Essays

Free Speech and Social Structure

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Freedom of speech is one of the most remarkable and celebrated aspects of American constitutional law. It helps define who we are as a nation. The principle is rooted in the text of the Constitution itself, but it has been the decisions of the Supreme Court over the last half century or so that have, in my view, nurtured that principle, given it much of its present shape, and accounts for much of its energy and sweep. These decisions have given rise to what Harry Kalven has called a Free Speech Tradition.

In speaking of a Tradition, Kalven, and before him, Llewellyn[1] and T.S. Eliot[2] (talking about the shoulders of giants), aspire to an all-embracing perspective. Everything is included—nothing is left out, not the dissents, not even the decisions overruled. Every encounter between the Court and the first amendment is included. There is, however, a shape or direction or point to the Tradition. It is not an encyclopedia or dictionary, but more in the nature of a shared understanding. Those who speak of a Free Speech Tradition try to see all the decisions and to abstract from them an understanding of what free speech means—what lies at the core and what at the periphery, what lies beyond the protection of the first amendment and what is included, where the law is headed, etc. The whole has a shape. The shape is not fixed for all time, since each new decision or opinion is included within the Tradition and thus contributes to refiguring the meaning of the whole, but the Tradition also acts as a constraining force on present and future decisions. The Tradition is the background against which every judge writes. It defines the issues; provides the resources by which the judge can confront those issues; and also creates the obstacles that must be surmounted. It orients the judge.

I believe it is useful to view the free speech decisions of the Supreme Court as a Tradition, and I am also tempted to celebrate that Tradition in much the way that Kalven does. The title of his (still unpublished)

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1. K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

2. Eliot, *Tradition and the Individual Talent*, in SELECTED PROSE OF T.S. ELIOT 37 (1975) (first published 1919).

manuscript is *A Worthy Tradition*.[3] But for me that is only half the story. It also seems to me that the Tradition is flawed in some important respects—so much so that it might be necessary to begin again (if that is even possible).

My concerns first arose in the seventies—one of the few periods when America wondered out loud whether capitalism and democracy were compatible. In the political world these doubts were linked to Watergate and the eventual resignation of President Richard Nixon. The precipitating event was the break-in at the Democratic National Headquarters, but by the time the impeachment process had run its course, we realized how thoroughly economic power had begun to corrupt our politics. Congress responded with the Campaign Reform Act of 1974,[4] imposing limits on contributions and expenditures and establishing a scheme for the public funding of elections. The tension between capitalism and democracy was also a special subject of concern to the academy, as evidenced by the excitement and controversy generated by the publication in 1977 of Charles Edward Lindblom's book *Politics and Markets*.[5] Lindblom tried to show that, contrary to classical democratic theory, politics was not an autonomous sphere of activity, but was indeed shaped and controlled by the dominant economic interests. As a consequence of this "circularity," the most important issues of economic and social structure—what Lindblom called the "grand issues"—remained at the margins of politics. Voters were not actually considering the continued viability of capitalism, the justness of market distributions, or the structure within which organized labor was allowed to act, because, Lindblom hypothesized, of the control exercised by corporate interests over the political agenda.[6]

While academics were reading and debating Lindblom's book, and while politicians were trying to make sense of Watergate, the Supreme Court was faced with a number of cases that required it to examine the relationship of political and economic power. The Court was asked whether it was permissible for a state to extend the fairness doctrine to the print media,[7] and whether the FCC was obliged to provide critics of our efforts in Vietnam access to the TV networks.[8] In another case the Campaign Reform Act of 1974 was attacked;[9] and in still another a challenge was

3. The manuscript is in possession of Jamie Kalven and myself, and will appear in print by 1987.

4. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified at 2 U.S.C. §§ 431-434, 437-439, 453, 455, 5 U.S.C. §§ 1501-1503, 26 U.S.C. §§ 2766, 6012, 9001-9012, 9031-9042 (1982)).

5. C.E. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS (1977).

6. *Id.* at 201-21.

7. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

8. Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

9. Buckley v. Valeo, 424 U.S. 1 (1976).

raised to a Massachusetts statute limiting corporate expenditures in a referendum on the income tax.[10] Political activists, lacking funds to purchase space or time in the media, sought access to the shopping centers to get their message across to the public, and they also turned to the courts for this purpose.[11] Admittedly, issues of this character had been presented to the Court before, but in the seventies they arose with greater frequency and urgency, and they seemed to dominate the Court's first amendment docket.

These cases presented the Court with extremely difficult issues, perhaps the most difficult of all first amendment issues, and thus one would fairly predict divisions. One could also predict some false turns. What startled me, however, was the pattern of decisions: Capitalism almost always won. The Court decided that a statute that granted access to the print media to those who wished to present differing views was invalid; that the FCC did not have to grant access to the electronic media for editorial advertisements; that the political expenditures of the wealthy could not be curbed; and that the owners of the large shopping centers and malls that constitute the civic centers of suburban America need not provide access to pamphleteers. Democracy promises collective self-determination—a freedom to the people to decide their own fate—and presupposes a debate on public issues that is (to use Justice Brennan's now classic formula) "uninhibited, robust, and wide-open."[12] The free speech decisions of the seventies, however, seemed to impoverish, rather than enrich public debate and thus threatened one of the essential preconditions for an effective democracy. And they seemed to do so in a rather systematic way.

