is just as likely. Candidates might forego campaign techniques designed to encourage individual self-expression (for example, campaign buttons) in order to finance more television exposure. Indeed, they have. J. WITCOVER, MARATHON 15-16 (1977) (describing the presidential campaign of 1976). Even if television ads were relied upon entirely, it is not clear that canvassing results in greater depth of issue discussion. Television ads themselves promote non-media discussion. See Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 922-23 (1978), reprinted in Collins, *supra* note 20, at 9, 11-12. The question is whether the detrimental impact on communicative interests is outweighed by the contribution toward advancing the legitimate interests of Congress. Right or wrong in result, the Court's treatment is a classic example of *ipse dixit*.

176. The issue can be framed differently: Can "the wealthy few . . . claim a constitutional guarantee to a stronger political voice than the unwealthy many because they are able to give and spend more money, and because the amounts they give and spend cannot be limited"? 519 F.2d at 841.

177. The argument of *Buckley* applied to government speech would be that courts cannot restrict government speech in order to enhance the relative voice of others. *But see* note 155 *supra*.

power arguments, *First National Bank v. Bellotti*¹⁷⁸ opened a window. In *Bellotti*, the Court considered the constitutionality of a Massachusetts statute prohibiting corporations from making any expenditures designed to influence the vote on any question submitted to the voters unless the question materially affected their property, business, or assets.¹⁷⁹ The statute specifically declared that any question solely involving taxation of individuals did not materially affect corporate property, business, or assets.¹⁸⁰ Plaintiff corporations sought to spend money to campaign against a ballot proposal that would have permitted the Massachusetts legislature to impose a graduated personal income tax.¹⁸¹

Among the considerations which the state proffered in support of the statute was one based upon the drowning out private sources model. The state argued that "corporations are wealthy and powerful"¹⁸² and that "their views may drown out other points of view."¹⁸³ Predictably the Court retorted by citing its language in *Buckley* that governmental restrictions of some speakers designed to enhance the voices of others are "wholly foreign to the First Amendment."¹⁸⁴ Without explanation, however, the Court observed in dictum that if the state's position had been supported by record or legislative findings that corporate advocacy "threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration."¹⁸⁵ The Court did not pause, however, to explain why factors found in *Buckley* and *Tornillo* to be foreign to the first amendment would have "merited consideration" in *Bellotti*.

If one strained to reconcile *Buckley* and the *Bellotti* dictum, one might seize upon the relative scope of the restrictions involved. In *Buckley* the expenditure restrictions were applicable to all federal elections. In *Bellotti* a portion of the statute had separately identified a particular issue for regulation—in past years, efforts to pass a personal income tax had arguably been thwarted by the domination of corporate political campaign expenditures.¹⁸⁶ Perhaps the Court is suggesting that general findings of influence by the wealthy are too broad, but that specific findings on specific issues supported by persuasive evidence might suf-

178. 435 U.S. 765 (1978).

179. *Id.* at 768 n.2.

180. *Id.*

181. *Id.* at 767-69.

182. *Id.* at 789.

183. *Id.*

184. *Id.* at 791 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)).

185. *Id.* at 789.

186. *Id.* at 810-11 (White, J., dissenting).

fice.¹⁸⁷ The dangers of resting judgment on ad hoc findings on specific issues, however, are acute, and *Bellotti* itself illustrates the difficulties.

The legislature in *Bellotti* had declared that a personal income tax was not relevant to corporate concerns. Many corporations, however, argued that a personal income tax would make it difficult to attract executive talent to the state, thereby harming their business.¹⁸⁸ Regardless of how one might evaluate the corporations' argument, it was clearly an issue to be debated. It would be politically naive to expect that a legislature composed of individuals with vested political interests would dispassionately arrive at findings about who should or should not speak. As Justice Rehnquist put it, the facts of *Bellotti* strongly suggest that the legislature:

desiring to impose a personal income tax but more than once defeated in that desire by the combination of the Commonwealth's referendum provision and corporate expenditures in opposition to such a tax, simply decided to muzzle corporations on this sort of issue so that it could succeed in its desire.¹⁸⁹

If the *Bellotti* dictum is designed to pave the road for case by case determinations of excessive power in particular campaigns, difficult questions of motive, concomitant institutional stress, and substantial risks of unfairness in the democratic process lie ahead. Application of the dictum would require extraordinarily difficult determinations about the specific effect of multiple communications in particular political campaigns.¹⁹⁰ The political process is sufficiently complicated that there are strong grounds to doubt our ability to make such judgments at all, let alone to permit first amendment rights to turn on their outcome. However well paved at its beginning, the road considered by the Court leads to a rocky terrain.

If the lessons drawn from attempts to apply the drowning out private sources model to powerful private speakers are to be heeded in limiting government speech, we must be suspicious of the role that ad hoc applications might play. The judiciary may be less biased than the legislature, but ad hoc determinations invite the same measurement problems, similar problems of institutional stress, and serious threats to the democratic process. The idea that government may add its voice to the many it must tolerate until it drowns out private communications is an unworkable

187. The Court apparently would scrutinize the record with care. See *id.* at 789 n.28.

188. *Id.* at 770.

189. *Id.* at 826 n.6 (dissenting).

190. If the clear and present danger doctrine raises difficult questions as applied to single speeches, assessments of groups of communications are problematic, *a fortiori*.

test. It does, however, underscore one of the problems to be faced in assessing government speech: the concern that government speech could result in unacceptable domination of the marketplace and the need for measures to confine the danger.

On the other hand, the following examination of the government functions model should make clear that the fear of excessive power is not the only relevant consideration. Even if the drowning out private sources model were applied to formulate prophylactic rules in general areas of government speech, rather than a case-by-case standard, it would not be a suitable general model. It will be argued both that the drowning out private sources model would sometimes invalidate government speech which should be permitted,¹⁹¹ and that it would sometimes permit speech which should not be tolerated.¹⁹² Excessive power and drowning out private sources do not cover all the first amendment concerns related to the question of government speech.

D. *The Government Functions Model*

Thomas Emerson has formulated an approach, tailored for some limited government speech questions that we shall call the government functions model:

[G]overnment's right of expression does not extend to any sphere that is outside the governmental function. . . . Thus the government would not be empowered to engage in expression in direct support of a particular candidate for office. It is not the function of government to get itself reelected. Government expression must therefore operate within these general boundaries.¹⁹³

There is rhetorical power in this passage, much of it deriving from its implicit appeal to the venerable concept of self-government. Moreover, Emerson's use of the model has the merit of focusing the *Barnette* principle on the area where its intuitive appeal is strongest, the elections process. In the final analysis, however, even with respect to the narrow problem it is designed to address, Emerson's government functions analysis needs considerable qualifications.

Suppose the State of California decided that it was in the state's interest that its governor be reelected and that it therefore appropriated \$1,000,000 for television messages to promote that end. Such an action might well be regarded as the prototypical

191. See text accompanying note 211 *infra*.

192. See text following note 212 *infra*.

193. T. EMERSON, *supra* note 21, at 699. See also *Anderson v. City of Boston*, 380 N.E.2d 628, 639 n.16 (Mass. 1978), *appeal dismissed*, 439 U.S. 1060 (1979); *Mountain States Legal Foundation v. Denver School Dist. 1*, 459 F. Supp. 357, 360-61 (D. Colo. 1978).

example of a constitutional violation in the government speech context.

It is not merely that dissenting taxpayers are forced to contribute to a candidate they oppose. A system of rebates for the dissenters should not suffice to validate the activity. Nor is the drowning out private sources model dispositive. Even if the extent of the government contribution could not conceivably "drown out other sources," the expenditure would be inappropriate. Nor is the most basic constitutional offense the failure to respect the rights of other candidates, though surely their rights are infringed. There is something much more fundamental involved. At bottom, the invalidity of the expenditures appears to hinge on Emerson's principle: it is not a function of government to perpetuate itself or otherwise to influence the selection of candidates for elective office. That function must rest with the people. Citizens are entitled to a government that is neutral in the process of selecting candidates. Whether or not the concept of self-government is "central" to the first amendment,¹⁹⁴ it is undeniably an important first amendment value, and the integrity of the democratic process could rightly be questioned if government officially intervened in the political process to favor particular candidates.¹⁹⁵ Whether or not the intervention was powerful, it would ipso facto disturb the first amendment equality principle. If *Barnette's* fixed star guides navigation at all, it must lead us to the view that government speech in support of specific candidates cannot be reconciled with the first amendment.

Presumably this is a fair rendition of the Emerson position, and if so it is understandable that the government functions analysis strikes a responsive chord. But the analysis is overdrawn. The major difficulty is that the conclusion that government cannot support speech designed to favor a particular candidate does not necessarily follow from the proposition that "It is not the function

194. See, e.g., Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; A. MEIKLEJOHN, *POLITICAL FREEDOM* (1965).

195. Surely, the Constitution of the United States does not authorize the expenditure of public funds to promote the reelection of the President, Congressmen, and State and local officials (to the exclusion of their opponents), even though the open discussion of political candidates and elections is basic First Amendment material. Government domination of the expression of ideas is repugnant to our system of constitutional government. In this Commonwealth, we might find a constitutional bar to such an attempt at political self-perpetuation in art. 9 of the Declaration of Rights of our Constitution, concerning free elections, and in considerations of equal protection and due process of law.

Anderson v. City of Boston, 380 N.E.2d 628, 637 n.14 (Mass. 1978), *appeal dismissed*, 439 U.S. 1060 (1979).

of the government to get itself reelected." Government at all levels rightly subsidizes a substantial amount of speech designed to support or oppose a particular candidate. As Professor Emerson recognizes, government speech takes many forms. "It takes the form of oral communications such as speeches, statements, press conferences, and fireside chats, as well as written communications such as pamphlets, books, periodicals, and other publications."¹⁹⁶ Press conferences are especially instructive. Public officials, including thousands of legislators at every level of government and still more thousands of administrators, such as agency heads, subordinates, and chief executives from mayors to the President, regularly hold press conferences at public expense. The expenses include such diverse items as the cost of sending communications to the press announcing the conferences, the cost of maintaining the facilities in which the conferences are held and, of course, the salaries of the officials giving the conferences. Certainly, during the campaign season, these conferences are dominated by questions of a partisan character. Does the official plan to run for reelection? Does the official support candidate *X* for office *Y* and why? Public officials are expected to respond to these questions and their answers or evasions are designed to advance partisan ends.

Presumably a plaintiff, even one with standing, would get nowhere arguing that expenditures of government funds to support partisan press conferences were unconstitutional. Yet it is important to understand why. One problem with the claim, of course, is remedial. A court would find it inconvenient to administer an injunctive remedy designed to distinguish the partisan uses of a press conference from the non-partisan. The more important problem, however, is the substantive impossibility of such a separation. The partisan and non-partisan aspects of press conferences are ineluctably intertwined. Non-partisan aspects such as informing the populace of government policy and explaining that policy are also necessarily partisan because incumbent candidates almost invariably claim that their reelection is justified by their link to the government policy they explain and defend.

Indeed it is arguably the function, and perhaps the duty, of public officials to speak out on all issues of the day,¹⁹⁷ including

196. T. EMERSON, *supra* note 21, at 697.

197. "The Board of Supervisors has traditionally expressed public policy in resolutions irrespective of its power to legislate in a given field. . . . [This] is a traditional and salutary function of the Legislature." *Eller Outdoor Advertising Co. v. Board of Supervisors*, 89 Cal. App. 3d 76, 80, 152 Cal. Rptr. 358, 360 (1979) (citing *Farley v. Healey*, 67 Cal. 2d 325, 431 P.2d 650, 62 Cal. Rptr. 26 (1967) (foreign policy resolutions by city and county)). The more interesting question is the extent to which public officials such as legislators have the constitutional right to speak out on questions of

candidate elections. When a Governor explains at a press conference that he or she will support candidate *X* for President and why, the public may learn something about candidate *X*, but even more importantly, something about the Governor. Governments, then, can justify subsidizing the speech of public officials, not to reelect them or others, but because there is a substantial interest in hearing what they have to say.

To take another example, suppose a state legislature were to pass a resolution expressing its views on particular candidates for office. Once again the public would have the advantage of knowing the collective judgment of the legislature and of knowing the views of its representatives, which would in turn be useful for evaluating them. That it is not government's function to get itself reelected does not inexorably imply that the government should not be empowered to engage in expression in support of a particular candidate.

In the final analysis, the "government functions" terminology is of limited assistance. If a state's constitution or a city's charter provided that its legislature must endorse particular candidates,¹⁹⁸ clearly such speech would be within the function of those governments if the use of the term "government function" were merely descriptive. The term must carry normative weight, therefore, if it is to separate protected government speech from the unprotected. To forbid all partisan government speech, including partisan remarks or speeches at press conferences, would go too far. Yet one could stare at the phrase "government function" all day without learning what should be permissible and what should not. Once

the day. Compare *Bond v. Floyd*, 385 U.S. 116, 136 (1966) (legislator cannot be excluded from legislature for public, non-legislative expressions protected under the first amendment, on the theory that the "First Amendment . . . requires that legislators be given the widest latitude to express their views on issues of policy"), and *Eller Outdoor Advertising v. Board of Supervisors*, 89 Cal. App. 3d at 80, 152 Cal. Rptr. at 360 (suggesting that *Bond* applies to legislative pronouncements), with *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 99 S. Ct. 1171, 1179 (1979) (whatever the applicability of the first amendment, the speech and debate clause does not apply to non-federal legislators). The line of cases involving public employees and academicians is familiar. Compare, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (right of teacher to criticize school board), with, e.g., *Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (right of federal employees to take an active part in political campaigns outweighed by interests in integrity of and confidence in government), and *Elrod v. Burns*, 427 U.S. 347 (1976) (patronage dismissals violate first amendment). Ordinarily, it is important to distinguish between off the job rights and on the job rights. This Article in discussing academic freedom, for example, focuses on the latter. In cases involving policy-making officials, however, (whatever the scope of the speech and debate clause), the distinction is less important.

198. The use of a legislative analyst to write comments concerning referenda and initiatives that are placed on the ballot is a variant of this example. For a discussion of the constitutionality of California's use of this scheme, see notes 356-378 & accompanying text *infra*.

one recognizes that the partisan and the non-partisan are intertwined, it becomes obvious that the government functions model is inadequate in scope even with respect to the small part of the government speech problem it addresses.

II. AN ECLECTIC APPROACH

A. *The Values to be Considered*

Although the principles considered in prior sections are inadequate general models, they are useful in formulating an approach to the government speech question. In formulating an approach and in drawing insights from the models considered, it is helpful as a preliminary matter to consider the one provision of the Constitution that clearly¹⁹⁹ prohibits some government speech. The Constitution, of course, prohibits Congress and the states from establishing a religion.²⁰⁰ Although the scope of the establishment clause is debated,²⁰¹ it is apparent that a major purpose is prophylactic. Whether or not the framers intended to prohibit government support of religion in general, they clearly feared that if government were permitted to throw its weight behind a particular religion, free exercise of other religions would be discouraged.²⁰² On the other hand, there is no free speech establishment

199. This Article does not consider the extent to which the equal protection clause or the fifth amendment due process clause prohibit government speech that is racist or sexist in character or purpose.

200. U.S. CONST. amend. I. The establishment clause applies to the states whether or not the state action involves compulsion or otherwise infringes free exercise of religion. *Engel v. Vitale*, 370 U.S. 421 (1962). *But see, e.g.*, Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 330, 352-53 (1963) (action must be likely to result in compromising beliefs or influencing choice).

201. The debate has many facets, but the principal academic dispute has concerned whether the establishment clause was designed to prohibit aid to religion in general. *Compare, e.g.*, L. PFEFFER, *CHURCH, STATE AND FREEDOM* (rev. ed. 1967) (no aid permitted), *with* W. BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* (1976) and Corwin, *The Supreme Court as National School Board*, 14 LAW AND CONTEMP. PROB. 3 (1949) (aid to religion permitted unless one religion is favored over another). The Court has rallied around the no aid theory, *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947), though the question of what constitutes aid remains problematic. *See, e.g.*, L. TRIBE, *supra* note 57, § 14-4 at 820; Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 261-62 (1968). The Court is now clearly determined to define aid in a way calculated to strike down attempts by states to provide support for secular education in parochial schools. *See, e.g.*, *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975).

202. Merel, *supra* note 146, at 811; Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 517 (1968). One commentator has said, "[i]f there are any points of general agreement in the field of church-state relationships, they are that probably the paramount purpose for the enactment of the establishment clause was to safeguard freedom of worship and conscience, and that the protection of religious liberty remains

clause, and the government frequently fosters particular beliefs with major deterrent impact on opposing beliefs. Consider one example which for pragmatic reasons does not violate the religious establishment clause.²⁰³ A religious parent attempting to raise a child to believe that traditional medical care is unnecessary and intrudes on the sanctity of the human body assumes a difficult task in a society which funds Medicare, hospitals, and medical schools, teaches health care in the schools, and vaccinates young and old. Permitting government to assume positions on the health question (and thus to promote some views of the good life at the expense of others) necessarily implicates major free speech and religion costs.

But few would suggest that government cannot speak on the health question despite free speech costs. In short, there can be no room for a non-religious establishment clause. Under the religious establishment clause, statutes are said to be invalid if they fail to have a secular purpose, if their primary effect is to advance or inhibit religion, or if they foster excessive entanglement with religion.²⁰⁴ An establishment clause model for non-religious speech would entirely prevent government persuasion or sponsorship of beliefs. That surely would go too far. It is simply too late in the day to propose that the Government Printing Office must close up shop, that subsidies for broadcasting and the arts must be abandoned, that legislatures and Commissions cannot produce public reports, or that controversial governmentally subsidized press conferences by public officials are unconstitutional. Government has legitimate interests in informing, in educating, and in persuading. If government is to secure cooperation in implementing its programs, if it is to be able to maintain a dialogue with its citizens about their needs and the extent to which government can or should meet those needs, government must be able to communicate. An approach that would invalidate all controversial government speech would seriously impair the democratic process.²⁰⁵

To recognize that government should be permitted to take positions on non-religious questions, however, is not to assume that government speech should be entirely unrestricted. We have seen that the *Barnette* principle sweeps too broadly, as do the *Mos-*

our society's major concern in the church-state sphere." Choper, *supra* note 200, at 333. "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to prevailing official approved religions is plain." *Engel v. Vitale*, 370 U.S. at 431. This principle seems unquestioned, whether or not there is room for a de minimis principle in establishment clause doctrine.

203. See, e.g., Merel, *supra* note 146, at 821-22; L. TRIBE, *supra* note 57, § 14-8, at 835. See note 146 *supra*.

204. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

205. See generally Tussman, note 19 *supra*.

ley and dissenters' rights models, each of which reflects the *Barrette* principle. Nonetheless there must be limits on government's ability to prescribe orthodoxy and to use public property and public funds to support its prescriptions.

The drowning out sources model provides a partial insight. It is often argued that the principal method of domination in totalitarian countries arises less from the imposition of sanctions on dissenting speakers than from control of the communications media by government.²⁰⁶ If a system of free expression is to be preserved, either custom, or statutes, or constitutionally based limitations must provide assurances that government speech will not unfairly dominate the intellectual marketplace. Those assurances cannot be provided by ad hoc determinations of whether particular government speech campaigns have unfairly dominated the marketplace. That kind of fact-finding is impractical. Instead, as was discussed in connection with the *Mosley* model,²⁰⁷ the task must be to develop structural restrictions on government domination of the intellectual marketplace.

To a large extent the system has produced such assurances. Thousands of governmentally appointed broadcast licensees are afforded first amendment protection not principally because they have personal rights of free expression, but because a system of free expression demands it.²⁰⁸ Government itself would abridge freedom of speech if it controlled the airwaves monolithically—if, for example, licensees were hired as military employees armed with the duty to communicate the government message. Similarly, as Professors Tussman²⁰⁹ and Yudof²¹⁰ have stressed, the doctrine of academic freedom is best understood not as an affirmation of any personal right of expression on behalf of educators employed by the government, but as a structural provision designed to avoid undue government influence and to promote diversity and free inquiry.

The drowning out sources model, therefore, contains the important perspective that first amendment values necessitate some control of government speech. Nonetheless some government speech should be permitted even when private sources are drowned out. As has been discussed earlier,²¹¹ to suggest that military instructors have a first amendment right to depart from the

206. For an interesting report on the techniques used in India, see Jablons, *India's Press: Can It Become Independent at Last*, COLUM. JOURNALISM REV., July/August, 1978, at 32.

207. See text accompanying notes 101-07 *supra*.

208. See notes 395-404 & accompanying text *infra*.

209. Tussman, *supra* note 19, at 58-59.

210. Yudof, *When Governments Speak*, *supra* note 19.

211. See note 68 & accompanying text *supra*.

reigning commander's views of what soldiers ought to know about military tactics would declare war on common sense. This is the case not because private sources are anything but drowned out, but rather because the risks of abuse are outweighed by the substantial interests in uniformity and the need for military discipline and efficiency.²¹²

The drowning out sources model, therefore, is overinclusive. It is also underinclusive. This underinclusiveness is apparent from our consideration of the government functions model. Although that model is overbroad in its application, its basic theme is easy to accept. A first amendment premised in large part on the importance of self-government cannot tolerate government subsidies designed to support particular candidates: a government subsidy designed to elect Democrats or Republicans should be unconstitutional wholly apart from whether it would drown out private sources. It is true that not all partisan government speech can be prohibited: there are significant non-partisan government interests at stake in much speech with partisan impact. Nonetheless, the government functions model has value that needs to be considered in formulating a government speech approach.

Similarly, insight is gained by examining some of the concerns underlying the establishment clause. When governments speak they threaten to overwhelm or impinge upon individual choice, a concern at the heart of the establishment clause; when governments address partisan electoral issues they tend to undermine respect for the political system and to depart from equality in ways that demand justification, just as government speech in support of particular religions diminishes respect for the political system and infringes upon equality. Many subsidies for the press, for political parties, and for education create entanglement problems that undermine values of autonomy, values akin to those represented by the establishment clause's "high wall."²¹³ An establishment clause model is not serviceable for government

212. There are other captive audience contexts, however, where it would be more difficult to defend the government speech interest. See generally Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960 (1953). For discussion of the difficult captive audience implications of the public grammar school, see text accompanying notes 413-39 *infra*.

213. This theme is not specifically developed in the examples considered in the applications section, but it is important nonetheless. For example, broadcasters and academics are required to meet certain standards of fairness. Yet government enforcement of these responsibilities becomes increasingly problematic when it involves day-to-day intervention. This difficulty plagues the requirement mentioned in note 283 *infra* which dictates objectivity and balance in particular public broadcasting programs. There the extent of entanglement is at least mitigated, however, by the fact that enforcement of the requirement is confined to general appropriations for the Corporation. For similar problems with the funding of presidential primaries, see Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 26-31.

speech, but many of the concerns underlying that clause need to be considered in a constitutional balance.²¹⁴

B. *The Need For An Eclectic Approach*

There is an understandable tendency for those interested in legal doctrine and policy to seek out models that generate positive answers to intractable problems. Values of predictability and of minimizing judicial caprice support such an enterprise. There is also psychological comfort associated with the reduction of complex problems to simple patterns and principles.

But the search for single principles or all-encompassing models yielding easy solutions is too often misdirected.²¹⁵ The variety of human communicative situations is sufficiently complex and involves enough variables that approaches at high levels of abstraction are of limited assistance.²¹⁶

This has certainly been the case in the rich variety of situations in which the government has acted as censor. The values at stake in areas such as libel, obscenity, fraud, and advocacy of illegal action are simply too diverse to permit the formulation of

See generally Canby, note 21 *supra*; Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977).

214. On the other hand, a major objective of the establishment clause has been to minimize political disputes along religious lines. The founders recognized that the country was too religiously diverse ever to hope for religious unity and recognized that religious debates in political life spell ill for political communities. If government were permitted to speak on religious matters, political debate as to what government should say about religion would necessarily follow. Government promulgation of particular religious views is, therefore, prohibited by the establishment clause. Political debate on non-religious issues is encouraged, however, and therefore there should be no concern about discouraging (or more precisely not encouraging) particular types of debate. Thus, although some concerns underlying the establishment clause are relevant, a major theme of the clause is not. *But see* Kamenshine, *supra* note 19, at 1119.

215. *See generally* I. BERLIN, *FOUR ESSAYS ON LIBERTY* (1969). *See also* Leff, *Law and*, 87 YALE L. J. 989, 1010 (1978) (quoting G. GILMORE, *THE AGES OF AMERICAN LAW* 99-100 (1977)):

For two hundred years we have been in thrall to the eighteenth century hypothesis that there are, in social behavior and in societal development, patterns which recur in the same way that they appear to recur in the physical universe.

[T]he hypothesis is itself in error. Man's fate will forever elude the attempts of his intellect to understand it. The accidental variables which hedge us about effectively screen the future from our view. The quest for the laws which will explain the riddle of human behavior leads us not toward truth but toward the illusion of certainty, which is our curse.

216. *Cf.* R. UNGER, *KNOWLEDGE AND POLITICS* 288 (1975): "Theory can define the tensions and suggest the factors that should be taken into account in dealing with them. But only prudence can teach us what to do about them at each moment. And only practice can yield the insights needed to correct the decisions we make." *See generally id.* at 253-59.

meaningful general theory.²¹⁷ At least, the attempts which have been tendered are unsatisfying. It should not prove surprising if similar attempts with respect to the government as speaker should be unsatisfying as well.

The government speaks in too many ways with too many different effects for too many different reasons to expect that general theory can be an unfailing guide to easy solutions. An approach which fails to pay attention to context will ignore much of importance.

An approach to thinking about government speech, therefore, must be eclectic.²¹⁸ It must draw on a variety of principles while recognizing that those principles must give way in the face of particular government interests in particular situations. An eclectic approach need not be a prescription for ad hoc balancing, however. There is an important difference between balancing a variety of values to arrive at general rules regulating recurring fact patterns and balancing those values again and again on an ad hoc basis from case to case.²¹⁹ It would be foolish to ask courts to decide whether government speech on particular issues had drowned out other sources. It is eminently sensible to take the value of avoiding government domination of the intellectual marketplace into account in formulating general rules for the broadcast industry. The eclectic approach, therefore, is one of definitional or general balancing;²²⁰ it is not ad hoc. The appropriate analogy is to a system of law and not to a system of equity.

An eclectic approach, however, is a balancing approach. It recommends that the values which counsel restricting government speech be weighed against legitimate government interests in its own communication. On the side of restriction, a number of values have been discussed. A system of self-government must look with caution at any government speech that appears to intrude on the electoral process whether or not it actually threatens to domi-

217. The literature needs more discussion of what can be legitimately expected of first amendment theory. For a helpful contribution, see Tribe, note 20 *supra*. I am currently at work on a manuscript entitled "Away From A General Theory of the First Amendment," which will expand upon the general claims made in this section.

218. An eclectic approach does not imply that truth is arbitrary or subjective, nor does it require that decision making be ad hoc or unprincipled. Instead it selects "what appears to be best or true in various and diverse doctrines or methods" and rejects "a single, unitary, and exclusive interpretation, doctrine or method." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 719 (Gove ed. 1966). For the argument that a belief in an objective moral theory is reconcilable with a rejection of a unitary conception of human nature and with an endorsement of a liberal political theory, see generally I. BERLIN, *AGAINST THE CURRENT* (1980).

219. See generally Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

220. Shiffrin, *supra* note 175, at 942-63, reprinted in Collins, *supra* note 20, 19-29.

nate the intellectual marketplace. There are many situations, it will be argued, in which government need not remain neutral, but departures from neutrality are indefensible when they undermine respect for the democratic process. Apart from electoral speech, first amendment values counsel that government speech impinging upon autonomy or threatening to overwhelm individual choice or dominate the intellectual marketplace requires substantial justification.²²¹ Because ad hoc decision making on such matters is ordinarily impractical, the search must be for structures to minimize abuse in those circumstances where government interests are insufficient to outweigh the other values at stake.

Many, of course, are uncomfortable with the view that it is the proper function of the judiciary to engage in balancing. There would be little point here in extending the continuing debate about the nature of judicial review. Even if judicial review did not exist, an eclectic approach and the applications here discussed would be relevant to the government speech problem. It is not merely that conscientious legislators need to interpret and follow the Constitution independently.²²² Wholly apart from constitutional dictates, an eclectic approach and its applications are offered as suggestions for thinking about government speech and as minimal expectations of what a healthy democracy should require.

"Balancing" is a metaphor for the process of accommodating values. Whether the judiciary should be permitted to accommodate values has nothing to do with the policy question of whether values should be accommodated. The question of who should do something should not be confused with the question of what should be done. Again, however, the Article assumes that the judiciary could properly adopt an eclectic approach. A system that relies on members of legislatures to abandon devices that serve their own self-interest has little to recommend it. A judiciary armed with the power to prevent such abuses, but with a methodology permitting it to accommodate values sensibly, can reinforce and preserve the democratic process.²²³

If, as has been suggested, general theory is helpful in guiding analysis and avoiding error, but not in dictating solutions, what becomes crucial is to discuss potential areas of abuse in govern-

221. I think that little is served by distinguishing between levels of substantial scrutiny. References to "exacting scrutiny," "substantial justification," and the like here are stylistic substitutes for the same idea. They are not related to the Court's pigeonholing of various fact patterns into a predetermined, yet shifting, assortment of possible levels of scrutiny.

222. See generally Brest, note 106 *supra*.

223. See generally Ely, *Toward A Representation - Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

ment speech, to identify the relative strength of the values at stake in such contexts, and to suggest how to think about formulating general rules. The remainder of this Article attempts to do just that. But before embarking upon a discussion of a number of discrete situations (from the franking privilege to grammar school education), it seems helpful, at the risk of some repetition, to justify an eclectic approach by applying it to a particular situation in which the other models considered are inadequate. Also, before considering additional and important applications of an eclectic approach, this section examines the various constitutional provisions that might be employed in considering government speech and in implementing an eclectic approach.

C. *Applying An Eclectic Approach*

The examples of a state government's buying media time to support the election of a particular candidate for Governor or to affect the outcome of a statewide initiative are convenient vehicles for illustrating one way in which an eclectic approach might be employed and why it is a more helpful framework than the other models considered.

Let us begin with the subsidy on behalf of a particular candidate. It was previously argued in contradiction to the government functions model that public officials may speak out at public expense on the qualifications of candidates without violating the Constitution.²²⁴ This power, coupled with their usually assured access to the media, itself creates a serious potential for abuse. To go beyond that point and permit general appropriations to conduct a campaign (employing letters or mass media) on behalf of a specific candidate creates risks of undue influence and perceived unfairness, risks which need not be run.²²⁵ To be sure, specific governmental campaigns would add to the public's knowledge, but the risk is unacceptably greater than that posed by public officials' statements at press conferences. To permit a government armed with the biggest campaign chest of all—the public treasury—to attempt to dominate candidate elections threatens the basic integrity of the democratic process.

The argument, of course, need not dictate that government could not purchase or require media time or space for other public service announcements,²²⁶ even if such announcements were con-

224. See notes 196-97 & accompanying text *supra*.

225. Other authors have similar intuitions. See Yudof, *When Governments Speak*, *supra* note 19, at 905 (distinction should be used in finding municipal advocacy unauthorized by the legislature); Note, *Municipal Advocacy*, *supra* note 19, at 561-62 (objecting particularly to concentration of resources, but apparently unwilling to allow public officials to use any public funds for advocacy on election issues).

226. The courts have displayed different attitudes towards those statutes which

troversial. In this respect, Emerson's government functions analysis with its self-government²²⁷ overtones is instructive. The analysis highlights a basic, albeit paradoxical conclusion: speech related to elections, the speech often considered to be centrally protected in the private sphere,²²⁸ is suspect in the public sphere.²²⁹

Distinctions between government speech in support of particular candidates and public service announcements, and distinctions between press conferences or press releases of government officials and purchased media time or mass mail, obviously do not come from the burning bush. They are pragmatic distinctions rooted in common sense. Their appeal rests on the extent to which they reflect shared understandings and intuitions²³⁰ just as other constitutional line-drawing²³¹ depends upon the perceived fairness and sagacity of the attempted accommodations.

Although government may make public service announcements, and government officials may discuss the qualifications of candidates at public expense, government should not be permitted to purchase media time to assist a specific candidate. This conclusion is open to debate; indeed, objections that are far from frivolous are discussed below. But as will be demonstrated, even the objections to this analysis can be discussed sensibly only within the framework of an eclectic approach.

First, one may object to first amendment outcomes turning on content. But the necessity of content distinctions appears inescapable. To return to the military example, if the sergeant teaching a military class to recruits talks about or invites speakers to discuss military strategy or the dangers of drug abuse, it is difficult to make a case for access for competing views, no matter how con-

require publication of legal notices even before *Tornillo*. Compare *Commonwealth v. Boston Transcript Co.*, 249 Mass. 477, 144 N.E. 400 (1924) (unfavorable) with *In re Gillette Daily Journal*, 44 Wyo. 226, 238, 11 P.2d 265, 269 (1932) (favorable dictum: "The publication of such notice is . . . a public duty, and particular publishers are called upon to perform it.").

227. See note 194 & accompanying text *supra*.

228. *Id.*

229. Note, *Municipal Advocacy*, *supra* note 19, makes the same point. "Ironically, the first amendment justifies the most strenuous restriction of government expression in precisely the same context in which it most vigorously protects individual political expression - when voters are about to go to the polls." *Id.* at 563. See also Canby, *supra* note 21, at 1127 ("It is questionable, however, whether a constitutional proscription of [government speech] ought to be imposed except for the most egregious partisan activity.").