My first inclination was to see these decisions as embodying a conflict between liberty and equality—as another phase in the struggle between the Warren and Burger Courts. I saw the decisions of the seventies as part of the program of the Court largely (and now, it seems, ironically) constituted by Nixon to establish a new priority for liberty and to bring an end to the egalitarian crusade of the Warren Court. The idea was that in these free speech cases, as in *Rodriguez*,[13] the Burger Court was not willing to empower the poor or less advantaged if that meant sacrificing the liberty of anyone. On reflection, however, the problem seemed deeper and more complicated. I saw that at issue was not simply a conflict between equality and liberty, but also and more importantly, a conflict between two conceptions of liberty. The battle being fought was not just Liberty v. Equality, but Liberty v. Liberty, or to put the point another way, not just between the first amendment and the equal protection clause, but a battle *within* the first amendment itself. I also came to understand that the Court was not advancing an idiosyncratic or perverted concep-

10. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).
11. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).
12. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
13. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

tion of liberty, but was in fact working well within the Free Speech Tradition. The Court was not crudely substituting entrepreneurial liberty (or property) for political liberty;[14] the rich or owners of capital in fact won, but only because they had advanced claims of political liberty that easily fit within the received Tradition. Money is speech—just as much as picketing is.

In time I became convinced that the difficulties the Court encountered in the free speech cases of the seventies could ultimately be traced to inadequacies in the Free Speech Tradition itself. The problem was the Tradition not the Court. The Tradition did not *compel* the results—as though any body of precedent could. Arguably, there was room for a nimble and determined craftsman working within the Tradition to come out differently in one or two of these cases, or maybe in all of them. But, on balance, it seemed that the Tradition oriented the Justices in the wrong direction and provided ample basis for those who formed the majority to claim, quite genuinely, that they were protecting free speech when, in fact, they were doing something of a different, far more ambiguous, character. This meant that criticism would have to be directed not simply at the Burger Court but at something larger: at a powerfully entrenched, but finally inadequate body of doctrine.

I

For the most part, the Free Speech Tradition can be understood as a protection of the street corner speaker. An individual mounts a soapbox on a corner in some large city, starts to criticize governmental policy, and then is arrested for breach of the peace. In this setting the first amendment is conceived of as a shield, as a means of protecting the individual speaker from being silenced by the state.

First amendment litigation first began to occupy the Supreme Court's attention during World War I, a time when the constitutional shield was rather weak. The street corner speaker could be arrested on the slightest provocation. Those early decisions were openly criticized, most notably in the dissents of Brandeis and Holmes, but that criticism—eloquent and at times heroic—stayed within the established framework and sought only to expand the frontiers of freedom incrementally; it sought to place more restrictions on the policeman and to give more and more protection to the street corner speaker. In this incremental quality, the criticism took on the character of the progressive movement in general, and also shared its fate. The progressive critique achieved its first successes during the thirties, at the hands of the Hughes Court, but its final vindication awaited the Warren Court: It was only then that the shield around the speaker became worthy of a democracy.

What largely emerged from this historical process is a rule against content regulation—it now stands as the cornerstone of the Free Speech

14. *But see* Dorsen & Gora, *Free Speech, Property, and the Burger Court: Old Values, New Balances*, 1982 SUP. CT. REV. 195.

Tradition. The policeman cannot arrest the speaker just because he does not like what is being said. Time, place, and manner regulations are permitted—the speaker must not stand in the middle of the roadway—but the intervention must not be based on the content of the speech, or a desire to favor one set of ideas over another. To be sure, the Court has allowed the policeman to intervene in certain circumstances on the basis of content, as when the speaker is about to incite a mob. But even then the Court has sought to make certain that the policeman intervenes only at the last possible moment, that is, before the mob is unleashed. In fact, for most of this century first amendment scholarship has largely consisted of a debate over the clear and present danger test, and the so-called incitement test, in an effort to find a verbal formula that best identifies the last possible moment.[15] The common assumption of all those who participated in that debate—finally made explicit in the 1969 decision of *Brandenburg v. Ohio*,[16] perhaps the culmination of these debates and in many respects the final utterance of the Warren Court on this subject—is that the policeman should not step in when the speaker is only engaged in the general expression of ideas, however unpopular those ideas may be.[17]

I would be the first to acknowledge that there has been something noble and inspiring about the fifty year journey from *Schenck*[18] in 1919 to *Brandenburg* in 1969. A body of doctrine that fully protects the street corner speaker is of course an accomplishment of some note; the battles to secure that protection were hard fought and their outcome was far from certain. *Brandenburg* is one of the blessings of our liberty. The problem, however, is that today there are no street corners, and the doctrinal edifice that seems to someone like Kalven so glorious when we have the street corner speaker in mind is largely unresponsive to the conditions of modern society.

Under the Traditional extolled by Kalven, the freedom of speech guaranteed by the first amendment amounts to a protection of autonomy—it is the shield around the speaker. The theory that animates this protection, and that inspired Kalven,[19] and before him Meiklejohn,[20] and that now dominates the field,[21] casts the underlying purpose of the first amendment in social or political terms: The purpose of free speech is not in-

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15. *See, e.g.*, Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975); Kalven, *Professor Ernst Freund and* Debs v. United States, 40 U. CHI. L. REV. 235 (1973).

16. 395 U.S. 444 (1969).

17. *Id.* at 447-49.

18. Schenck v. United States, 249 U.S. 47 (1919).

19. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191.

20. *See* Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; *see also* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

21. *See, e.g.*, Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438 (1983). The breadth of the support is indicated by adherents as diverse as Kalven and Bork. *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

dividual self-actualization, but rather the preservation of democracy, and the right of a people, as a people, to decide what kind of life it wishes to live. Autonomy is protected not because of its intrinsic value, as a Kantian might insist, but rather as a means or instrument of collective self-determination. We allow people to speak so others can vote. Speech allows people to vote intelligently and freely, aware of all the options and in possession of all the relevant information.