230. Cf. note 225 & accompanying text *supra*.

231. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (complex constitutional rules created to accommodate values in defamation context); *Roe v. Wade*, 410 U.S. 113 (1973) (complex accommodations in abortion context); *Miranda v. Arizona*, 384 U.S. 436 (1966) (complex accommodations in context of interrogation of criminal suspects).

troversial the remarks might be. If the sergeant, however, wishes to spend a week talking about or inviting speakers to explain why the policies of the Democratic party are better for the military, the case for access or even prevention²³² is strong. If regulation of government electoral speech is admissible, some attention to content becomes unavoidable. As previously discussed, the *Mosley* equality²³³ and the dissenting taxpayers²³⁴ models are unable to handle such content distinctions.

A different but related objection is that the best response to the candidate subsidy example is to permit the political process to work its way without judicial interference. The objection draws upon the difficulties of line drawing, concepts of federalism and separation of powers and the assumption that any government that bought media time or otherwise spent large sums to influence the outcome of candidate elections would reap the whirlwind of public rejection.

The argument for the permissive approach in candidate elections can also be made for initiative campaigns. In both, the permissive approach might be preferred over an approach which requires difficult line drawing and finely tuned constitutional calibrations. But if one believes that government speech cannot be unrestricted in the initiative process or in candidate elections, the line drawing and calibrations become inescapable. On numerous occasions government agencies have appropriated funds to influence the outcome of initiative or other campaigns.²³⁵ Indeed, in California a government official gives an opinion on the ballot itself as to the financial impact of particular initiatives.²³⁶ This Article's position is not that government should be wholly disabled from taking a position,²³⁷ but that neither the appearance nor the reality of unfairly influencing the outcome of an election should

232. The case for prevention is supported by the considerations stressed by the concurring opinions in *Greer*. See notes 61-63 & accompanying text *supra*.

233. See text following note 123 *supra*.

234. See text accompanying notes 124-52 *supra*.

235. See, e.g., *Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976); *Miller v. Miller*, 87 Cal. App. 3d 762, 151 Cal. Rptr. 197 (1978); *Citizens to Protect Public Funds v. Board of Educ.*, 13 N.J. 172, 98 A.2d 673 (1953); *City Affairs Committee v. Board of Comm'rs*, 134 N.J.L. 180, 46 A.2d 425 (1946); *Stern v. Kramarsky*, 84 Misc. 2d 447, 375 N.Y.S.2d 235 (1975); *Porter v. Tiffany*, 11 Or. App. 542, 502 P.2d 1385 (1972).

236. CAL. ELEC. CODE § 3572 (Deering 1977):

The Legislative Analyst shall prepare an impartial analysis of the measure describing the measure and including a fiscal analysis of the measure showing the amount of any increase or decrease in revenue or cost to state or local government The title of the measure which appears on the ballot shall be amended to contain a summary of the Legislative Analyst's estimate of the net state and local government financial impact.

237. To argue that government must be neutral on the ballot itself is not to argue

be permitted and that government editorials on the ballot itself are utterly unacceptable.

Optimistic expectations about the capacity of the political process to counter partisan government speech are quixotic. The permissive approach is ultimately defective for several reasons. First, it is empirically unfounded. When government funds have been used to influence the outcome of elections, there has been no significant backlash.²³⁸ Often the partisan character of the subsidy does not reach the public consciousness. It will be argued, for example, that the franking privilege is often used as a partisan subsidy, and such use not only fails to produce a backlash but is an important factor in assisting the election of incumbent representatives.²³⁹ In the case of initiative spending, backlash is by no means significant. Boston, for example, prevailed when it spent a million dollars to favor the passage of the statewide initiative.²⁴⁰

But in many cases the backlash theory would be no more helpful if it were empirically founded. The question of the propriety of government intervention is entirely unrelated to the merits of the initiative. Had the Massachusetts initiative lost because Boston intervened (that is, had there been a backlash), an initiative that might otherwise have passed and that might have deserved to pass on the merits would nonetheless have been defeated. It is hard to see how that result could inure to the integrity of the process.²⁴¹

The initiative example illustrates the weakness of the drowning out private sources model. It is impossible to tell whether the initiative succeeded because of the government expenditures. And the harm to the integrity of the process is created by the expenditure itself, regardless of whether private sources are drowned out. In the political arena, a perception of government unfairness may be as important as its reality.

that it cannot submit arguments for inclusion in ballot pamphlets. *See Ferrara v. Belanger*, 18 Cal. 3d 253, 555 P.2d 1089, 133 Cal. Rptr. 849 (1976).

238. In addition to the examples mentioned in the text, federal funding of elections has not produced any recognizable backlash, despite the fact that they discriminate against minority parties, *see* notes 287-325 & accompanying text *infra*, nor has there been any perceivable backlash against the government statements appearing on California ballots in initiative campaigns. *See* text accompanying notes 356-378 *infra*.

239. *See* notes 328 and 330 *infra*.

240. MASS. CONST. amend. CXII (amending MASS. CONST. pt. II, ch. 1, § 1 art. 4). *See also* MASS. ANN. LAWS ch. 59A, §§ 1-42 (Michie/Law. Co-op. Supp. 1980) (repealed 1979, effective January 1, 1980) (law became effective upon passage of the constitutional amendment initiative).

241. Voters may make foolish decisions, but this behavior in and of itself does not call the integrity of the process into question. On the other hand, the injection by the state of an issue irrelevant to the merits of the dispute before the voters does invite questions about the process' integrity.

The dissenting taxpayers model also fails to serve as a guiding principle for this example because it does not adequately deal with the problem of perceived government unfairness. A system of tax rebates distributing a few pennies to disgruntled taxpayers would not do much to relieve a general perception of unfairness.²⁴² The harm is to the system of self-government, not to the finances of the dissenters.

In the final analysis, the potential for unfairness also undercuts the most significant justification for government intervention in the initiative process. As previously discussed, a major concern about the election process has been that the media, or the wealthy, or the corporations may dominate the marketplace. The Supreme Court has blocked reform efforts by positing that it is foreign to the first amendment to curb some voices to enhance the relative impact of others.²⁴³ A forceful argument for government electoral speech, then, is that if government cannot prevent inequities by curbing speech, it ought to be able to rectify them by adding different points of view to the marketplace.²⁴⁴ But no structural methods could possibly assure that the added voice would be different²⁴⁵ and, as has been previously discussed, ad hoc determinations would be impractical. Moreover, government, through its officials, already has substantial power to add its voice to the marketplace and already possesses substantial access to the media. The economic value of that access, could it be quantified, would certainly be great. To permit that power to be multiplied is to invite risks of abuse without accompanying assurances of benefits.²⁴⁶

242. The same point is discussed well in Kamenshine, *supra* note 19, at 1108-09. But see Note, *Municipal Advocacy*, *supra* note 19, at 562 n.154.

243. See text accompanying note 175 *supra*.

244. Yudof also raises and rejects this argument at least insofar as it is used to justify a first amendment right of expression by government corporations. Yudof, *When Governments Speak*, *supra* note 19, at 866-67.

245. See also Note, *Municipal Advocacy*, *supra* note 19, at 562 n.155.

246. It might be argued that because of the possibility of circumvention the dangers of government abuse are unavoidable. If the government can purchase media time for public service announcements, it could thereby frame messages designed to support particular candidates or particular initiatives. Moreover, there are grave problems associated with permitting the use of discovery to uncover legislative or administrative purpose in these circumstances. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 215 (1962).

Nonetheless there are at least three reasons for discounting the importance of this objection without denying that it has some force. First, a significant percentage of public officials take seriously their responsibility to obey the Constitution. If it were clearly established that officials had a duty not to go beyond press conferences and the like in influencing candidate elections, many officials would, on moral or professional grounds, avoid circumvention. Second, even if moral or professional considerations were not in evidence, circumvention would be politically risky whether or not a judicial remedy would be seriously feared. Third, even in the cases where circumvention

Finally, building on the *Mosley* model,²⁴⁷ some will argue that the first amendment should be used not to silence government but to insure that a countervoice be heard.²⁴⁸ In the case of government endorsing candidates this would mean that the government would have to subsidize the speech of non-endorsed candidates. Yet, as will be argued later, government subsidies of candidates raise enormously difficult constitutional problems.²⁴⁹ Such intervention in the process of candidate elections, therefore, should be prohibited unless adequate provisions are made to ensure that the other sides are amply protected. Similarly, in the case of an initiative, either government should not be permitted to send mail to its citizens stating its views or adequate provision for opposing views must be made.

Whether or not one agrees that government should be prohibited from buying media time to influence candidates or initiative elections, the claim made here is that an eclectic approach is necessary. Models based on general principles of neutrality prohibit too much. Even the government functions model sweeps too broadly. Moreover the access implications of the *Mosley* model are too general. Access is one method of limiting government power, but it is not the only means. The dissenters' rights model fails both because it provides no method of determining when it should be invoked (it too would prohibit too much) and because a system of rebates would not directly address the need to limit government abuse. The drowning out private sources model fails for several reasons. First, to the extent it is to be applied on an ad hoc basis without formulating prophylactic general rules, it is relatively unreliable and subject to abuse. Even if ad hoc applications were eschewed, the model would be both underinclusive and over-inclusive. Only an eclectic approach permits the basic concerns to be addressed while affording necessary latitude to the government.

D. *The Appropriate Constitutional Peg*

The argument thus far has assumed that the free speech

might be attempted, there is some gain (that is, less risk of undue influence); the communications literature is clear that the failure to make explicitly logical links, or the failure specifically to identify the persuasive end, makes a message less persuasive. See, e.g., M. BURGOON, *APPROACHING SPEECH COMMUNICATION* 105 (1974). Thus, there are strong grounds to believe that circumvention would rarely be tried and even if tried, such communication would be less effective than if legal limits on government speech were not imposed.

247. See notes 32-33 & accompanying text *supra*.

248. Canby, *supra* note 21, at 1127 (citing Van Alstyne, *Suppression of War-mongering*, *supra* note 21, at 532.)

249. See text accompanying notes 287-355 *infra*.

clause is the best constitutional peg for an eclectic approach. Yet other constitutional provisions can set limits to the abuse of government speech, and there are some objections to the use of the speech clause that need to be considered.

Some would argue that the press clause should be interpreted as a structural provision designed to assure that a powerful voice is available to counter government power.²⁵⁰ Justice Stewart, for example, has argued that the press clause extends protection to an institution, that is, "the publishing business is . . . the only organized private business that is given explicit constitutional protection."²⁵¹ It is difficult for many reasons, symbolic and otherwise, to accept the idea that those citizens employed by the press should have greater rights than others.²⁵²

On the other hand, many of the objections to a separate privilege for the press could be overcome if the press clause were regarded as protecting a function—the countervoice to government—rather than an institution or private business.²⁵³ If the press clause were so understood, the doctrine of academic freedom could be characterized as a part of freedom of the press, a check against government indoctrination; similar reasoning might explain protection for broadcast licensees.²⁵⁴

250. Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 218-20 (1976). Melville Nimmer's argument for construing the press clause to be independent of the speech clause is more broadly based. Nimmer, *Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975). While some have argued that the press would do well to avoid claims of a preferred position for fear that unwelcome responsibilities would accompany the new freedom, Van Alstyne, Comment, *The Hazards to the Press of Claiming a "Preferred Position"*, 28 HASTINGS L.J. 761 (1977), dangers of a different kind are exposed in Bezanson, note 213 *supra*. Professor Bezanson argues for an elaboration of the Stewart position which would, in virtually every case, put the press in the same or a worse position than it enjoys under existing law. For excellent general attacks on the concept of an independent press clause see Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77 (1975) and Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979). But see Abrams, *The Press is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563 (1979). For the claim that the press should not enjoy a privileged position in the defamation context, see Shiffrin, note 175 *supra*. For comprehensive consideration of the checking of the abuse of official power as a function of both the speech and press clauses, see Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B.F. RESEARCH J. 521.

251. Stewart, *supra* note 250, at 633.

252. It is unnecessary to add to the growing commentary on that subject. See note 250 *supra*.

253. The counterforce value need not be confined to the press clause, however. See Blasi, *supra* note 250. Nor need a functional interpretation of the press clause necessarily focus upon the counterforce value. Other alternatives are possible. See generally Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629 (1979).

254. See notes 395-404 & accompanying text *infra*.

Yet others may argue that freedom of the press is an improper constitutional peg for developing a limit on government speech because it was intended not to add any affirmative rights, but only to assure that free speech rights applied to a relatively new and powerful medium.²⁵⁵ However one chooses to resolve this argument, the press clause, even in its most expansive reading, only provides a peg from which to argue for a countervoice. As argued previously,²⁵⁶ there are some circumstances in which the voice of government needs to be stilled. On any reading, a press clause analysis is inherently inadequate in scope to deal with the problem.

Others might suggest that the right to vote (if it exists)²⁵⁷ or at least equality principles related to the voting power are the appropriate constitutional foundations for establishing limits on government participation in political campaigns. To be sure, some constitutional limitations might independently be generated from non-first-amendment rights connected with voting, but the underlying concern with government speech goes beyond the elections process. The concerns that would arise if the government monolithically dominated the airwaves would relate to elections, but would not be exclusively bound up with them. The underlying concern is the undue power of one source, the government, to shape beliefs in general. These concerns are even more obvious in the educational sphere where concerns about indoctrination are by no means confined to a fear about the impact of government speech on the elections process.

Finally, it has been suggested that the proper constitutional peg for limiting government speech is the equal protection clause or its federal complement in the fifth amendment's due process clause.²⁵⁸ In *Buckley v. Valeo*²⁵⁹ minor political parties challenged as unconstitutional a statute providing for public financing

255. L. TRIBE, *supra* note 57, § 12-19 at 676, n. 5 (citing Van Alstyne, *supra* note 250, at 769 n.16).

256. *See* note 232 *supra*.

257. *Compare* Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (purporting to apply the "right to vote"), *with* San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) (denying the existence of a right to vote per se but recognizing the right to participate equally in the elections process).

One court has suggested that limits on government speech might be found in the guarantee clause. Mountain States Legal Foundation v. Denver School Dist. 1, 459 F. Supp. 357, 361 (D. Colo. 1978). Putting aside the political question barrier, the same problems discussed here with respect to voting rights apply inasmuch as the invocation of the guarantee clause is itself an assertion of voting rights. The right to vote could also be founded on the first amendment. *See* A. MEIKLEJOHN, note 194 *supra*; Karst, *supra* note 37, at 52-65.

258. *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976).

259. 424 U.S. 1 (1976).

of presidential elections.²⁶⁰ They argued among other things that the government distorted the election process by subsidizing some candidates and not others.²⁶¹ The Court rejected appellants' speech clause argument as irrelevant, offering the superficial hypothesis that public funding subsidizes speech and, therefore, "furthers, not abridges, pertinent First Amendment values."²⁶² The Court was willing, however, to entertain an equal protection claim under the fifth amendment due process clause.²⁶³

There are at least three objections to exclusive reliance on equal protection notions. Although in most cases there is an identifiable person who is damaged by the government's action, a major concern with government speech is its impact on the total system of freedom of expression.²⁶⁴ In broadcasting or in education, for example, a desire to limit government speech can properly be based on a concern over government power independent of which other persons or views have a right of access to the process. A focus on equality, therefore, while not improper, is not comprehensive.

Second, an equal protection analysis can accommodate the concerns suggested by the government functions model only by letting them in the back door. Suppose the government were to argue that it has selectively funded a candidate (or directly supported a candidate) because it favors the candidate and thinks that it is in the public interest that the candidate be elected. The selectivity of the funding would then be not only a rational means of achieving the end but a necessary means as well. No level of means-end scrutiny could invalidate the government action. The government action could be challenged on equality grounds only if the means were illegitimate or if the end was illegitimate. But the means would be illegitimate only if the first amendment analysis tendered above were accepted.²⁶⁵ The same is true of the ends analysis. If exclusion from public funding based on governmental favoritism is unconstitutional, the reason is that first amendment

260. *Id.*

261. *Id.* at 92.

262. *Id.* at 93.

263. *Id.*

264. Even if it would always be possible to find someone who had been treated unequally, a relevant concern should include the damage to the system of expression as a whole. But the causation standards in cases such as *Warth v. Seldin*, 422 U.S. 490, 502-10 (1975), might make it impossible for those who wish their views to be presented to show that but for the policy in question their view would in fact have been presented.

265. The distinction between the use of government-funded press conferences and government buying media time becomes constitutionally significant only against a background of a conception about the appropriate limits of government derived from a view of the system of expression or of voting.

values are at war with such partisan interests. To rule equality considerations out of the first amendment and then magically to revive them elsewhere is thus a doctrinal shell game.²⁶⁶

A third objection, developed later,²⁶⁷ to using an equal protection analysis alone is that resting first amendment outcomes on the casuistry of equal protection doctrine places them on an unstable foundation. In particular, the degree of burden that the aggrieved party is required to show for equal protection purposes may make a difference not made by an analysis that focuses on government power.²⁶⁸

Although limitations on government speech can be generated by an analysis based on the press clause, a right to equality in the voting process, or a general right to equal protection, none of these furnishes a comprehensive focus. At the very least, the speech clause is needed to complement the conceptual framework. The claim for the speech clause is stronger, however: it can provide a comprehensive framework for each of the concerns. Even if there were no press clause, no right of equality in voting, and no general equal protection clause, the speech clause would suffice. The idea that a voice ought to be available to counter government power is a central concern of the speech clause;²⁶⁹ the idea of self-government has major free speech dimensions;²⁷⁰ and the ideal of equality runs deep in first amendment law.²⁷¹ Thus an eclectic approach relying on the speech clause can direct attention to the concerns of excessive government power and to the need to respect equality and private autonomy.

What remains is the task of applying an eclectic approach to a wide variety of important government speech questions. This Article argues that attention to the values prominent in an eclectic approach makes sense of *Abood v. Detroit Board of Education*; makes it obvious that the Court's analysis of the public funding provisions in *Buckley v. Valeo* was insensitive; makes it possible to sustain a vigorous assault on the franking privilege as it currently functions; and generates a better constitutional understanding of the system of broadcasting, of programs subsidizing the arts, and

266. Cf. L. TRIBE, *supra* note 57, § 16-1, at 991. Tribe says that the "Equality [Model] makes non-circular commands and imposes non-empty constraints only to the degree that we are willing to posit substantive ideals to guide collective choice." *Id.*

267. See text accompanying notes 290-98 *infra*.

268. See text accompanying notes 290-98 *infra*. For the argument that a first amendment emphasis on equality in the voting area would generate different results, see Karst, *supra* note 37, at 52-65.

269. Blasi, *supra* note 250, at 529-44.

270. See A. MEIKLEJOHN, *supra* note 194, at 3-89.

271. Karst, *supra* note 37, at 20-68.

of the educational system as a whole. It is to these considerations and applications that we will now turn.

III. APPLICATIONS

In Part Three an eclectic approach is used to evaluate government subsidies of political speech, artistic speech (including broadcasting), and education. The categories overlap, but the use of separate discussions exposes different problems that arise in government speech cases. The variety of the problems considered should highlight the need for an eclectic approach. The government interests are diverse and the threat to important values varies in degree and sometimes in kind. The problems treated below have been chosen to emphasize that government speech cannot be unrestricted and that the diverse values involved can be accommodated in satisfactory ways.

Government speech on partisan election issues needs to be examined with care and the section on political speech attempts to demonstrate that the political system has not been careful enough. Government subsidies of artistic speech and of broadcasting raise difficult issues not only because of their potential relationship to politics but also because of first amendment values that bear only an attenuated relationship to politics. Government subsidies of public grammar school education raise what may be the most difficult questions in the government speech area: how to balance the effect of government speech on a captive audience of small children, a legitimate state interest in educating its citizenry, and a profound countervailing concern with preventing indoctrination and preserving individual choice.

A. *Political Subsidies*

This first section will apply an eclectic balancing approach to a number of important political subsidies. As has been discussed, government properly subsidizes much controversial speech that addresses issues of political importance. An eclectic approach would posit, however, that selective government subsidies designed to influence elections tend to undermine respect for the political system and depart from equality in ways that must be justified. Intervention by government to buy media time to assist specific candidates would be the classic first amendment violation. From this perspective, *Abood*, in which the Court prohibited the spending of compulsory union dues on political campaigns, becomes an easy case. If government cannot directly spend on behalf of specific candidates, it should not be able to contribute to

the campaign chests of private groups.²⁷² If government is not permitted specifically to favor the Democratic party, it should not be permitted to give funds to unions who, in turn, give the money to Democratic candidates.²⁷³

Such indirect expenditures might be defended by arguing that compelled contributions to unions grant underrepresented views access to the marketplace. But, for reasons discussed in connection with the drowning out sources model,²⁷⁴ this would be a dangerous principle.²⁷⁵ Society is too pluralistic to suppose that government could specifically intervene in the elections marketplace without serious risks of abuse. Surely unions and corporations do not exhaust the relevant political interests. Indeed, unions and corporations may unite on matters alien to environ-

272. One might object that this analysis is overdrawn. The government does not contribute to the campaign chests of unions; it insures against free riders by requiring all employees to make payments to the union. In turn, the union decides to use a portion of its wealth for political purposes. Moreover, government promulgates many regulations transferring wealth to individuals or groups that have the additional effect of freeing other funds for use by them in the political process. To conceive of each of these regulations as a tax and the use of the distributed wealth as government spending is to engage in metaphor. Nonetheless, the *Abood* situation seems more like a taxing and spending program because of the directness of the financial extraction, the ease with which the funds can be traced to political contributions and expenditures, the predictability of the political ends for which the funds will be employed (it is no accident that Democrats tend to favor unions more than Republicans do), and the obvious feasibility of fashioning a rebate remedy.

Yet, there are always grounds for reservation when legal distinctions turn upon concepts as fuzzy as directness and indirectness. Moreover the rebate remedy may, in some contexts, unfairly impinge upon union autonomy and create free riders.

I have not thought through the implications of this analysis for wealth-shifting regulations, and find it unsatisfying to posit that directness, tracing, predictability, and practicality are the key distinguishing factors. One might support direct payments to the poor to permit them to participate in the electoral process via contributions, despite the directness and the predictability and despite the extent to which such subsidies would be motivated by partisan concerns. Fairness considerations there cut both ways. It is the kind of example that highlights the need for an eclectic approach while, at the same time, illustrating the difficulty of the government speech issue.

273. Admittedly some unions give money to other candidates. The nature of the political interests that unions are likely to support, however, is predictable. It would be naive to suppose that politicians do not take such matters into account in shaping campaign contribution laws. See generally Comment, *Regulation of Union Political Activity*, *supra* note 151.

274. See text accompanying notes 188-90 *supra*.

275. Permitting ad hoc government decisions that particular viewpoints are underrepresented in the electoral process would provide a blueprint for abuse. On the other hand, not permitting intervention risks control of the electoral speech market by corporate and wealthy interests. The preferable approach is to devise structural methods of assuring diversity. Certainly, for example, postal subsidies applicable to all periodicals present less risk of abuse than content-based intervention. A thorough analysis of the power problem would require discussion of media and corporate structure which has not been attempted here. As to broadcasting regulation, however, see text accompanying notes 395-404 *infra*.

mental groups, consumer groups, women's groups, religious groups, minorities, the aged, and the poor. Moreover, reliance on pluralism discriminates against those whose interests do not neatly align with the interests of specific groups.²⁷⁶ Such reasoning does not rule out subsidies for specific testimony or evidence to be developed for legislative purposes or for administrative proceedings.²⁷⁷ If a legislature can instruct its staff to develop evidence for specific legislative purposes, it can hire private individuals or groups for the same purposes.²⁷⁸ But special intervention in elections raises serious doubts about the integrity and fairness of the political process.

On the other hand, a principle that government may never give money to those who would editorialize about the elective process would be too broad. Commercial broadcasters are heavily subsidized on even the least sophisticated understanding of the system.²⁷⁹ And strong and obvious interests support a vibrant and diverse public affairs broadcasting system, whether it be commercial, non-commercial, or both. Moreover, broadcasters are saddled with fairness requirements that are at least intended to mitigate possible abuse. If broadcasters can edit public affairs programs (thus requiring them to take a point of view), there is little harm in letting them express their point of view directly.²⁸⁰ Indeed, there are substantial grounds for questioning discrimination between commercial broadcasters and public broadcasters.²⁸¹

276. See R. WOLFF, *THE POVERTY OF LIBERALISM* 150-61 (1968).

277. *Chamber of Commerce v. United States Dep't of Agr.*, 459 F. Supp. 216, 221-22 (D.D.C. 1978) (approving payments for study). On this premise, *Aboud* stands on shaky ground to the extent that it suggests that compulsory dues are unavailable for lobbying purposes.

278. In the administrative context, the problem of bias may be significant. Cf. *Association of Nat'l Advertisers, Inc. v. FTC*, 460 F. Supp. 996, 998 (D.D.C. 1978) (FTC Chairman disqualified from proceeding because he had prejudged facts) *rev'd*, 5 Med. L. Rptr. 2233 (1979). For a comparison of procedural due process in the administrative and legislative contexts, see Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 225-230 (1976).

279. For example, the government does not charge anything for their licenses. Yet "[t]he average television station was sold for \$5,680,807 in 1978, while radio properties went for an average of \$565,797." BROADCASTING Feb. 5, 1979, at 34. The value of the spectrum in prime markets is enormous. If they were sold on any regular basis, the average would be considerably higher. The limited funds granted to public broadcasting stations are paltry compared to the economic value of the spectrum given to many if not most commercial broadcasters. The proposed spectrum fee has brought howls of protest from the broadcast community. See, e.g., *id.* at 106.

280. This consideration influenced the FCC in its decision to permit editorializing by commercial broadcasters. *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1254 (1949).

281. Requirements differentiating between commercial and public broadcasters' rights to retain audio tapes involving issues of public importance were found to violate fifth amendment equal protection in *Community-Service Broadcasting v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978).

The former are permitted to editorialize;²⁸² the latter are not.²⁸³

Editorializing by public school student newspapers also arouses controversy. Indeed, several cases have been brought by disgruntled students whose compulsory fees were used for ideological purposes to which they were opposed.²⁸⁴ As we have seen in connection with the dissenting taxpayers model, the students' claim should depend on the extent to which the government subsidy is itself improper. The state, however, has substantial interests in promoting journalistic independence for pedagogical reasons and in promoting a stimulating intellectual environment. Here there is little basis for fear that government power is being unfairly exploited to affect the outcome of the election process.²⁸⁵ At most, nondiscriminatory access to the letters page might fairly be required.²⁸⁶

More serious concerns about government's influence on the

282. See note 280 *supra*.

283. 47 U.S.C. § 399(a) (1976). The fairness doctrine is no less applicable to non-commercial broadcasters. *Accuracy In Media, Inc. v. FCC*, 521 F.2d 288 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). Whether the Corporation for Public Broadcasting is required to meet more stringent requirements remains unclear. *Network Project v. Corporation for Public Broadcasting*, 561 F.2d 963 (D.C. Cir. 1977); *Accuracy In Media, Inc., supra*. See 47 U.S.C. 396 (g)(1)(A) (Supp. 1978). For an articulate opinion supporting the difficult proposition that Congress can constitutionally enforce higher standards through the appropriations process, see *Community-Service Broadcasting v. FCC*, 593 F.2d 1102, 1135-50 (D.C. Cir. 1978) (Leventhal, J., concurring).

284. See, e.g., *Arrington v. Taylor*, 380 F. Supp. 1348 (M.D.N.C. 1974), *aff'd*, 526 F.2d 587 (4th Cir. 1975); *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D. Neb.), *cert. denied*, 414 U.S. 1135 (1973); *Larson v. Board of Regents*, 189 Neb. 688, 204 N.W.2d 568 (1973); *Good v. Associated Students*, 86 Wash. 2d 94, 542 P.2d 762 (1975). Although the students were unsuccessful in these cases, a few of the cases contain dictum to the effect that the newspaper should not be permitted to become a vehicle for a particular point of view. The question of whether a fairness doctrine is required for government-subsidized school newspapers is specifically left open in *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973). As discussed earlier, the experience with the fairness doctrine has not been happy. See note 78 *supra*. If ideological purity is to be required of student-subsidized newspapers and if that purity is to be enforced in some way, what of the former federal subsidy for periodicals, that is, reduced postal rates? What of the subsidy for teachers? Should a fairness doctrine be enforced against teachers? See generally note 213 *supra*. For a discussion on whether a fairness doctrine should be permitted for student newspapers, see Canby, *supra* note 21, at 1145-48. For a comprehensive and thoughtful analysis of the problems raised by state-owned media, see Comment, *Access, supra* note 97.

285. It is important to consider the purpose of the particular government support. The purpose in this example is to support a newspaper whatever its views, not to support a newspaper so that a particular point of view might be established. On the other hand, in student elections the case for access is strong even if the subsidizer's purpose is entirely neutral.

286. The same solution might be considered with respect to union newspapers in *Abood* situations. To place *Abood* in perspective, presumably it would be unconstitutional for compulsory student fees to be used for monetary contributions to candidates.

election process can be advanced with respect to several direct subsidies, including federal funding for presidential elections, and the franking privilege, and with respect to certain practices in initiative campaigns. Those matters, therefore, deserve fuller discussion.

1. Federal Funding of Presidential Elections

In *Buckley v. Valeo*,²⁸⁷ certain minor party candidates challenged the system of public financing of presidential elections, alleging that their exclusion from eligibility for such funding violated the first amendment. As previously discussed, the Court cavalierly dismissed the relevance of the first amendment on the ground that a subsidy "furthers, not abridges, pertinent First Amendment values."²⁸⁸ One suspects that if the subsidy had been for Democrats only, the Court might have seen that equality is a first amendment value and that both the appearance and the reality of the government's partisan involvement in the political arena are vital free speech concerns. But that ground has been covered.²⁸⁹

Under an eclectic approach, the Court would have started with the presumption that selective funding of political candidates required substantial justification. It would have scrutinized the government interests with care to be assured that a purpose independent of partisan favoritism was involved. Finally it would have balanced the contribution to the government interests against the impact on the relevant constitutional values and considered the possibility of less harmful means to further the same interests. Despite its failure to understand the relevance of the first amendment, the Court could have addressed most of these issues, for it was willing to consider an equality claim under the due process clause. This section argues, however, that the Court's analysis was appallingly insensitive to the dangers posed by selective funding of candidates. The matters commended by an eclectic approach deserved serious consideration.

Buckley presents striking evidence of the dangers involved when the protection of free speech values is grounded in the doctrinal quagmire which has evolved in the equal protection—due process realm. The *Buckley* Court asked whether the "burden" imposed by the statutory scheme was sufficiently acute to generate judicial protection.²⁹⁰ The analysis was reminiscent of the much

287. 424 U.S. 1 (1976). The analysis here focuses upon the general election subsidies although other public funding raises equally serious difficulties.

288. *Id.* at 93. See notes 259-63 & accompanying text *supra*.

289. See text accompanying notes 212-49 *supra*.

290. 424 U.S. at 94.

criticized manipulations employed in cases such as *San Antonio Independent School District v. Rodriguez*.²⁹¹ The Court agreed that the ballot access cases²⁹² were not relevant because they involved direct burdens on the candidates and the voters.²⁹³ Here no burden was presented, it was said, because nothing in the public funding statutes prevented ineligible candidates from raising funds on their own. Moreover, eligible candidates were presented with a "countervailing" burden: as recipients of public funding, they were required to accept an expenditure ceiling.²⁹⁴ On balance, therefore, the Court found the burden on ineligible candidates to be less restrictive than ballot access limitations and suggested that there was no need to find any substantial or vital governmental interest in support of the funding statutes.²⁹⁵

But this analysis is surely flawed, as the governmental interests asserted in support of the statute made clear. Among those interests was a desire to "facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising."²⁹⁶ Thus, government funding confers advantages on recipients not available to those excluded. Whether the scheme creates "burdens" or not, it confers advantages on some that are not available to others. When first amendment values are so obviously at stake, it should make no difference whether restrictions are selectively imposed or whether some are relatively disadvantaged when restrictions on others are removed by government action. One suspects that the Court's resort to a burdens analysis was influenced by its own subjective denigration of the importance of minority parties.²⁹⁷ Again, had Congress afforded the funding option to Democratic candidates, but not to Republicans, there would have been little talk of "burdens" and little patience for imagined countervailing offsets. The Court would have recognized what an eclectic approach makes clear: exacting scrutiny of

291. 411 U.S. 1 (1973) (unequal state distribution of educational funds upheld). For criticism, see L. TRIBE, *supra* note 57, § 16-9 at 1006.

292. See, e.g., *Lubin v. Panish*, 415 U.S. 709 (1974).

293. 424 U.S. at 94.

294. *Id.* at 95. That the Court assumed that this condition, with its potential for limiting the variety of debate (considered to be fatal to expenditure limitations), is constitutional is one of *Buckley's* more impenetrable mysteries. See, e.g., Polsby, *supra* note 213, at 26-31. That mystery has its companion: the Court's willingness to say that candidates have a right to spend as much as they want lest the public be deprived of the entire message while limits on contributions (which despite the Court's protestations obviously limit the amount available to the candidates) involve only a marginal impact on free speech.

295. 424 U.S. at 94-96.

296. *Id.* at 91.

297. One would think that the Court's appropriate role would dictate precisely the opposite. See Ely, *supra* note 223.

selective funding is required.²⁹⁸

Significantly, the Court was unwilling to rest its analysis solely on a discussion of relative burdens; it went on to find that "in any event," important government interests were present.²⁹⁹ Again, however, the Court's analysis of the relevant interests disclosed its hostility to minority parties and its insensitivity to basic first amendment values. The Court posited an important public interest in avoiding "artificial incentives to 'splintered parties and unrestrained factionalism.'"³⁰⁰ It is hard to see how this "interest" can be reconciled with the first amendment's "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open . . ."³⁰¹ Minor parties add variety and complexity to public debate, forcing major party candidates to address issues they might otherwise be tempted to avoid.³⁰² But even if this were not the case, the first amendment counsels that, at the very least, governmental measures cannot appropriately be premised on hostility to new associations or to variety in public debate.