The crucial assumption in this theory is that the protection of autonomy will produce a public debate that will be, to use the talismanic phrase once again, "uninhibited, robust, and wide-open." The Tradition assumes that by leaving individuals alone, free from the menacing arm of the policeman, a full and fair consideration of all the issues will emerge. The premise is that autonomy will lead to rich public debate. From the perspective of the street corner, that assumption might seem plausible enough. But when our perspective shifts, as I insist it must, from the street corner to, say, CBS, this assumption becomes highly problematic. Autonomy and rich public debate—the two free speech values—might diverge and become antagonistic.[22] Under CBS, autonomy may be *insufficient* to insure a rich public debate. Oddly enough, it might even become *destructive* of that goal.

Some acknowledge the shift of paradigms, and the obsolescence of the street corner, but would nonetheless view CBS as a forum—an electronic street corner.[23] They would demand access to the network as though it were but another forum and insist that the right of access should not follow the incidence of ownership. This view moves us closer to a true understanding of the problem of free speech in modern society, for it reveals how the freedom to speak depends on the resources at one's disposal, and it reminds us that more is required these days than a soapbox, a good voice, and the talent to hold an audience. On the other hand, this view is incomplete: It ignores the fact that CBS is not only a forum, but also a speaker, and thus understates the challenge that is posed to the received Tradition by the shift in paradigms. For me CBS is a speaker and in that capacity renders the Tradition most problematic. As speaker, CBS can claim the protection of autonomy held out by the Tradition, and yet the exercise of that autonomy might not enrich, but rather impoverish, public debate and thus frustrate the democratic aspirations of the Tradition.

In thinking of CBS as a speaker, and claiming for it the benefit of the Tradition, I assume that the autonomy protected by the Tradition need not be confined to individuals. It can extend to institutions. Autonomy

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22. On the two free speech values, see Justice Brennan's remarks in *Address*, 32 RUTGERS L. REV. 173 (1979). For an opinion informed by this perspective, see Richmond Newspapers v. Virginia, 448 U.S. 555, 584-89 (1980) (Brennan, J., concurring in judgment). *See also* Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273 (1983).

23. *See, e.g.*, J. BARRON, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA (1973).

is not valued by Meiklejohn and his followers because of what it does for a person's development (self-actualization), but rather because of the contribution it makes to our political life, and that contribution can be made either by individuals or organizations. The NAACP, the Nazi Party, CBS, and the First National Bank of Boston are as entitled to the autonomy guaranteed by the Tradition as is an individual, and no useful purpose would be served by reducing this idea of institutional autonomy to the autonomy of the various individuals who (at any one point of time) manage or work within the organization.

Implicit in this commitment to protecting institutional autonomy is the understanding that organizations have viewpoints and that these viewpoints are no less worthy of first amendment protection than those of individuals. An organization's viewpoint is not reducible to the views of any single individual, but is instead the product of a complex interaction between individual personalities, internal organizational structures, the environment in which the organization operates, etc. The viewpoint of an organization such as CBS or First National Bank of Boston might not have as sharp a profile as that of the NAACP or Nazi Party (that is probably one reason why we think of a network as a forum), but that viewpoint is nonetheless real, pervasive, and communicated almost endlessly. It is not confined to the announced "Editorial Message," but extends to the broadcast of *Love Boat* as well. In the ordinary show or commercial a view of the world is projected, which in turn tends to define and order our options and choices.

From this perspective, the protection of CBS's autonomy through the no-content-regulation rule appears as a good. The freedom of CBS to say what it wishes can enrich public debate (understood generously) and thus contribute to the fulfillment of the democratic aspirations of the first amendment. The trouble, however, is that it can work out the other way too, for when CBS adds something to public debate, something is also taken away. What is said determines what is not said. The decision to fill a prime hour of television with *Love Boat* necessarily entails a decision not to broadcast a critique of Reagan's foreign policy or a documentary on one of Lindblom's "grand issues" during the same hour. We can thus see that the key to fulfilling the ultimate purposes of the first amendment is not autonomy, which has a most uncertain or double-edged relationship to public debate, but rather the actual effect of a broadcast: On the whole does it enrich public debate? Speech is protected when (and only when) it does, and precisely because it does, not because it is an exercise of autonomy. In fact, autonomy adds nothing and if need be, might have to be sacrificed, to make certain that public debate is sufficiently rich to permit true collective self-determination. What the phrase "the freedom of speech" in the first amendment refers to is a social state of affairs, not the action of an individual or institution.

The risk posed to freedom of speech by autonomy is not confined to situations when it is exercised by CBS, or by the other media, but occurs whenever speech takes place under conditions of scarcity, that is, whenever

the opportunity for communication is limited. In such situations one utterance will necessarily displace another. With the street corner, the element of scarcity tends to be masked; when we think of the street corner we ordinarily assume that every speaker will have his or her turn, and that the attention of the audience is virtually unlimited. Indeed, that is why it is such an appealing story. But in politics, scarcity is the rule rather than the exception. The opportunities for speech tend to be limited, either by the time or space available for communicating or by our capacity to digest or process information. This is clear and obvious in the case of the mass media, which play a decisive role in determining which issues are debated, and how, but it is true in other contexts as well. In a referendum or election, for example, there is every reason to be concerned with the advertising campaign mounted by the rich or powerful, because the resources at their disposal enable them to fill all the available space for public discourse with their message. Playing Muzak on the public address system of a shopping mall fills the minds of those who congregate there. Or consider the purchase of books by a library, or the design of a school curriculum. The decision to acquire one book or to include one course necessarily entails the exclusion of another.

Of course, if one has some clear view of what should be included in the public debate, as does a Marcuse,[24] one has a basis for determining whether the public debate that will result from the exercise of autonomy will permit true collective self-determination. Such a substantive baseline makes life easier but it is not essential. Even without it there is every reason to be concerned with the quality of public discourse under a regime of autonomy. For the protection of autonomy will result in a debate that bears the imprint of those forces that dominate the social structure. In the world of Thomas Jefferson, made up of individuals who stand equal to one another, this might not be a matter of great concern, for it can be said that the social structure, as well as the formal political process, is itself democratic. But today we have every reason to be concerned, for we live in a world farther removed from the democracy Jefferson contemplated than it is from the world of the street corner speaker.