Nonetheless, selective funding of political candidates might be supported by entirely legitimate government interests unrelated to partisanship,³⁰³ making the question of the constitutionality of the selective funding correspondingly more difficult. An important argument in favor of government funding is that it reduces "the deleterious influence of large contributions on our political process."³⁰⁴ Selective funding might then be justified on the ground that the dangers of corruption with respect to electible major party candidates are far more severe than with respect to those minor party candidates whose chances of election range from the remote to the nonexistent. A difficulty with this justification is the fact that large contributions are themselves banned by the statutory scheme.³⁰⁵ Nonetheless some may evade the contribution

298. The Court's selective use of strict scrutiny throughout the opinion marks its central methodological weakness. See generally Comment, Buckley v. Valeo: *The Supreme Court and Federal Campaign Reform*, 76 COLUM. L. REV. 852 (1976) [hereinafter cited as Comment, *Federal Campaign Reform*].

299. 424 U.S. at 95.

300. *Id.* at 96, (quoting *Storer v. Brown*, 415 U.S. 724, 736 (1974)). Even if such interests were appropriate in ballot access cases, but see Karst, *supra* note 37, at 59-65, they are dubious when a state has permitted ballot access.

301. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

302. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979).

303. One would have to ignore the Senate's clear statement on the issue, however. It justified the subsidies in part on the ground that all but fringe candidates would have an incentive to seek major party nominations and that fringe candidates would be unlikely to receive funding. [1974] U.S. CODE CONG. & AD. NEWS 5594.

304. 424 U.S. at 91.

305. *Id.* at 23-28.

ban by "independent" expenditures³⁰⁶ and a generous public funding scheme might well reduce the number and importance of such evasions. Yet this argument was not available to the government or the Court. They had attempted to justify the contribution ban as applied to minority candidates by resort to the corruption threat.³⁰⁷ Unpersuasive as the corruption argument might be with respect to minor candidates, it surely would not have done to use it in one context and to dismiss it in the other.³⁰⁸

Even if avoidance of corruption could be said to be a legitimate interest justifying selective funding, however, the constitutional inquiry would not be exhausted. It is necessary to balance the gravity of the interest and the extent to which selective funding furthers the interest against the impact on first amendment interests endangered by the scheme and the possibility of less harmful means to further the same interests.³⁰⁹ Moreover, it would be inappropriate to defer to legislative findings in this regard, not only because first amendment interests are at stake but also because selective funding advances the self-interest of the legislators, virtually all of whom are majority party members.³¹⁰ That balancing requires speculation in this context works against the funding scheme and not in its favor. In the absence of a clear showing in support of the scheme, artificially imposed disadvantages on prospective candidates should not be tolerated.

Nonetheless, selective funding might well be justified on an entirely different ground. The government argued that Congress did not wish to fund hopeless candidacies with large sums of public money.³¹¹ Congress thought it was crucial that candidates with serious election prospects be freed from the rigors of fund raising so that they might have more time and energy to communicate

306. Comment, *Federal Campaign Reform*, *supra* note 298, at 868-69. The Court does not explain why we are required to believe that persons have enough "ingenuity and resourcefulness," 424 U.S. at 45, to benefit candidates by expenditures that do not expressly advocate election, but do not possess enough intellectual wherewithal to benefit candidates without prearrangement.

307. *Id.* at 26-29.

308. As it is, the Court's treatment of minor party candidates as "hopeless" (*id.* at 96) in the funding context and then as people who "may win . . . or have a substantial impact on the outcome of an election" (*id.* at 35) in the contributions context does little to inspire confidence in the Court's penchant for consistency.

309. See notes 215-223 & accompanying text *supra*.

310. *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1268 (1975) [hereinafter cited as *Developments*]. The Court of Appeals recognized that judicial deference to the legislature might be "diluted" to some unspecified extent if the legislation served the "ins." 519 F.2d at 843. Similarly, the administration of the Act creates grave danger of manipulation. The Court described the danger as wholly speculative, but it has in fact proven to be serious. See Polsby, *supra* note 213, at 31-43.

311. 424 U.S. at 96.

their views to the electorate and presumably so that the electorate might be in a better position to make informed choices.³¹² On this rationale, the selectivity of the funding would not be based on any animus against the views of particular candidates, nor on any other partisan considerations, but simply on the pragmatic judgment that Congress need not fund anyone and everyone who might choose to run, but only those who run with a fighting chance. Thus, "Congress may legitimately require 'some preliminary showing of a significant modicum of support.'"³¹³

Even this rationale is unsettling, for it requires a finding that some political speech is more important than other political speech and it minimizes the contribution that minor candidates' speech serves in the electoral process. More significant, however, the alleged purpose does not match the statutory scheme. Under the scheme, minor candidates who receive more than five percent of the national vote are entitled to a proportionate degree of funding.³¹⁴ Thus, some hopeless "candidates" are entitled to a degree of funding,³¹⁵ others are not.³¹⁶

The funding scheme provisions suggest that Congress was willing to provide support to those candidates who, although without winning chances, might otherwise play a significant role. Drawing the line at five percent of the national vote, however, is difficult to reconcile with the federal character of presidential elections. Under the federal system, the states decide which candidates are sufficiently important to warrant a place on the ballot, and the voters' task by voting for a candidate is to select electors who will represent their state in the electoral college.³¹⁷ Thus, a third party in New York may be insignificant nationally but play an important role in the presidential election insofar as New York is concerned. If the state decided that the electors pledged to a

312. *Id.* at 91.

313. *Id.* at 96 (quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)).

314. *Id.* at 87-89.

315. In 1972, however, by way of example, no minor-party candidates received five percent of the popular vote. *Id.* at 99 n.135. If one had, funds would have been available in the 1976 election even though the popularity of the minor party may have declined significantly while others had been enhanced. Recall, for example, that George Wallace as the leader of his party received more than 10 percent of the popular vote in 1968.

316. The fact that a line must be drawn somewhere does not mean that it may be drawn anywhere. The line was apparently drawn at five percent to ensure that the candidates such as George Wallace would receive funds. George Wallace, however, was a "hopeless" candidate, if hope is defined in terms of prospects for victory. If genuinely "hopeful" candidates were the only ones to be funded presumably a much higher figure could safely have been selected. The five percent figure evidences an intent to fund all nationally significant albeit hopeless candidates.

317. U.S. CONST. art. II, § 1 cls. 2, 3.

particular candidate³¹⁸ warrant a ballot spot, Congress demeans the state's judgment and the federal system of elections by deciding that the candidate must be active in more than one state to be considered sufficiently important to warrant federal funding. Even those who would dismiss the electoral college system as an antiquated relic would presumably be prepared to concede that a minor party candidate in a particular state (but no other) might be an important candidate nonetheless.³¹⁹ At bottom, the fundamental issue is whether or not Congress is entitled to determine that some candidates are more important than others and to allocate funds on that basis.

The issue could be finessed, however, by recharacterizing the role that funding is arguably designed to serve. By placing limits on contributions and by requiring disclosure by even small contributors, Congress clearly makes it more difficult for a candidate to raise funds. If public funding be viewed as an attempt to replace the contributions process,³²⁰ recipients should be entitled to receive what they would otherwise have received.³²¹ On this basis, minor candidates would be entitled to receive less than major party candidates not because they are less important but because a funding system would give them a windfall. Considering major party candidates relatively equal in their ability to amass funds and considering the amount of votes received by minor candidates as a relevant factor may be imprecise measuring devices, but they are at least not based on assumptions of the importance of the speech involved.

Nonetheless, the notion that some candidates with ballot status should be entirely excluded from funding seems at odds with the principles of both federalism and freedom of speech. Indeed, to the extent that Congress was concerned with the damaging impact of contribution limits and disclosure requirements, those concerns apply with considerable force to minor party candidates.³²² The failure of the Court to take these factors into account in evaluating the funding plan worked to the detriment of minor candidates. By treating the contributions issues, the disclosure issue, and the funding issue as discrete and unrelated matters, the Court turned losses on three close questions into a rout.³²³

318. *Id.*

319. It bears repeating that the strength of this argument depends upon the accuracy of the assumption that the five percent figure was selected to ensure that nationally significant albeit hopeless candidates were funded. *See* notes 315 & 316 *supra*.

320. *See* 424 U.S. at 96.

321. The legitimate interest, of course, would be to replace only the uncontaminated contributions.

322. 424 U.S. at 33-35 (contributions); *id.* at 68-74 (disclosure).

323. *Developments, supra* note 310, at 1271 n.209.

Again, even if the funding scheme were said to be part of an attempt to replace the contributions process, the analysis would not be complete. Even the matching rationale disadvantages minor parties: candidates of no recognized party with no past track record must wait until after the election in order to receive federal funds; candidates of established parties receive funds in advance. These first amendment costs needed to be seriously weighed against the government interests served by the legislative scheme, and they were not.

The most disturbing aspect of *Buckley* is not so much its result (though the exclusion of many candidates is indefensible) but its failure to recognize that the equality concerns of the first amendment were implicated, that deference to Congress was inappropriate,³²⁴ and that a more searching examination of the government subsidies to candidates was required.³²⁵

2. The Franking Privilege

Similarly deserving of searching inquiry are the benefits afforded to Congressional incumbents during election campaigns.³²⁶ Subject to limited exceptions, incumbents are permitted by statute, under the franking privilege, to use the mails free of charge to communicate with the relevant electorate;³²⁷ non-incumbents are required to pay the appropriate postal rates. The impact of this privilege on the electoral process and the inequality that it produces should not be underestimated.³²⁸ Communications via the

324. With respect to the five percent figure, the Court opined that "the choice of the percentage requirement that best accommodates the competing interests involved was for Congress to make. . . . We cannot say that Congress' choice falls outside the permissible range." 424 U.S. at 103-04.

325. The argument, therefore, is not that public financing systems are inherently unconstitutional. Indeed a system of matching grants or grants tied in some way to contributions would avoid most of the objections lodged here. *But see Developments, supra* note 310, at 1269-70. For a survey of funding proposals, see, Biden, Jr., *Public Financing of Elections: Legislative Proposals and Constitutional Questions*, 69 NW. U.L. REV. 1 (1974).

326. Many commentators have been concerned with the abuses arising from the franking privilege, and have come to different conclusions than those proposed in this Article. *See, e.g.,* Note, *Congressional Perquisites and Fair Elections: The Case of the Franking Privilege*, 83 YALE L.J. 1055 (1974) (supporting disclosure requirement) [hereinafter cited as Note, *Congressional Perquisites*]; Comment, *The Franking Privilege—A Threat to the Electoral Process*, 23 AM. U.L. REV. 883 (1974) (suggesting that the franking privilege be extended to all serious candidates in an election season) [hereinafter cited as Comment, *Franking Privilege*]; Comment, *Use and Abuse of the Congressional Franking Privilege*, 5 LOY. L.A.L. REV. 52 (1972) (proposing criminal sanctions and more specific regulations to cure abuse).

327. 39 U.S.C. §§ 3210-3219 (1976 & Supp. 1980).

328. "The \$46,000 that the average member of Congress spent in 1972 in order to frank mail was one-and-one-half times the total campaign fund of the average major party challenger to a United States Representative." Note, *Congressional Perquisites*,

mails are a potent campaign device, particularly in campaigns for the House of Representatives in urban districts where radio and television advertisements are ordinarily impractical.³²⁹ The formidable cost of mailings to an entire district and their undoubted importance for influencing the electorate make it understandable that many political analysts regard the franking privilege as a vitally important weapon in the congressional incumbent's campaign arsenal.³³⁰

Clearly this one-sided subsidy—conferring substantial benefits upon incumbents while denying them to opponents—raises serious questions about the fairness of Congressional elections and corresponding doubt about whether the franking privilege can be reconciled with first amendment values. If the stated purpose of the franking privilege were to help reelect incumbents, its constitutional illegitimacy would be obvious.³³¹ The stated purpose is cast in neutral terms,³³² however, and the constitutional question is correspondingly more difficult.

The franking privilege is purportedly designed to assist the congressional representative in fulfilling legislative duties.³³³ Constituents need to be informed of government policies and programs that affect their lives. The franking privilege serves to apprise representatives of the views of their constituents through devices such as questionnaires.³³⁴ It similarly informs constituents of the views of their representatives, permitting them to make better judgments of their representative's performance. Moreover, the Congress has taken steps designed to mitigate abuse of the

supra note 326, at 1061 (footnote omitted). "The amount budgeted for 1974 represents almost \$70,000 a year per member of Congress, which is more than three times the average amount spent by most non-incumbents for their entire campaign." Comment, *Franking Privilege*, *supra* note 326, at 884 n.6 (citation omitted).

329. Note, *Congressional Perquisites*, *supra* note 326, at 1061.

330. Steven Stockmeyer, executive director of the National Republican Congressional Committee, concerned about the franking privilege, decided not to pour money into traditional Republican districts which recently had voted for Democrats, but instead to concentrate on districts without incumbents. "'At least we start even in the open seat races.' Incumbency perquisites 'have enshrined the younger Democrats in their districts and made most unbeatable.'" Wash. Post, Jan. 9, 1978, § A, at 1.

331. See text accompanying notes 224-49 *supra*.

332. It is the intent of the Congress that such official business, activities, and duties cover all matters which directly or indirectly pertain to the legislative process or to any congressional representative functions generally, or to the functioning, working, or operating of the Congress and the performance of official duties in connection therewith, and shall include, but not be limited to the conveying of information to the public, and the requesting of the views of the public, or the views and information of other authority of government, as a guide or a means of assistance in the performance of those functions.

39 U.S.C. § 3210(a)(2) (1976).

333. *Id.*

334. *Id.* § 3210(a)(3)(C).

privilege.³³⁵ Mass unsolicited mailings cannot be franked during the last twenty-eight days of an election³³⁶ and obvious campaign mail (asking for votes or contributions) cannot be franked at any time.³³⁷

Influenced by the legitimate government purposes in favor of the franking privilege and the attempts to minimize abuse, the courts have routinely upheld unsolicited mass mailings to constituents under the franking privilege against attacks based upon equality principles.³³⁸ The Third Circuit's treatment of an equality attack in *Schiaffo v. Helstoski*³³⁹ is perhaps typical. The court cryptically stated that the federal interest promoted by the privilege "outweighs the harm;"³⁴⁰ that the object of the privilege is not "unreasonable, arbitrary, or capricious";³⁴¹ and that "the means selected does have a 'real and substantial relation' to that object."³⁴²

Yet, in view of the substantial character of the "harm" (going to the very fairness of the elections process) and the first amendment dimensions of the equality interests at stake, a showing of non-arbitrariness is patently insufficient. In addition to a more realistic appraisal of the damage inflicted,³⁴³ the Court should require nothing less than a showing that the means employed were necessary to achieve a compelling state interest and that no means less damaging to first amendment equality and the system of freedom of expression were available.

The case for deferring to purported legislative purposes in franking privilege cases is weak. When self-interested incumbents vote themselves benefits that substantially assist their reelections,

335. *Id.* § 3210(a)(5) (containing a set of restrictions).

336. *Id.* § 3210(a)(5)(D).

337. *Id.* § 3210(a)(5)(C).

338. For a review of most of the cases, see sources cited in note 326 *supra*. Without questioning the general validity of mass mailing to constituents within a representative's own district, the courts have found some abuses of the privilege. *Berlardino v. Murphy*, 364 F. Supp. 1223 (S.D.N.Y. 1972) (mass mailing outside district into prospective new district not "official business" entitled to franking privilege); *Hoellen v. Annunzio*, 348 F. Supp. 305 (N.D. Ill.) (mailing with picture of congressman not "official business" entitled to franking privilege), *aff'd*, 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973); *Rising v. Brown*, 313 F. Supp. 824 (C.D. Cal. 1970) (mass mailing by representative who was a Senate candidate to entire state not official business). The revised statute now permits mass mailings by representatives into proposed new districts whether or not the redistricting is yet in effect. 39 U.S.C. § 3210(d)(1)(B) (1976). Even when abuses have been identified, remedial opportunities for plaintiff challengers have been confined. *Caprio v. Wilson*, 513 F.2d 837 (9th Cir. 1975).

339. 492 F.2d 413 (3rd Cir. 1974).

340. *Id.* at 431.

341. *Id.*

342. *Id.*

343. See notes 194-95 & accompanying text *supra*.

there are strong reasons for being skeptical as to their claims of neutrality.³⁴⁴ Indeed, the Court itself has recognized that the preparation of "so-called 'news letters'"³⁴⁵ is made "in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections."³⁴⁶ And while the Court in dictum has described these "political . . . rather than legislative"³⁴⁷ activities as "entirely legitimate"³⁴⁸ the Court has yet to hold that such selective political subsidies are constitutional. Implicit in the Court's recognition of the political character of the mass mailings is the concomitant recognition that legislative prohibitions on explicit requests for votes or contributions do not disguise their political purpose or effect. Equally significant, the legislative prohibition of such mailings in the last days of the election period implicitly recognizes the political effect of such mass mailings. Although such a prohibition curbs some significant abuse, the ability to employ the franking privilege in the balance of the election campaign is of major political advantage for incumbents.³⁴⁹

Nor does the franking privilege survive a serious examination of whether it is a necessary or appropriate means to accomplish its ends. Most suspect is the relationship of the privilege to the goal of informing constituents of the views of their representative. Concededly there is a legitimate government interest in permitting government officials to communicate their positions to the electorate, but, as has been discussed in connection with press conferences,³⁵⁰ partisan and non-partisan interests here are inextricably intertwined. In an election campaign, the record and views of the incumbent are at issue. Opposing candidates and the incumbent are involved in debate that is central to the concern of the first amendment. To permit government to subsidize mass mailings by incumbents is to subsidize massive inequality in the democratic process. The legitimate government interest here is outweighed by the franking privilege's impact on the process of self-government; as such the means—the franking privilege—is not necessary or appropriate for reaching the desired end, an informed constituency.

344. See note 310 *supra* and note 347 *infra*.

345. *United States v. Brewster*, 408 U.S. 501, 512 (1972).

346. *Id.*

347. *Id.* The Court's characterization of the mass mailings as political is not to be faulted. Statistics filed by Common Cause in its suit against the franking privilege, *Common Cause v. Klemer*, Civ. No. 1887-73 (D.C.D.C. 1974), indicate that Senators and Representatives collectively "transact at least twice the 'official business' in periods preceding elections than at comparable times in nonelection years." *Wall St. J.*, June 2, 1975, at 5.

348. 408 U.S. at 512.

349. See notes 328 & 330 *supra*.

350. See text accompanying notes 196-97 *supra*.

Contrast the subsidies for press conferences. There too partisan and nonpartisan interests are intertwined. But the relative effects of subsidized mass mailings and subsidized press conferences are different. Nonincumbent candidates can and do hold press conferences at will; mass mailings are inordinately expensive. One subsidy, therefore, has significant effects on the electoral process; the other does not.

More defensible is the relationship of the franking privilege to the goals of informing constituents of government policies that affect their lives and of permitting representatives to solicit the view of constituents in the interests of better representation. Surely the relationship should be sufficient to sustain the use of the franking privilege in response to solicited requests for information or assistance from constituents.³⁵¹ In the absence of required first amendment scrutiny, however, the relationship would sustain unsolicited mass mailings because it is reasonable for the government to suppose that the representative is in the best position to determine which policies and programs are important to a particular constituency.

But, the above legislative goals could be achieved without such severe impact on the process of free elections. Even aside from the possibility of requiring funding for all candidates, constituents could be informed of important policies and their views solicited without materials placing the representative's name on display. Even assuming that the relevant representative prepared such unsolicited materials, they could be sent in the name of the House or Senate without any reference to the name of the incumbent candidate, and the Congressional objectives would be fully accomplished.³⁵² Material relevant to government programs need not carry the incumbent's name, but returns could be forwarded by the House or Senate to the relevant legislator. The only legitimate objective that would not be furthered would be apprising the constituents of the views of the particular representative, but, as discussed previously, that objective can legitimately be furthered only by affording all candidates equal advantages.

Here, as elsewhere, the task of an eclectic approach is to fashion communicative structures that accommodate the relevant interests. Ad hoc decisionmaking as to whether the privilege has affected or would be likely to affect the outcome in particular

351. Although mass mailings are prohibited in the closing days of an election, direct responses to inquiries are permitted. 39 U.S.C. § 3210(1)(5)(D)(i) (1976). Similarly, mail to government officials and news releases to the communications media are properly permitted.

352. This also helps to distinguish subsidized press conferences. Alternatives to press conferences involving anonymity are unavailable whereas in the franking situation a workable alternative exists.

campaigns would be improvident.³⁵³ It would be equally improvident to reject the judicial propriety of formulating general rules by accommodating the relevant interests. This is patently not a proper situation for deference to legislation fashioned by incumbents.³⁵⁴ The hope for a backlash is misconceived.³⁵⁵ Rather, this is an area for judicially formulated prophylactic rules and structures.

3. Initiative Campaigns

Although the constitutionality of the franking privilege in some contexts is subject to question, the legitimacy of communications by government and government officials to the public on controversial political questions should not be. Even though dissenting taxpayers are forced to contribute to communications with which they disagree, the constitutionality of a government issuing reports, supporting a government printing office, publishing the *Congressional Record*, supplying research facilities and staff for government officials, and paying salaries for government officials while they speak out on the issues of the day, is unquestioned.³⁵⁶ Although such subsidies are helpful to incumbents in maintaining their position in office, and may, in some circumstances, be decisive, the necessity for government to function effectively outweighs the political unfairness of such advantages to incumbents. In balancing competing claims under an eclectic approach, the contribution of government speech to the democratic process should not be underestimated.

Nonetheless, the right of government and its officials to speak out on questions of the day should be subject to some constitutional limits. The most difficult questions arise when the issues become the subject of an initiative campaign or referendum. The problem is to decide when the intervention of government into the initiative process undermines, or threatens to undermine, its basic fairness. In the earlier justification of an eclectic approach, the impropriety of government's buying media time to advertise its point of view was explored.³⁵⁷ Another clear example of governmental abuse, yet to be litigated, is contained in a California practice codified in Elections Code § 3572.³⁵⁸ That section provides that a government official, the Legislative Analyst, shall determine the probable financial impact of ballot measures and that his or

353. See notes 153-92 & accompanying text *supra*.

354. See note 310 & accompanying text *supra*.

355. See text accompanying notes 234-41 *supra*.

356. *But cf.* Kamenshine, *supra* note 19 (arguing that most controversial government speech is suspect).

357. See text accompanying notes 224-49 *supra*.

358. CAL. ELEC. CODE § 3572 (West 1977).

her determination shall appear on the ballot itself.³⁵⁹ For example, in the November 1978 elections in California, Proposition Five proposed that smoking be prohibited in enclosed public places, places of employment, and educational and health facilities.³⁶⁰ Proposition Six proposed that those who publicly advocate homosexuality or publicly engage in homosexual conduct shall be ineligible to teach in the public schools.³⁶¹ Both propositions, after being summarized on the ballot, were followed by financial impact statements drafted by the Legislative Analyst, although their author was not identified on the ballot.³⁶²

There are two deficiencies in this procedure. First, the presence of a financial impact statement places emphasis on issues which may or may not be important with respect to the measure. The proponents of the anti-smoking measure, for example, would want to contend that any concern with economic impact was outweighed by concerns of public health.³⁶³ The ballot directed the voters' attention to economic concerns at the very moment of final voting decisions. The proponents of the anti-homosexuality initiative emphasized public morals and the right of parents to decide who would teach their children.³⁶⁴ The opponents of the initiative focused on first amendment rights and feared the prospects of a McCarthy-like witch hunt.³⁶⁵ Economic issues, although mentioned by the opposition,³⁶⁶ were of little concern. Nonetheless, the governmental impact statement focused the voters' attention on an issue of little import and one favorable to one side of the measure, in this case the opponents.³⁶⁷

Second, the presence of the financial impact statement often purports to decide the very issues being debated. In Proposition Five, the proponents argued (without conceding that economics was the issue) that the proposal "will save tax dollars and reduce business costs."³⁶⁸ The opponents contended that the initiative would cost the taxpayers and businesses millions of dollars with-

359. *Id.*

360. California Voters Pamphlet: General Election November 7, 1978, at 24 (hereinafter cited as Voters Pamphlet).

361. *Id.* at 28.

362. The material contained on the ballot itself is contained in the Voters Pamphlet under the heading "Official Title and Summary Prepared by the Attorney General." *Id.* at 24, 28.

363. In the ballot materials proponents of the measure contended that the proposal would save tax dollars and reduce business costs, *id.* at 26, but the primary appeal was to evidence from the American Lung Association and medical authorities.

364. *Id.* at 30.

365. *Id.* at 31.

366. *Id.*

367. The financial impact statement referred to "[u]nknown but potentially substantial costs." *Id.* at 28.

368. *Id.* at 26.

out significant health gains. For example, they argued that enforcement costs and manufacture of "no smoking" signs alone would cost "43 MILLION."³⁶⁹ The financial impact statement on the ballot referred to enforcement costs as "minor"³⁷⁰ and the public building sign costs as "modest."³⁷¹ The statement concluded that if smoking were significantly reduced, there could be a substantial "reduction in health and other smoking related government costs and . . . substantial reduction in state and local sales, cigarette tax collections."³⁷²

The issue, of course, is not whether the government's financial impact statements are accurate. The issue is whether the government should be able to monopolize for itself the right to address the merits of an issue on the ballot³⁷³ or to call the voters' attention to issues which it and perhaps it alone wishes considered. It should not. Such a procedure violates the first amendment equality rights of proponents or opponents (depending on the particular position taken) and abuses the process of free and fair elections itself. Under an eclectic approach, government speech that threatens to dominate the elections marketplace and that undermines respect for the political process is highly suspect. Courts have already held that the allocation of preferred places on the ballot to incumbents³⁷⁴ and even the allocation of preferred places on the ballot on an alphabetical basis violates such rights.³⁷⁵ Governmental pronouncements appearing on the ballot going to the very merits of the issues are similarly infirm.³⁷⁶

369. *Id.*

370. *Id.* at 24.

371. *Id.*

372. *Id.*

373. Thus the argument in the text concedes government's interest in communicating a position. It concedes that government has a right to ask voters to take matters into account which they might otherwise not consider. The vice attacked here is the monopolistic method employed. The evil is particularly acute in initiative situations because the initiative process is designed to give the people an opportunity to do what their representatives have refused to do on their behalf. For the legislature to insert its final word (through its Analyst) at the moment of decisionmaking, when its own conduct is at issue, seems especially unfair.

374. *See, e.g.,* *Netsch v. Lewis*, 344 F. Supp. 1280 (N.D. Ill. 1972); *Gould v. Grubb*, 14 Cal. 3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377 (1975); *Wells v. Kent Election Comm'rs*, 382 Mich. 112, 168 N.W.2d 222 (1969); *In re Holtzman v. Power*, 27 N.Y.2d 628, 261 N.E.2d 665, 313 N.Y.S.2d 760 (1970); *cf. Sangmeister v. Woodard*, 565 F.2d 460, 467 (7th Cir. 1977) (county clerk's placement of his or her party's candidate first on ballot unconstitutional). *See also* *Anderson v. Martin*, 375 U.S. 399 (1964) (identification of race on ballot violates equal protection).

375. *Gould v. Grubb*, 14 Cal. 3d 661, 674, 536 P.2d 1337, 1346, 122 Cal. Rptr. 377, 386 (1975). *But cf. Board of Election Comm'rs v. Libertarian Party*, 591 F.2d 22 (7th Cir.) (placement of major parties first on ballot not unconstitutional), *cert. denied*, 99 S.Ct. 2840 (1979).

376. Summaries of ballot measures, although they can be misleading and generate controversy, do not address the merits of the issues and should be permitted. The

None of this analysis, of course, denies that government may otherwise add its voice to the political debate surrounding ballot measures. Here too, though, at least some limits are appropriate. For example, in many states, voters receive sample ballots accompanied by arguments of proponents and opponents.³⁷⁷ The addition of governmental views on these questions does not serve to monopolize the process. Nonetheless, the first amendment surely requires that the procedures for selection of proponent and opponent authors be fair.³⁷⁸ Moreover, if the government refused any such access and instead sent only its own partisan views at taxpayers' expense, the practice would be even less defensible than the franking privilege practices previously criticized.

B. *Artistic Speech*

Although the degree of government support for artistic speech in the United States is but a fraction of that provided in European countries,³⁷⁹ it is clear that local, state and federal governments now routinely support the arts in a wide variety of ways.³⁸⁰ Governments, for example, operate museums and theatres and support artists directly via grants.³⁸¹ When these programs are analyzed from a constitutional perspective, surprisingly difficult problems emerge even though little case law exists. The problem is to assess the impact of government support on first amendment values and the extent to which such impact can be justified.

One may begin from the premise that government is constitutionally barred from financing particular political candidacies to the exclusion of others—whatever one thinks about the propriety

listing of occupations on ballots presents a closer question, but they at least serve identification purposes which are not implicated by financial impact statements.

377. See generally Comment, *The Direct Initiative Process: Have Unconstitutional Methods of Presenting the Issues Prejudiced Its Future?*, 27 UCLA L. REV. 433 (1979) [hereinafter cited as Comment, *The Direct Initiative Process*]. The arguments in California are included with the sample ballot. If they were on the actual election ballot itself a difficult question would be presented. To permit the material on the actual ballot would require greater confidence in the fairness of the process or the court's ability to enforce fairness of the process than I can muster. But see Yudof, *When Governments Speak*, *supra* note 19, at 869-70 n.27 (apparently assuming that it would be permissible to place such arguments on the California ballot). Yudof's tentative endorsement of the California procedures does not address the financial impact statement. *Id.*

378. Comment, *The Direct Initiative Process*, *supra* note 377, at 442-447.

379. W. BAUMOL & W. BOWEN, PERFORMING ARTS: THE ECONOMIC DILEMMA 370 (1966); ROCKEFELLER PANEL, THE PERFORMING ARTS 111-12 (1965).

380. See generally W. BAUMOL, *supra* note 379, at 347-67.

381. The framework for the principal federal grants (with the exception of public broadcasting grants) is contained in 20 U.S.C. §§ 951-977 (1976 & Supp. 1978). This Article does not discuss the subsidies involved in tax exemptions.

of selective exclusions of major candidacies, the government clearly could not subsidize Democrats while refusing to subsidize Republicans. How then can it constitutionally decide to subsidize some artists while refusing to subsidize others? At first glance the comparison may appear strained, but analysis of the problem underscores the complex relationship between artistic and political speech. Some commentators have argued that artistic speech is entitled to first amendment protection precisely because (or to the extent that) it contributes to political decision making.³⁸² One can recognize that artistic speech deserves protection regardless of its political connections³⁸³ without denying that artistic endeavors are often designed to contribute to political dialogue. Indeed, the history of government subsidies in this country is marred by spectacular instances in which government support of the arts was designed to further political aims and in which subsidies were denied because of the artists' politics.³⁸⁴

At one level, the problem can be partially resolved by recognizing the difference between government speech in support of candidates and government speech in support of points of view about issues. As discussed previously,³⁸⁵ government routinely and appropriately adds its voice to the political dialogue by speaking out in favor of particular policies and programs. Although some limits on such endeavors would appropriately be adopted when that speech relates to ballot initiatives, it is reasonable to ask why there should be any other occasion for limits when government speech in favor of particular policies happens to be cast in artistic form.

There is, nonetheless, something profoundly disturbing about a government program that would deny subsidies to artists because of their political beliefs, just as it is constitutionally offensive for government to deny employment to teachers,³⁸⁶ or any other non-policymaking government employees,³⁸⁷ on political grounds.

Perhaps a distinction is to be made by assessing the purpose

382. Micklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256-57; BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 357 (1978).

383. Shiffrin, *supra* note 175, at 936-38, reprinted in Collins, *supra* note 20 at 17; Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 16.

384. Cf. Yudof, Address, *supra* note 19 (dangers of government speech generally). Indeed current charges of politicization of the humanities and arts endowments are by no means frivolous. Friedman, *A Populist Shift in Federal Cultural Support*, N.Y. Times, May 13, 1979, § 2, at 1.

385. See text accompanying note 356 *supra*.

386. Pickering v. Board of Education, 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

387. Elrod v. Burns, 427 U.S. 347 (1976). But see Branti v. Fickel, 100 S. Ct. 1287, 1294 (1980) (dictum).

of the governmental programs. If the government in a public relations program decides to hire an artist to create communications designed to further its policies, consideration of the artist's commitment to the policies is just as appropriate as it would be if an official were hiring a speech writer.³⁸⁸ But if government purports to subsidize the arts generally (or education generally), consideration of the political beliefs of those to be subsidized is inconsistent with its general purpose and threatens to undermine first amendment values. It is one thing to permit government to fund endeavors that necessarily have political aspects; it is quite another to permit the politicizing of the arts generally (or as we shall discuss later, education). Considerations such as these lie behind the Court's decision in *Elrod v. Burns*³⁸⁹ that government may not tie government employment in general to a patronage system. Some politicizing of government employment is necessary; but politicizing of government employment in general will not be tolerated.

Wholly apart from the relationship of art to politics, however, a difficult objection to government subsidies to art remains to be considered. Government subsidy programs for artists cannot and do not fund all artists. Limited resources demand quality judgments as to which artists are most deserving of government aid. Thus, the government will supply funds to those who engage in communications the government likes and deny them to those whose communications it dislikes or relatively dislikes. To be sure, cases invalidating the denial of employment benefits to those whose religions do not permit them to be available for work on Saturdays³⁹⁰ or welfare benefits to those who have recently moved into a state can be distinguished.³⁹¹ Those decisions financially burden the relevant programs or, at a minimum, prohibit the government from cutting costs by using religious classifications or classifications which impinge on the right to travel. But a decision requiring that if some artists are to be funded, all are to be funded, or that artistic subsidies be awarded by the application of content-neutral principles, would mark the end of government subsidies to art. The very purpose of artistic subsidies is cultural enrichment. If government could not award subsidies on the basis of quality, the purpose of the program would necessarily be frustrated. On

388. L. TRIBE, *supra* note 57, § 12-23 at 706. See 427 U.S. at 367-68.

389. 427 U.S. 347 (1976).