The fear I have about the distortion of public debate under a regime of autonomy is not in any way tied to capitalism. It arises whenever social power is distributed unequally: Capitalism just happens to be one among many social systems that distribute power unequally. I also think it wrong, even in a capitalist context, to reduce social power to economic power, and to attribute the skew of public debate wholly to economic factors; bureaucratic structures, personalities, social cleavages, and cultural norms all have a role to play in shaping the character of public debate. But I think it fair to say that in a capitalist society, the protection of autonomy will on the whole produce a public debate that is dominated by those who are economically powerful. The market—even one that operates smoothly and efficiently—does not assure that all relevant views will be heard, but

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

only those that are advocated by the rich, by those who can borrow from others, or by those who can put together a product that will attract sufficient advertisers or subscribers to sustain the enterprise.

CBS is not a monopoly, and competes with a few other networks (and less powerful media) for the public's attention. The fact that CBS's managers are (to some indeterminate degree) governed by market considerations does not in any way lessen the risk that the protection of autonomy—staying the hand of the policeman—will not produce the kind of debate presupposed by democratic theory. The market is itself a structure of constraint that tends to channel, guide and shape how that autonomy will be exercised. From the perspective of a free and open debate, the choice between *Love Boat* and *Fantasy Island* is trivial. In this respect, CBS and the rest of the broadcast media illustrate, by example, not exception, the condition of all media in a capitalist society. True, CBS and the other networks operate under a license from the government or under conditions of spectrum scarcity. But the dangers I speak of are not confined to such cases, for distortions of public debate arise from social, rather than legal or technical factors.

Individuals might be "free" to start a newspaper in a way that they are not "free" to start a TV station, because in the latter case they need both capital and government approval, while for the newspaper they need only capital. But that fact will not close the gap between autonomy and public debate; it will not guarantee that under autonomy principles the public will hear all that it must. Licensing may distort the market in some special way, but even the market dreamt of by economists will leave its imprint on public debate, not only on issues that directly affect the continued existence of the market, but on a much wider range of issues (though with such issues it is often difficult to predict the shape and direction of the skew). No wonder we tend to identify the Free Speech Tradition with the protection of "the marketplace of ideas."[25]

II

Classical liberalism presupposes a sharp dichotomy between state and citizen. It teaches us to be wary of the state and equates liberty with limited

25. The metaphor stems from Holmes's famous dissent in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."). The actual phrase "marketplace of ideas" is, oddly enough, Brennan's. *See* Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). The deliberative element in Brennan's thinking about the first amendment can ultimately be traced to Brandeis, who is often linked to Holmes in his use of the clear and present danger test, but who in fact had no taste for the market metaphor. On the poetics of the Tradition, see the inspired essay by David

government. The Free Speech Tradition builds on this view of the world when it reduces free speech to autonomy and defines autonomy to mean the absence of government interference. Liberalism's distrust of the state is represented by the antagonism between the policeman and soapbox orator and by the assumption that the policeman is the enemy of speech. Under the received Tradition, free speech becomes one strand—perhaps the only left[26]—of a more general plea for limited government. Its appeal has been greatly enhanced by our historical commitment to liberalism.

Nothing I have said is meant to destroy the distinction presupposed by classical liberalism between state and citizen, or between the public and private. Rather, in asking that we shift our focus from the street corner to CBS, I mean to suggest that we are not dealing with hermetically sealed spheres. CBS is neither a state actor nor a private citizen but something of both. CBS is privately owned and its employees do not receive their checks directly from the state treasury. It is also true, however, that CBS's central property—the license—has been created and conferred by the government. It gives CBS the right to exclude others from its segment of the airwaves. In addition, CBS draws upon advantages conferred by the state in a more general way, through, for example, the laws of incorporation and taxation. CBS can also be said to perform a public function: education. CBS is thus a composite of the public and private. The same is true of the print media, as it is of all corporations, unions, universities, and political organizations. Today the social world is largely constituted by entities that partake of both the public and private.

A shift from the street corner to CBS compels us to recognize the hybrid character of major social institutions; it begins to break down some of the dichotomies between public and private presupposed by classical liberalism. It also renders pointless the classificatory game of deciding whether CBS is "really" private or "really" public, for the shift invites a reevaluation of the stereotypical roles portrayed in the Tradition's little drama. No longer can we identify the policeman with evil and the citizen with good. The state of affairs protected by the first amendment can just as easily be threatened by a private citizen as by an agency of the state. A corporation operating on private capital can be as much a threat to the richness of public debate as a government agency, for each is subject to constraints that limit what it says or what it will allow others to say. The state has a monopoly on the legitimate use of violence, but this peculiar kind of power is not needed to curb and restrict public debate. A program manager need not arrest someone (lawfully or otherwise) to have this effect, but only choose one program over another, and although that choice is not wholly free, but constrained by the market, that does not

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Cole, *Agon at Agora: Creative Misreading in the First Amendment Tradition*, 95 YALE L.J. 857 (1986).

26. *See* Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. PROC. 384 (1974); Director, *The Parity of the Economic Market Place*, 7 J. LAW & ECON. 1 (1964).

limit the threat that it poses to the integrity of public debate. Rather, it is the source of the problem. All the so-called private media operate within the same structure of constraint, the market, which tends to restrict and confine the issues that are publicly aired.

Just as it is no longer possible to assume that the private sector is all freedom, we can no longer assume that the state is all censorship. That too is one of the lessons of the shift from the street corner orator to CBS. It reminds us that in the modern world the state can enrich as much as it constricts public debate: The state can do this, in part, through the provision of subsidies and other benefits. Here I am thinking not just of the government's role in licensing CBS, but also and more significantly of government appropriations to public television and radio, public and private universities, public libraries, and public educational systems. These institutions bring before the public issues and perspectives otherwise likely to be ignored or slighted by institutions that are privately owned and constrained by the market. They make an enormous contribution to public discourse, and should enjoy the very same privileges that we afford those institutions that rest on private capital (and, of course, should be subject to the same limitations).