390. *Sherbert v. Verner*, 374 U.S. 398 (1963).

391. *Shapiro v. Thompson*, 394 U.S. 618 (1969). The leading unconstitutional conditions case is *Speiser v. Randall*, 357 U.S. 513 (1958). There the condition, which denied a tax exemption to those who advocated the overthrow of the government, was irrelevant to the exemption's purpose. The same is true in *Sherbert* and *Shapiro*. Even when the condition is relevant to the purpose of the subsidy, however, the impact on protected values must be weighed against the government interest.

one side of the balance is the enjoyment and edification of those who ultimately see the subsidized work and the accompanying societal benefits associated with cultural uplift. On the other side, the impact on first amendment values is not substantial. Although unsubsidized artists, as taxpayers, are forced to contribute to the subsidy of others, and although their failure to receive subsidies could be characterized as a penalty for failing to produce art popular in the eyes of governmental administrators,³⁹² the fact is that unsubsidized artists remain free to continue their work, and that the tax contribution of any individual citizen to government arts programs is miniscule. If the denial of subsidies is to be characterized as a "penalty" (which seems stretching anyway), it at least comes in the form of a denied carrot rather than an administered stick.³⁹³ Indeed, the existence of government subsidies may help unsubsidized artists by freeing private money to support non-governmentally funded alternatives.³⁹⁴ If an absolute neutrality principle were applied across the board, even governmentally funded museums could not be justified. On balance, therefore, the first

392. The penalty analysis seems inapplicable here. Artists denied subsidies are not subjected to the kinds of penalty or stigmatization present in *Speiser*. The subsidies at issue in *Maier v. Roe*, 432 U.S. 464 (1977), arguably stigmatize those who were denied benefits for abortions and arguably were designed to discourage (poor but not rich) people from procuring abortions. Those factors pointed to, but did not necessarily command, a different result. *Maier* is not *Speiser*, however. If those who had abortions in the past were to be denied welfare benefits, *Maier* and *Speiser* would be on all fours. Nor is the apparent intent of the artistic subsidy to discourage particular forms of art. In this sense the subsidies at issue in *Buckley* are distinguishable, for the legislature intended to discourage minority parties. See note 303 *supra*. The same argument was available in *Maier*. Indeed *Maier*, which holds that support for some services (childbirth care) does not require support for other services (abortions), is the strongest case available to support artistic subsidies.

393. If the lack of funding were greater, the carrot-stick distinction would become more problematic. The effect of dominant federal funding in grant programs is often to channel initiative in particular directions. This is arguably the case in funding for the sciences. Robertson, *The Scientist's Right to Research: A Constitutional Analysis*, 51 S. CAL. L. REV. 1203, 1208 (1977); Delgado & Millen, *God, Galileo, and Government: Toward Constitutional Protection for Scientific Inquiry*, 53 WASH. L. REV. 349, 389 n.235, 397 n.272 (1978). See generally Kirk, *Massive Subsidies and Academic Freedom*, 28 LAW & CONTEMP. PROB. 607 (1963). But cf. Kidd, *The Implications of Research Funds for Academic Freedom*, 28 LAW & CONTEMP. PROB. 613 (1963) (on balance research money has invigorated science). There, however, the government interest in favor of channeling scientific research seems compelling. The case for content restrictions in grants for scientific research seems even stronger than that which can be made for the arts. See Robertson, *supra*, at 1267-77 (arguing that content restrictions on funded research are constitutional but not if conditions are attached applying to non-funded research). But see Delgado & Millen, *supra*, at 389 n.237 (content restrictions permissible but not on moral, ethical or philosophical grounds).

394. The opposite may be the case. Government assistance may discourage private support. See W. BAUMOL & W. BOWEN, *supra* note 379, at 372. But if the argument is problematic here, it is hopeless in the political context. The Court's supposition in *Buckley*, 424 U.S. at 94 n.128, that government funding for major parties might free private support for minor parties is surely a make-weight.

amendment costs appear to be outweighed by the public benefits conferred.

Nonetheless, first amendment considerations suggest that such subsidy programs be administered with an eye toward limiting constitutional risk. Clearly, for example, a program that discriminated against racial or religious groups could not be tolerated. It may be, however, that subsidy programs need accompanying structural protections designed to assure that the grant process is not politicized. Similar considerations play significant roles in the broadcasting system and the educational system.

Although the broadcasting system has been monopolized by the government in that access to the airwaves is entirely subject to government control,³⁹⁵ the negative impact of that assumption of power allegedly has been minimized by a regulatory system that insures that access decisions are made by hundreds of different decision makers—the licensees.³⁹⁶ The constitutionality of the broadcast system depends upon decentralized control. Consider, for example, how different it would be if the FCC were to replace all licensees and substitute its decisions for theirs. The prospect of a monolithic decisionmaker³⁹⁷ could hardly be reconciled with the Court's recognition in *Red Lion* that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."³⁹⁸

Nonetheless the statutory scheme itself blinks at reality. Access decisions are now not made by independent licensees but largely by three networks. Structural attempts to diversify decisionmaking further may well be constitutionally required.³⁹⁹ Even in the absence of network dominance, a strong constitutional attack can be based on the fact that only one licensee has de jure control of each entire frequency. There is an undeniable similar-

395. This assumes that the governmentally appointed public trustee licensee is an agent of the state, an assumption but not the holding of *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). See notes 112-13 *supra*. Whether or not licensee action is state action, and disregarding the rest of the regulatory framework, FCC appointment of one licensee for each frequency and enforced public trusteeship responsibilities demonstrate a substantial state role.

396. See *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 477-78 (2d Cir. 1971).

397. Ironically there are strong reasons to believe that if a single monopolist controlled all television frequencies, programming would be more diverse than it is today. See Owen, *Structural Approaches to the Problem of Television Network Economic Dominance*, 1979 DUKE L.J. 191, 238. The dangers to the political system, however, would obviously be unacceptable.

398. 394 U.S. 367 at 390.

399. For a variety of proposals on how to diversify program content, see Owen, note 397 *supra*.

ity to the messages produced by licensees.⁴⁰⁰ But whatever is constitutionally required, if the government is managing its own resources,⁴⁰¹ it must be constitutionally permitted to select multiple licensees for each frequency⁴⁰² and, for example, to limit the license for some to children's programs, programs for the aged, educational programs, etc.⁴⁰³

Government has an interest in communicating to children and in providing enriching entertainment to diverse groups. If it is constitutional for government to write publications for limited groups or to hire teachers to teach particular groups particular subjects, it can use the airwaves for the same purposes. Those considerations that mandate diverse decision makers need not cancel out legitimate interests in communication. Even if government is not constitutionally required to diversify programming further, a broad range of options are constitutionally permitted.⁴⁰⁴

The structural interest in multiple decision makers also underlies the concept of academic freedom. As Professor Yudof has explained, without this premise it is hard to understand why teachers have greater constitutional rights to determine the scope of their duties than do other government employees.⁴⁰⁵ As the Court put it in *Keyishian v. Board of Regents*,⁴⁰⁶

Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas."⁴⁰⁷

Two features drawn from the broadcast and educational spheres deserve recognition in the artistic subsidy arena. First, as has been noted, both systems require multiple decision makers. But, second, and perhaps more important, the decision makers are

400. For a discussion of the economic factors which produce the similarity, see, e.g., sources in notes 122 & 397 *supra*.

401. See generally Van Alstyne, *Möbius Strip*, note 21 *supra*; Price, note 78 *supra*. See also note 123 *supra*.

402. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). For a variety of stimulating proposals that are consistent with the premise of multiple licensees, see Firestone & Jacklin, *Deregulation and the Pursuit of Fairness in TELECOMMUNICATIONS POLICY AND THE CITIZEN* 107 (T. Haight ed. 1979).

403. Price, note 78 *supra*. It is necessary to place conditions on the license or adopt some other technique to alter the economic incentives in order to create diverse programming. The mere existence of multiple licensees on a particular frequency would be ineffective. See Owen, note 397 *supra*.

404. See Owen, note 397 *supra*.

405. Yudof, *When Governments Speak*, *supra* note 19, at 876-82; see also J. TUSSEMAN, note 21 *supra*.

406. 385 U.S. 589 (1967).

407. *Id.* at 603.

insulated from the regular political process. They are not governors, senators, or other politicians subject to the immediate pressures of popular majorities, but private licensees or instructors chosen without regard to their political beliefs.

If these structural considerations were applied to governmental subsidies of the arts, the first amendment risks of politicization would surely be minimized. A case in point is *Advocates for the Arts v. Thomson*.⁴⁰⁸ There the Governor of New Hampshire vetoed a proposed subsidy for a particular literary magazine that had published an "offensive" poem.⁴⁰⁹ The First Circuit upheld the veto against a first amendment attack by noting that decisions on quality were inherent in artistic subsidies and were necessarily subjective.⁴¹⁰ But if protections for diverse speech are to be respected, and if the broadcast and education analogies are at all relevant, the propriety of permitting a governor to have the final word on subsidies in individual cases surely cannot be defended.⁴¹¹ The constitutional infirmity of the funding decision lies not in its subjectivity but rather in the failure of the funding process to afford structural assurances⁴¹² that such decisions will be removed from politicization.

Thus, government artistic speech and subsidies to the arts can be reconciled with constitutional principles if sufficient safeguards are introduced to protect against monolithic decision making and politicization. Again an eclectic approach suggests the propriety of general prophylactic rules designed to accommodate government interests with first amendment values. Ad hoc decision mak-

408. 532 F.2d 792 (1st Cir. 1976).

409. *Id.* at 793.

410. *Id.* at 796-97.

411. Although the centralization of power in the hands of the Chairman of the National Council on the Arts, 20 U.S.C. § 956 (1976), has been criticized, Comment, *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 867, 1054-56 (1972), the criticism draws on cases involving campus speaker regulations in which college chancellors had rejected recommendations of student advisory committees. In those cases the courts were influenced by the rights of faculty and students to hear speakers they invited to the campus. However, these rights of association are not involved in the funding of the arts context. Nor was the scarcity of funds a consideration in most of the campus cases. See, e.g., *Molpus v. Fortune*, 311 F. Supp. 240 (N.D. Miss. 1970); *Smith v. University of Tenn.*, 300 F. Supp. 777 (E.D. Tenn. 1969); *Brooks v. Auburn Univ.*, 296 F. Supp. 188 (M.D. Ala.), *aff'd*, 412 F.2d 1171 (5th Cir. 1969) (some discussion of scarce funds); *Snyder v. Board of Trustees*, 286 F. Supp. 927 (N.D. Ill. 1968). Cf. Canby, note 21 *supra* (arguing that the separation of editorial functions should generally not be permitted).

412. The court in *Advocates for the Arts v. Thomson* recognized that there might be "good reason to leave the decision to an agency . . . relatively removed from political pressures," but thought there was "something to be said for having decisions made in the open." 532 F.2d 797 n.7. Yet the board continues to make decisions behind the "screen of informality," *id.*, which worried the court, but subject now to the judicially approved additional pressure of a political veto.

ing in particular cases would be ineffective. Attention to the structure of the government role in the communicative process yields the most promising solutions.

C. Educational Speech

Children are the Achilles heel of liberal ideology. It is therefore understandable that the most difficult government speech problems surface in the context of elementary school education. Here there is a captive audience. Here private sources are often overwhelmed. Accommodation of the relevant interests is extremely difficult.

Academic freedom, the major technique employed to minimize the dangers of state power in universities, could be mechanically insisted upon, but an unswerving and absolute commitment to academic freedom at the grammar school level is difficult to support.⁴¹³ Looking at only one side of the balance, however, the argument for academic freedom is at its strongest in elementary education. The dangers of state power are acute: young children are more impressionable and they constitute a captive audience. The concerns raised by the drowning out private sources model are particularly in evidence. Looking purely through this lens, it is easy to say that decisionmaking power over the content of curriculum should not be concentrated, but dispersed.⁴¹⁴ From this perspective, teachers should be free to make independent, good faith judgments as to what should and should not be taught; any comprehensive attempt by government (local, state, or federal) to dictate the points of view addressed in classrooms should be resisted.

Assume, however, that a fourth grade teacher decides, in his independent good faith discretion, that it is appropriate to teach his students that black people are inferior and should be exterminated (or at least expelled from the country), that heroin consumption is psychologically stimulating and worthwhile, that sadomasochism is the right approach to sexual behavior, and that cruelty to animals is a desirable cathartic outlet. Assume further that each of these positions is relevant to some subject he is supposed to teach (perhaps "Civics" or "American Society"), that he does not advocate breaking any laws (but thinks that any laws forbidding any of his views from being implemented are probably

413. Many contend that academic freedom has no application at elementary and secondary levels. See, e.g., van den Haag, *Academic Freedom in the United States*, 28 LAW & CONTEMP. PROB. 515, 516 (1963). The case law is divided, but many courts have upheld academic freedom claims at the secondary level. See Read, note 22 *supra*.

414. For thoughtful discussion see Yudof, *When Governments Speak*, *supra* note 19, at 874-82.

unconstitutional and at least wrong), that he informs the students that most of society disagrees with these positions (but wants them to know what his biases are), and that he carefully and fairly explains the arguments for and against these outrageous positions.

Even good liberals (those with the consistency to be "right" on the *Skokie* issue)⁴¹⁵ must squirm at examples such as these. Well-schooled in the stopping place problem, however, they know that if they deny the teacher freedom here, Pandora's Box has opened wide.⁴¹⁶

But the box was opened long before any question of allocating curriculum decisionmaking power arose. To make education compulsory was itself to challenge liberal ideology.⁴¹⁷

The essence of compulsory education is that the state and not parents will ultimately decide what is best for children.⁴¹⁸ Parents who believe that their children will be happiest as illiterate farmers and who want to raise them with such an end in view are told by the state that they are wrong and that they must send their children to school.

To be sure, *Pierce v. Society of Sisters*⁴¹⁹ still⁴²⁰ stands for the

415. *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1978) (Nazi speech protected under first amendment), *aff'd*, 578 F.2d 1197 (7th Cir. 1978); *accord*, *Village of Skokie v. National Socialist Party*, 373 N.E.2d 21 (Ill. 1978).

416. William Van Alstyne would apparently permit absolute academic freedom so long as the teacher's presentation does not "deliberately . . . proselytize for a personal cause or knowingly . . . emphasize only that selection of data best conforming to his own personal biases," and so long as he sticks to material within the "proper compass of his subject." Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 856-57. This standard might well protect our fourth grade teacher. It also raises its own stopping place problems. Unless one gives absolute deference to the teacher's conception of the "proper" compass of the subject, the concept of relevance is up for grabs, and some would argue that the editorial process ordinarily involves an emphasis upon data best conforming to one's own personal bias. See also Nahmod, note 12 *supra*, arguing that in the high school context, "[o]nce a teacher has made a balanced presentation on a controversial subject relevant to the curriculum, he should constitutionally be permitted to express his own opinion." *Id.* at 1049. A thorough but brief review of the academic freedom cases in lower education is to be found in Read, note 22 *supra*.

417. To be sure, many variants of liberalism assume a mature adult. Mill, *supra* note 3, at 484, 560-61. But the assumption of compulsory education is that the state knows more than the adult parents.

418. This is not to suggest that the state's judgment always overcomes that of the parents. Indeed the trend is in the opposite direction. Moskowitz, *Parental Rights and State Education*, 50 WASH. L. REV. 623 (1975). It is to suggest that the constitutionality of compulsory education *per se* is not open to doubt. Witness the difficult struggle of the Court to create even a limited exception. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

419. 268 U.S. 510 (1924). For an excellent discussion of *Pierce*, see Yudof *When Governments Speak*, *supra* note 19, at 888-91. Yudof's discussion of *Pierce* in his address, note 19 *supra*, has influenced my own thinking.

420. Some cases give *Pierce* a religious gloss, *Yoder*, 406 U.S. at 232; *Palko v. Connecticut*, 302 U.S. 319, 324 (1937), but the general right of parents to raise their

proposition that parents, if they can afford it, are entitled to send their children to private schools; nonetheless, they must provide them with education, and a private school which decided to produce illiterate farmers would change its ways or forfeit *Pierce* protection.⁴²¹ To decide that children must be educated is also to decide, at least in part, what they must know. And to insist by force of law that a child cannot be illiterate is to make a major and irreversible decision about his or her life. The stopping place problem starts here.

It is worthwhile to notice that the problems run in many directions. Return to the public school teacher who thinks and teaches that black people are inferior. Suppose the school board decides that black people have been misrepresented in American classrooms and that their contributions to American culture have not been appropriately observed. History teachers are directed to use a text that emphasizes the contributions of black people and are directed to emphasize their contributions. Is this unconstitutional?⁴²² Does it violate academic freedom to fire the teacher who refuses to go along? If not, can the school board order the teachers to emphasize the virtues of capitalism (and Ronald Reagan), the vices of socialism or communism (and Teddy Kennedy), the value of patriotism (and George Wallace), and the evil of civil

children was the original basis of the decision, *Pierce* 268 U.S. at 534-35. *But see* Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 218 (1973) (improper interference with business the basis). Moreover, the right of parents to guide the education of their children remains substantial. *Norwood v. Harrison*, 413 U.S. 455, 461 (1973); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 788 (1973); Moskowitz, note 418 *supra*.

421. For a general discussion of the ways in which states regulate private schools, see T. VAN GEEL, *AUTHORITY TO CONTROL THE SCHOOL PROGRAM* 153-68 (1977).

422. Van Alstyne, for example, has argued that it is unconstitutional for an instrumentality of the state, be it teacher or school board, to attempt "ideological proselytism." Van Alstyne, *supra* note 416, at 856. *But see* Goldstein, *supra* note 12, at 1346-49. The Court, however, has recently endorsed the idea that public schools properly preserve values and inculcate fundamental values. *Ambach v. Norwick*, 441 U.S. 68, 75-80 (1979). Indeed in an attempt to justify the exclusion of aliens from teaching positions in New York, the Court rejected academic freedom arguments by stating that it thought "the attempt to draw an analogy between choice of citizenship and political expression or freedom of association is wide of the mark, as the argument would bar any effort by the State to promote particular values and attitudes toward government." *Id.* at 79 n.10. The issue there was presented in an abstract way, but the Court's language indicates a negative attitude toward any broad view of academic freedom in the primary grades and a clear approval of government speech encouraging traditional values. The difficulties of expecting schools to promote moral values while quite properly ruling religion out of the classroom are obvious. The literature on the problems involved in values education is enormous. *See, e.g.*, H. KIRSCHENBAUM, *ADVANCED VALUE CLASSIFICATION* 153-87 (1977). For a thoughtful discussion of value education from a legal perspective, see Moskowitz, *The Making of the Moral Child: Legal Implications of Values Education*, 6 PEPPERDINE L. REV. 105 (1978).

disobedience (and Martin Luther King)?⁴²³ If the board cannot direct what must be taught, can it prevent our hypothetical teacher from ruminating about sadomasochism or about the inferiority of black people? If the state can stop a public school teacher from teaching about the value of sadomasochism or about the inferiority of blacks in public schools, can it stop teachers in private schools?⁴²⁴ Can it prevent parents from teaching such views to their children in the privacy of their home?⁴²⁵

Any attempt to unravel these problems must start with the obvious: the child is not going to be set free at any early age, and the child is going to be educated in some way. The individual choice of the child will necessarily be impinged upon. The problem, viewed from the eclectic approach, is to fashion a structure that allocates the decisionmaking authority so as to accommodate the relevant interests. At one extreme, the parents could be given absolute authority; at another, the child could be turned over at birth to the "feds." The fact that neither these nor other extremes are seriously considered suggests that basic values are being ac-

423. Thus the language in *Ambach v. Norwick*, 441 U.S. 68 (1979), which points to a narrow view of academic freedom need not be interpreted to rule it out altogether. The question, in the Court's terms, is how much discretion teachers have in interpreting their judicially approved "obligation to promote civic virtues . . . in their classes, regardless of the subject taught." *Id.* at 80. Moreover, the Court in *Pierce* denied any "general power of the state to standardize its children." 268 U.S. at 535. Although *Pierce* applies to private schools, the general tenor of *Barnette* suggests that state powers of indoctrination in public elementary schools are subject to limits. Presumably, teachers will be permitted the freedom "not simply to indoctrinate the student in the values of a narrow or local majority, but rather in the broader values that prevail in the wider and diverse community of civilized men." Emerson & Haber, *Academic Freedom of the Faculty Member as Citizen*, 28 LAW & CONTEMP. PROB. 525, 547-48 (1963). On the other hand, the fear of undue concentration of power should lead one to pause before accepting federal attempts to dictate values taught in classrooms even if the regulation is under the guise of adding to the marketplace. *But see* Hodgson, *Sex, Texts, and the First Amendment*, 5 J. OF LAW & ED. 173, 175-79 (1976). Federal judicial attempts to permit teacher freedom should not be confused with federal executive attempts to require that particular points of view be included in the curriculum.

424. Clearly the state's power to regulate private schools is less expansive than its power over public schools. *See Norwood v. Harrison*, 413 U.S. 455, 461 (1973); *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Meyer v. Nebraska*, 262 U.S. 390 (1923). "[I]t is unlikely that courts would sustain any regulations but those reasonably designed to assure [that] private education was minimally adequate." T. VAN GEEL, *supra* note 421, at 19. *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (group libel beneath first amendment protection), is not a healthy precedent (*see* cases cited in note 415 *supra*), but it may have some vitality in the education context. *Norwood, supra*, however, suggests that free speech considerations might prevail. 413 U.S. at 469-70.

425. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court upheld a statute outlawing the sale of obscene material to children, but noted in the statute's favor that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." *Id.* at 639.

commodated, and a recognition of the nature of the accommodation is instructive.

Viewed from one perspective, parental authority is compromised only slightly, albeit fundamentally. Parents, subject only to minimum demands from the state, have the *de jure* power to determine how their children will be educated. Under *Pierce* they have the absolute right to send their children to private schools. Most parents do not, however, and the choice does not necessarily reflect unfettered preference for public education.

The parents of millions of children simply cannot afford private education; millions more can afford it but would rather spend the money elsewhere. The economic structure of education forces or at least encourages parents to select public education.⁴²⁶ To the extent, therefore, that teachers have an academic freedom right to determine the control of education, parental rights are concomitantly diminished. The tension between *Pierce* and academic freedom is severe.

For most of those who would exalt parental rights,⁴²⁷ vesting power in local boards of education is an option superior to academic freedom. To allocate power to control curriculum to higher levels of government restricts parental authority. On the other hand, enhancing the power of local boards of education will not necessarily assure parental authority. Not only are there too many parents to assure that any particular parent will be able to influence strongly his or her child's education, but local school boards are ordinarily elected by and responsive to all constituents in the community,⁴²⁸ most of whom are not currently parents of grammar school children. Thus, when any political agency, even the local school board, has power to determine educational control, interests other than parental ones are likely to be served.

Moreover, understanding those interests is crucial because the educational system *de facto* grants enormous curricular power to political boards.⁴²⁹ Arguably, the system can be explained in terms of community rights. Although parents raise their children

426. The argument that the failure to fund religious education (through, for example, a voucher program) violates free exercise was rejected in *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 788-89 (1973) (rare situation in which establishment clause values prevail over free exercise values). The argument that *Pierce* requires states to fund non-religious private schools was rejected in *Norwood v. Harrison*, 413 U.S. 455 (1973).

427. The parent with views different from the majority might fare better with a broad view of academic freedom.

428. The question of whether a state could limit the franchise to those "primarily interested in school affairs" is still open. *Kramer v. Union Free School Dist.*, 395 U.S. 621, 631-33 (1969).

429. This remains the case whether the state pattern is characterized as centralized or decentralized. See T. VAN GEEL, *supra* note 421, at 73-96.

in the home, the community has a stake in the kind of person who will be a part of it, and that stake transcends its interest in discouraging the production of Charlie Mansons, David Berkowitzs and Lee Harvey Oswalds. For example, our society has constitutionalized some basic conceptions of equality, freedom, and political democracy. It has a stake in seeing that its citizens are at least exposed to its point of view.⁴³⁰ If the state is to claim authority and to posit an obligation of obedience to law,⁴³¹ it has a stake in seeing that its conceptions of justice are understood. On the other hand, the conception of community rights is not essential to an explanation of the system. The system can be rationalized and explained in terms of childrens' rights. If you were behind Rawls' veil of ignorance⁴³² and told that you were to be born again and that someone other than you would determine your education, it is likely that you would not want to gamble by deciding that early education could be entirely determined by whoever happened to become your parent. You would want to understand the society in which you lived, and you would want the decisionmaking powers to be broadly based. At the same time, you probably would not want centralized decisionmaking for fear of an indoctrinated authoritarian society.

The system of education reflects these concerns. The very existence of public education inspires fear of authoritarian indoctrination. The existence of private education is constitutionally protected, although economically discouraged⁴³³ (and publicly regulated), and that protection serves to thwart complete centralization, to permit experimentation, and to expose public schools to competition.⁴³⁴ Within the public school system itself teachers are typically afforded a broad measure of freedom.⁴³⁵ Yet a number of factors tend to assure that community perspectives will reach the student. State or local authorities usually dictate the subjects to be taught and the textbooks to be used.⁴³⁶ Academic freedom

430. *Ambach v. Norwick*, 441 U.S. 68, 75-80 (1979).

431. See also Scanlon, *A Theory of Freedom of Expression*, 1 PHILOSOPHY & PUB. AFF. 204 (1972) (obligation to obey laws important in determining scope of freedom of speech).

432. J. RAWLS, *supra* note 5, at § 24.

433. No one behind Rawls' veil, however, could conclude that access to private schools could appropriately be rationed by market pricing in a society where wealth is unjustly distributed. The justice of a "free market" depends in part on the justice of wealth distribution generally. Baker, *Ideology of the Economic Analysis of Law*, 5 PHILOSOPHY & PUB. AFF. 3 (1975).

434. A voucher system would arguably advance these purposes even better, albeit at the expense of shared community values. See, e.g., J. COONS & S. SUGARMAN, *FAMILY CHOICE IN EDUCATION: A MODEL STATE SYSTEM FOR VOUCHERS* (1971). For Mill's views, see Mill, *supra* note 3, at 586-89.

435. *Ambach v. Norwick*, 441 U.S. at 78.

436. For a description of the variety of structures employed, see T. VAN GEEL,

does not extend (at any level) to the teaching of material not relevant to the subject matter⁴³⁷ or at the elementary school level to language or positions⁴³⁸ which fundamentally depart from and are patently offensive to community standards⁴³⁹ (our cat-beating sadomasochist). The system taken together represents an adequate attempt to accommodate the relevant interests. Obviously there are some difficult aspects. Divining precise methods for adequately treating the problems of academic freedom at the grammar school level is probably not possible. We are probably best advised to tolerate more ambiguity than we would like. The central lesson of the inquiry, however, must be that a system which fragments decisionmaking about educational control is more likely to further childrens' rights. Granting absolute authority over what a second grader will learn to one parent, one school board, or one teacher is both unnecessary and undesirable.

CONCLUSION

The premise that it is necessary or acceptable for the community to dictate a major part of the education of children entails a square rejection of the *Barnette* principle: it implies that public officials can prescribe what is orthodox in politics, nationalism, or other matters of opinion. Indeed, there are those, ranging from Lord Devlin⁴⁴⁰ and Walter Berns⁴⁴¹ to Herbert Marcuse,⁴⁴² who have contended that a community has the right not only to promote the values and life styles it respects, but to employ sanctions to impose a measure of conformity.

The dangers of repression in such an approach are obvious, but there is an appeal as well. Consider, for example, the consequences of legalized gambling. Legalization can have a profound

supra note 421, at 73-96. See also note 11 *supra*. For a fascinating discussion of the political struggle over textbook selections, see F. FITZGERALD, *AMERICA REVISED* (1979).

437. "The States are most assuredly free to choose their own curriculums for their own schools." *Epperson v. Arkansas*, 393 U.S. 97, 115 (1968) (Stewart, J., concurring). Although some clear cases exist, applying the concept of relevance can be difficult. See note 416 *supra*; Nahmod, *supra* note 12, at 1046-47; Read, *supra* note 22, at 258; *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 414 U.S. 829 (1973); *Ahern v. Board of Educ.*, 327 F. Supp. 1391 (D. Neb. 1971), *aff'd*, 456 F.2d 399 (8th Cir. 1972).

438. With respect to language, the conclusion follows from *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) *a fortiori*. With respect to positions, the conclusion suggested in the text (and regrettably even less academic freedom) is supported by the rationale in *Ambach v. Norwick*, 441 U.S. 68 (1979). See note 422 *supra*.

439. See note 423 *supra*.

440. P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

441. W. BERNS, *FREEDOM, VIRTUE, AND THE FIRST AMENDMENT* (1957).

442. Marcuse, *Repressive Tolerance*, in *A CRITIQUE OF PURE TOLERANCE* 81 (1969).

impact on the culture of a metropolis. The freedom of many can affect the lives of many others. Surely one of the admissible considerations for those citizens who would consider legalizing gambling is whether or not their city would be transformed into another Las Vegas and, if so, whether the kind of culture and community promoted would be the kind in which they would like to live. Even people who like gambling and would be caught up in the culture if it were created might vote against legalization. To move beyond sanctions: if in 1934 the government had known the kind of culture that television would produce (with its emphasis on materialism, its tendency to undermine the literacy of a print-oriented culture, its encouragement of passivity, and its tendency to discourage personal interaction)⁴⁴³ it might have paused before intervening to prevent chaos in the frequencies.

In short, the notion that people have a stake in the character of the community in which they live⁴⁴⁴ is a vital concept. It animates the aesthetic zoning discussion,⁴⁴⁵ the obscenity discussion,⁴⁴⁶ and educational policy,⁴⁴⁷ to name a few. At bottom, the conflict between rights to promote a particular type of community and rights of individuals is at the heart of the government speech issue.⁴⁴⁸

Indeed, the concept of community qualifies the thinking of most liberals. Ronald Dworkin, for example, would permit society to educate its citizens to accept his conception of social justice.⁴⁴⁹ Even John Stuart Mill was willing to permit society to

443. G. MANDER, *FOUR ARGUMENTS AGAINST TELEVISION* (1978).

444. "Community rights" is used here for this concept as opposed to an organic community right considered apart from the individuals involved. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 253-54 (1977).

445. See, e.g., *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74 ("interesting" home cannot be built); *People v. Stover*, 12 N.Y.2d 462, 240 N.Y.S.2d 734 (upheld prohibition against clotheslines in front yard against free speech claim), *appeal dismissed*, 375 U.S. 42 (1963).

446. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); H. CLOR, *OBSCENITY AND PUBLIC MORALITY* (1969).

447. See, e.g., Moskowitz, note 422 *supra*.

448. The issue is central to political theory. For a variety of views, see generally Karst, *Individuality, Community, and Law*, in *LAW AND THE AMERICAN FUTURE* 68 (M. Schwartz, ed. 1976); G. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA* (1976); K. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (5th ed. 1966); J. RAWLS, note 5 *supra*; R. UNGER, note 216 *supra*; Wolff, note 276 *supra*; Holmes, *Aristippus In and Out of Athens*, 73 AM. POL. SCI. REV. 113 (1979). Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977).

449. R. DWORKIN, *supra* note 444, at 264. It is important to emphasize, however, that the concept of community discussed here is that mentioned in note 444. Dworkin would not permit state "education" designed to encourage people to subordinate their own personalities when the interests of others are not at stake. If one compares Dworkin's conceptions of education cited above with his conception of liberalism (I read him to accept that label, see *id.*, at vii & 259-78) as outlined in Dworkin, note 4

prevent public sexual activity in order to maximize public conceptions of decency.⁴⁵⁰ The stopping place problem is again evident. The Court has stretched Mill's concession, which would probably bar sexual intercourse in Central Park, to "obscene" (but not "adult") films in the Paris Adult theatre,⁴⁵¹ and to language on the radio that makes some members of the Court wince.⁴⁵² The point is not that we should avoid the dangers of the stopping place problem,⁴⁵³ nor even that liberties are unsafe in the hands of the squeamish and the insensitive. The point is that if accommodating rights of community and self-expression is difficult in the context of government sanctions, it is even more difficult "when governments speak."⁴⁵⁴

This Article has argued that there are limits of content and structure that need to be placed on government speech. Government speech relating to ballot questions raises serious first amendment problems, and general rules need to be formulated that limit government departures from electoral neutrality. Elsewhere the principal task is to promote structures that help assure that government speech does not overwhelm individual choice. The establishment clause applies only to religion, but if government's activities as non-religious speaker were entirely beyond first amendment control, major and unacceptable incursions on liberty and equality would be effected. At the same time, it must be recognized that the government interest in communicating is often formidable and arises in different ways in widely various contexts. Indeed the power of the argument in favor of an eclectic approach depends upon attention to various contexts. It cannot satisfy those reductionists who believe that all articles are crisply summarized on the last page. In short, there are too many rights and interests worth "taking seriously" to make the government speech problem an easy one to resolve.

supra, quite serious anomalies emerge. That contention, however, must be postponed for later work.

450. Mill, *supra* note 3, at 578. Mill, however, was otherwise unwilling to permit offense or conceptions of decency to count as harm sufficient to justify the imposition of sanctions. *Id.* at 529, 562.

451. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

452. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

453. On the undesirability of bailing out when stopping place problems are recognized, see Karst, note 37 *supra*.

454. See Yudof, *When Governments Speak*, note 19 *supra*.