We can also look beyond the provision of subsidies, and consider whether the state might enrich public debate by regulating in a manner similar to the policeman. CBS teaches that this kind of governmental action—once again based on content—might be needed to protect our freedom. The power of the media to decide what it broadcasts must be regulated because, as we saw through an understanding of the dynamic of displacement, this power always has a double edge: It subtracts from public debate at the very moment that it adds to it. Similarly, expenditures of political actors might have to be curbed to make certain all views are heard. To date we have ambivalently recognized the value of state regulation of this character on behalf of speech—we have a fairness doctrine for the broadcast media and limited campaign financing laws. But these regulatory measures are today embattled, and in any event, more, not less, is needed. There should also be laws requiring the owners of the new public arenas—the shopping centers—to allow access for political pamphleteers. A commitment to rich public debate will allow, and sometimes even require the state to act in these ways, however elemental and repressive they might at first seem. Autonomy will be sacrificed, and content regulation sometimes allowed, but only on the assumption that public debate might be enriched and our capacity for collective self-determination enhanced. The risks of this approach cannot be ignored, and at moments they seem alarming, but we can only begin to evaluate them when we weigh in the balance the hidden costs of an unrestricted regime of autonomy.

At the core of my approach is a belief that contemporary social structure is as much an enemy of free speech as is the policeman. Some might move from this premise to an attack upon the social structure itself—

concentrations of power should be smashed into atoms and scattered in a way that would have pleased Jefferson. Such an approach proposes a remedy that goes directly to the source of the problem, but surely is beyond our reach, as a social or legal matter, and maybe even as an ethical matter. The first amendment does not require a revolution. It may require, however, a change in our attitude about the state. We should learn to recognize the state not only as an enemy, but also as a friend of speech; like any social actor, it has the potential to act in both capacities, and, using the enrichment of public debate as the touchstone, we must begin to discriminate between them. When the state acts to enhance the quality of public debate, we should recognize its actions as consistent with the first amendment. What is more, when on occasions it fails to, we can with confidence demand that the state so act. The duty of the state is to preserve the integrity of public debate—in much the same way as a great teacher—not to indoctrinate, not to advance the "Truth," but to safeguard the conditions for true and free collective self-determination. It should constantly act to correct the skew of social structure, if only to make certain that the status quo is embraced because we believe it the best, not because it is the only thing we know or are allowed to know.

A question can be raised whether the (faint-hearted) structural approach I am advocating really represents a break with the Free Speech Tradition, for some traces of a welcoming attitude toward the state can be found within the Tradition. One is *Red Lion*, which upheld the fairness doctrine and the regulation of content for a speaker such as CBS.[27] This decision does not fit into the overall structure of the Tradition taken as a whole, and never has been sufficiently rationalized. It has been something of a freak, excused, but never justified, on the ground that broadcasters are licensed by the government. It has never grown, as an adequately justified precedent might, to allow a state to impose a similar fairness obligation on newspapers or to allow the fairness doctrine and all that it implies to become obligatory rather than just permissible. It is of no small significance to me that Kalven (and a number of the other first amendment scholars working within the Tradition) signed briefs in *Red Lion* on the side of the media.[28] There is, however, one other aspect of first amendment doctrine that evinces a welcoming attitude toward the state and that is more firmly entrenched and more adequately justified. I am now referring to what Kalven called the "heckler's veto."[29]

This doctrine has its roots in Justice Black's dissent in *Feiner v. New*

27. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

28. Included are Archibald Cox and Herbert Wechsler (the lawyer for the *New York Times* in *New York Times Co. v. Sullivan*). *See* Brief for Respondents Radio Television News Directors Ass'n and Brief for Respondent Columbia Broadcasting System in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1967).

29. H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 140-45 (1965).

York,[30] but it is now an established part of the Tradition. It recognizes that when a mob is angered by a speaker and jeopardizes the public order by threatening the speaker, the policeman must act to preserve the opportunity of an individual to speak. The duty of the policeman is to restrain the mob. In such a situation strong action by the state is welcomed, and the doctrine of the heckler's veto might thus appear as an opening wedge for my plea for a reversal of our ordinary assumptions about the state, but one that would allow the Court to work within the Tradition. Upon closer inspection, however, this seems to me wishful thinking, and that a more radical break with the past is called for.

First, the heckler's veto does not require an abandonment of the view that free speech is autonomy, but explains that the state intervention is necessary to make the speaker's autonomy "real" or "effective." The person on the soapbox should be given a *real* chance to speak. In contrast, the approach I am advocating is not concerned with the speaker's autonomy, real or effective, but with the quality of public debate. It is listener oriented. Intervention is based on a desire to enrich public debate, and though the concept of "real" or "effective" autonomy might be so stretched as to embrace the full range of interventions needed to enrich the public debate, the manipulative quality of such a strategy will soon become apparent once the extensiveness and pervasiveness of the intervention is acknowledged. It is also hard to see what is to be gained by such a strategy: Autonomy, in its inflated version, would remain as the key value, but note that while in the received Tradition it operated as a response to government intervention, under this strategy it would serve as a justification of such intervention. Autonomy would be saved, but be put to a different use.

Second, although the doctrine of the heckler's veto welcomes the strong arm of the law, it does so only on rare occasions, when violence is about to break out, and then only to divert the police action away from the speaker and toward the mob. The general rule is that the state should not intervene, but when it must, it should go after someone other than the speaker. In contrast, the structural approach contemplates state intervention on a much more regular and systematic basis. A prime example of such intervention is, once again, the fairness doctrine, a varied and elaborate set of regulations and institutional arrangements that have evolved over several decades. Other instances of this sort of intervention can be found in federal and state laws regulating campaign contributions and expenditures, or in the laws of some states creating access to privately owned shopping centers for political activities. These laws entail a form of state intervention that is more regular and more pervasive than that contemplated by the occasional arrest of the heckler.

Third, when the policeman arrests hecklers, no interests of any great

30. 340 U.S. 315 (1951).

significance seem to be jeopardized. The government is interfering with the hecklers' freedom, but they are not objects of much sympathy. Hecklers are obstructionists, who are not so much conveying an idea as preventing someone else from doing so. They are defined rather two-dimensionally, as persons who refuse to respect the rights of others. Yes, they will have their chance on the soapbox, if that is what they want, but they must wait their turn. The issue appears to be one of timing. But the laws that have divided the Supreme Court over the past decade, and that the structural approach seeks to defend, jeopardize interests that are more substantial than those represented by hecklers.

At the very least, the laws in question involve a compromise of the rights we often believe are attached to private property—the right to exclude people from the land you own, or to use the money you earn in any way that you see fit. In some cases the stakes are even greater: free speech itself. The laws in question threaten the freedom of an individual or institution to say what it wants and to do so precisely because of the content of what is being said. One branch of the fairness doctrine requires a network to cover "public issues," and another requires a "balanced presentation." In either case, a judgment is required by government agency as to what constitutes a "public issue" and whether the presentation is "balanced." By necessity, attention must be paid to what is being said, and what is not being said. Similarly, laws that regulate political expenditures to prevent the rich from completely dominating debate also require some judgment as to which views should be heard. The same is true even if the state acts through affirmative strategies, such as when it grants subsidies to candidates or purchases books or sets a curriculum.

From the perspective of autonomy these dangers are especially acute, and present what is perhaps a decisive reason against intervention. However, even if we shift the perspective, and rich public debate is substituted for autonomy as the controlling first amendment value, there is good reason to be concerned, and to a greater degree than we are when the heckler is silenced. The stated purpose of the government intervention and content regulation might be to enrich debate, but it might have precisely the opposite effect. It might tend to narrow the choices and information available to the public and thus to aggravate the skew of debate caused by the social structure. In fact, there is good reason to suspect that this might be the case, for, as suggested by Lindblom's idea of circularity, the social structure is as likely to leave its imprint on government action (especially of a legislative or administrative character) as it is to leave its mark on the quality of public debate.

The presence of these dangers is sufficient to distinguish the approach I am advocating from the heckler's veto, and the general Tradition of which it is part, but a question still remains—perhaps the ultimate one—whether these dangers are sufficient to reject the structural approach altogether and turn back to the received Tradition and the protection of autonomy. Are the dangers just too great? When the government interven-

tion threatens what might be regarded as an ordinary value, signified by the interference with property rights, then the answer seems clearly "no." Free speech is no luxury. Sacrifices are required, and though there are limits to the sacrifice (as Justice Jackson put it, the Constitution is no "suicide pact"[31]), free speech lies so close to the core of our constitutional structure to warrant tipping the scales in its favor. In this regard the structuralist can confidently borrow the weighted balancing process used by progressives to protect speech in the interest of autonomy. Traditionally, speech is protected even if it causes inconvenience, a congestion, etc. and I see no reason why the same rule could not be applied to further public debate—where the state appears as a friend rather than an enemy of speech.

This perspective could help in a number of the cases that stymied the Court in the seventies. A law creating access to a shopping center might interfere with the property rights of the owners, and cause a loss of sales (by keeping away those who do not like to be bothered by politics), but those interests might have to be sacrificed in order to fulfill the democratic aspirations that underlie the first amendment. To use one of the phrases that inspired the progressives of the fifties and sixties and that gave the Tradition much of its vitality, freedom of speech is a "preferred freedom."[32] The only difference is that under the structural approach the enrichment of public debate is substituted for the protection of autonomy and free speech operates as a justification rather than as a limit on state action. The same process of weighted balancing, with the hierarchy of values that it implies, is used, though the traditional perspective on the relationships between the state and freedom is reversed. The notion of "preferred freedoms" or weighted balancing is, however, of little help when the interests sacrificed or threatened by state action are not "ordinary" ones, like convenience or expense, but are also grounded on the first amendment. Then, so to speak, the first amendment appears on both sides of the equation: The state may be seeking to enrich public debate but might in fact be impoverishing it.

This danger is presented by the fairness doctrine and that—not the talk about infringement of institutional autonomy—is what makes the doctrine so problematic. The doctrine seeks to enhance public debate by forcing the broadcasters to cover public events and to present opposing sides of an issue; but it simultaneously restricts debate by preventing the media from saying what it otherwise might (in response to market pressures, or to advance the political views of the managers or financial sponsors, etc.). The hope is that public debate will be enriched, but the fear is that it might work in the opposite direction, either directly by forcing the networks to cover issues that are not important, or indirectly by discourag-

31. Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("[I]f the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact").

32. *See* McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182 (1959).

ing them from taking chances, and by undermining norms of professional independence. Federal and state laws that restrict political expenditures by the rich or corporations also might be counterproductive. These laws seek to enhance the public debate by allowing the full range of voices to be heard, by assuring that the ideas of the less wealthy are also heard. But at the same time these laws might over-correct, slanting the debate in favor of one view or position, and in that way violate the democratic aspirations of the first amendment.

I do not believe that this danger of first amendment counterproductivity arises in every single instance in which the state intervenes to enhance public debate, as is evident from my discussion of the shopping center cases (I put the displacement of Musak by the songs of protest to one side). Nevertheless, believing as I do that scarcity is the rule rather than the exception in political discourse, and that in such situations one communicative act displaces another, I must acknowledge that this danger of counterproductivity is almost always present. I also acknowledge how real a danger this truly is, for as Lindblom teaches, the state is not autonomous. We turn to it because it is the only hope, the only means to correct the distorting influence of social structure on public debate, and yet there is every reason in the world to fear that the state is not as "public" as it appears but is in fact under the control of the very same forces that dominate the social structure. Indeed, I chose CBS (rather than, say, the shopping center) as the new paradigm, and insisted that it be viewed as a speaker (rather than as a forum), in order to underscore, rather than to minimize, the problematic character of state intervention. CBS impeaches the received Tradition, but also acts as a painful reminder to the structuralist that whenever the state adds to public debate it is also taking something away. The hope against hope is that in the final analysis we will be better off than under a regime of autonomy.

The burden of guarding against the danger of first amendment counterproductivity will largely fall to the judiciary. Judges are the ultimate guardians of constitutional values, and due to institutional arrangements that govern tenure and salary and due to professional norms that insulate them from politics, they are likely to be more independent of the forces that dominate contemporary social structure (the market) than other government officials. The burden of protecting the first amendment is theirs, and under the structural approach it is likely to be an excruciating one. Judges are accustomed to weighing conflicting values, but the conflict here is especially troublesome because the values seem to be of similar import and character. We cannot casually insist that the courts allow the political agencies to experiment or to take a risk, as we do when something like productive efficiency or administrative convenience is at stake, for the evils to be suffered are qualitatively equal to the benefits to be gained. Nor can we take comfort in doctrines of deference that generally ask courts to respect the prerogatives of legislative or administrative agencies. Those agencies might be as captive to the forces that dominate social structure as is public discourse itself. And I see no more reason in this context than

I do in the discrimination area[33] to revert to an approach that emphasizes the motives or "good faith" of the state agency involved: From democracy's standpoint, what matters is not what the agency is trying to do but what it has in fact done. To assess the validity of the state intervention the reviewing court must ask, directly and unequivocally, whether the intervention in fact enriches rather than impoverishes public debate.

This is no easy question, especially when we proceed, as we must, without Marcuse's guidance as to what kind of views are to be allowed in a democracy. The democratic aspirations of the first amendment require robust debate about issues of public importance, and as such, call for process norms, betrayed as much by the imposition of particular outcomes, as by the failure to secure meaningful conditions of debate. In constructing the required norms, however, we may find help in the old notion that it is easier to identify an injustice than to explain what is justice. In the racial area,[34] we have proceeded in this negative fashion, trying to identify impermissible effects ("group disadvantaging," "disproportionate impact," etc.), without a commitment to a particular end state. I suspect that is how we must proceed in the first amendment domain as well. In fact, the notions of "drowning out,"[35] or "domination,"[36] used by Justice White on various occasions to explain how social or economic power under a regime of autonomy might distort public debate strike me as gestures in this direction. They are, of course, only a beginning, and perhaps a small one at that, and we should have no illusion about how long and how difficult a journey lies ahead.

Realism is not, however, the same as pessimism, and in these matters I tend to be optimistic. I believe in reason and in the deliberate and incremental methods of the law: The courts are no more disabled from giving content to the enrichment of public debate idea than to any other (including autonomy). I am also sustained by my belief in the importance—no, the urgency—of the journey that the structuralist has invited us to take. Unless we stop the by now quite tiresome incantation of Brennan's formula, and begin to explain precisely what we mean when we speak of a debate that is "uninhibited, robust, and wide-open," and to assess various interventions and strategies in light of their contribution toward that end, we will never establish the effective precondition of a true democracy.

III

I do not expect everyone to share my optimism. I can understand someone who acknowledges how social structure and the protection of

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33. *See* Fiss, *Inappropriateness of the Intent Test in Equal Protection Cases*, 74 F.R.D. 276 (1977) (remarks presented at the Annual Judicial Conference, Second Judicial Circuit of the United States, Sept. 11, 1976).

34. *See* Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

35. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1969).

36. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 809-12 (1978) (White, J., dissenting).

autonomy might skew public debate, but believes (for some reason) that the inquiries called for by another approach are too difficult, or too dangerous. I would argue with that position, but I would understand it. It would be an acknowledgment of the tragic condition in which we live—we know what freedom requires, but find it too difficult or too dangerous to act on its behalf. But that has not been the posture of the controlling bloc of the Burger Court in the free speech cases of the seventies, and that is why I believe a reaction stronger than mere disagreement is appropriate. The Court did not, for example, present its decision to invalidate the Massachusetts law limiting corporate political expenditures as a tragedy, where, on the one hand, it acknowledged how the "domination" that White described might interfere with first amendment values, but on the other, explained that it might be too dangerous or too difficult even to entertain the possibility of corrective measures by the state. Rather, Justice Powell announced the Court's decision as a full and triumphant vindication of first amendment values. It is this stance, above all, that I find most troubling, and that has led me to wonder whether the real source of the problem is not the Justices, but rather the Tradition.

Some of the Justices have recognized the divergence between autonomy and rich public debate, and have been prepared to honor and further the public debate value at the expense of autonomy. Now and then they are prepared to work in patient and disciplined ways to make certain that the intervention in question will actually enrich rather than impoverish public debate. At their finest moments they are attentive to questions of institutional design and the danger of first amendment counterproductivity. Here I am thinking especially of Justices White and Brennan, though even they sometimes stumble under the weight of the Tradition. The method of the prevailing majority, perhaps best typified by the work of Justice Powell but by no means confined to him, is, however, of another character entirely. For them, it is all autonomy—as though we were back on the street corner and the function of the first amendment were simply to stop the policeman. Their method *is* the Tradition.

One part of this method is to see a threat to autonomy whenever the state acts in a regulatory manner. For example, Powell feared that a law requiring access to a shopping center might compromise the free speech rights of the owners[37]—the fourtheenth amendment may not enact the *Social Statics* of Mr. Herbert Spencer, but maybe the first amendment does. The autonomy of the owners will be compromised, Justice Powell argued, because there is a risk that views of the political activists will be attributed to them. Faced with the fact that the activists gained access by force of law and under conditions that provide access to all, and that in any event, the owners could protect against the risk of attribution by

37. PruneYard Shopping Center v. Robins, 447 U.S. 74, 96-101 (1980) (Powell, J., concurring in part and in the judgment).

posting signs disclaiming support for the views espoused, Justice Powell moved his search for autonomy to an even more absurd level. He insisted that being forced to post a disclaimer might itself be a violation of the autonomy guaranteed by the first amendment.[38] (For some strange reason, Justice White joined this opinion.)

Another part of the method of the prevailing majority is to treat autonomy as a near absolute and as the only first amendment value. The enrichment of public debate would be an agreeable by-product of a regime of autonomy (they too quote the Brennan formula), but what the first amendment commands is the protection of autonomy—individual or institutional—and if that protection does not enrich public debate, or somehow distorts it, so be it. To be sure, the fairness doctrine is tolerated, but largely out of respect for precedent, or a deference to the legislative or administrative will, and is distinguished on rather fatuous grounds. The Court has made clear that the FCC is free to abandon it, and in any event, the doctrine and the regulation of content that it implies are not to be extended to the print media (and presumably other electronic media that do not require an allocation of the scarce electromagnetic spectrum). Curbs on financial contributions to candidates are permitted once again out of deference to precedent, and as a way of curbing corruption, but curbs on expenditures are invalidated as interference with the autonomy supposedly guaranteed by the first amendment. These are the decisions that gave the seventies its special character. Reflecting the full power of the received Tradition, time and time again, the Court declared: "[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. . . ."[39]

Autonomy is an idea that is especially geared to the state acting in a regulatory manner—it is the shield against the policeman. When the state acts affirmatively, say through the provisions of subsidies or benefits, the Tradition does not have much to say. As a result, during this same period the Burger Court has been, much to my relief, more tolerant of such state intervention, but that tolerance has been achieved at the price of coherence. The Court has no standard to guide its review. Rather than asking whether the action in question enriches debate, the Justices have tried to reformulate the issue in terms of the received Tradition. In a school library case Justice Brennan found himself obliged to cast the censorship—a transparent attempt to narrow debate—into an infringement of autonomy and a violation of the rule against content regulation.[40] This led him to make an untenable distinction between the removal and acquisition of books, and to look into the motives of the school board—a type of inquiry

38. *Id.* at 99.

39. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 790-91 (1978) (quoting Buckley v. Valeo, 424 U.S. 1, 48-49 (1976)).

40. Board of Educ. v. Pico, 457 U.S. 853 (1982).

for which, as he demonstrated in other contexts, he has no taste whatsoever. Even then, he was unable to secure a majority.

In this case, and in others that involved the state in some capacity other than policeman, Brennan and his allies faced a high-pitched dissent by Justice Rehnquist, in which he made explicit the distinction between when the state acts as sovereign (policeman) and when it acts in other capacities (e.g., as educator, employer, financier).[41] For the latter category, Rehnquist argued for a standard that leaves the state with almost total discretion. In this regard he speaks for others, and in one case,[42] he secured a majority and wrote the prevailing opinion (which Brennan joined—a fact he later regretted[43]). It seems to me, however, that what the first amendment requires in these cases is not indifference, but a commitment on the part of the Court to do all that it can possibly do to support and encourage the state in efforts to enrich public debate, to eliminate those restrictions of its subsidy programs that would narrow and restrict public debate, and if need be, even to require the state to continue and embark on programs that enrich debate.[44] The problem of remedies and the limits on institutional competence may, in the last instance cause the Justices—even one so strong in his conception of office as Brennan—to retreat from such an ambitious undertaking, but such a failure of nerve, or exercise in prudence, should be recognized for what it is: a compromise, and not a vindication of the first amendment and its deepest democratic aspirations.

When subsidies are involved, the Court allows the state to act—the Court is torn, and the opinions incoherent, but the first amendment is not viewed as a bar to state action. When confronted with regulatory measures, however, such as ceilings and limits on political expenditures, the Court sees a threat to autonomy as defined by the Tradition and reacts in a much more straightforward and much more restricted way: The state is stopped. In so reacting the Justices give expression to the Tradition, and our longstanding commitment to the tenets of classical liberalism and its plea for limited government. They also give expression to the political mood of the day, which is defined by its hostility to the activist state. Today abolition of the fairness doctrine can be passed off as just one more instance of "deregulation."[45] It seems to me, however, that there is much to regret in this stance of the Court and the Tradition upon which it rests.

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41. *Id.* at 908-10 (Rehnquist, J., dissenting).

42. Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983).

43. *See* FCC v. League of Women Voters, 104 S. Ct. 3106, 3128 (1984).

44. *See* Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 170-204 (1973) (Brennan, J., dissenting).

45. For the current challenge to the fairness doctrine, see *In re* Inquiry into Section 73-1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1985), *review pending in the Court of Appeals for the District of Columbia sub nom.* Radio-Television News Directors Ass'n v. FCC, No. 85-1691.

The received Tradition presupposes a world that no longer exists and that is beyond our capacity to recall—a world in which the principal political forum is the street corner. The Tradition ignores the manifold ways that the state participates in the construction of all things social and how contemporary social structure will, if left to itself, skew public debate. It also makes the choices that we confront seem all too easy. The received Tradition takes no account of the fact that to serve the ultimate purpose of the first amendment we may sometimes find it necessary to "restrict the speech of some elements of our society in order to enhance the relative voice of others," and that unless the Court allows, and sometimes even requires, the state to do so, we as a people will never truly be free.