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**THE AUDIENCE REFLECTED IN THE MEDIUM OF LAW:
A CRITIQUE OF THE POLITICAL ECONOMY OF SPEECH RIGHTS
IN THE UNITED STATES**

by

Myles Alexander Ruggles

**THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
J MASTER OF ARTS (COMMUNICATION)**

in the Department

of

Communication

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SIMON FRASER UNIVERSITY

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ABSTRACT

The central concern of this thesis is to show how the audiences of the mass media are represented in the discourse of constitutional interest-adjudication. Because of its political and moral authority and because it commands enforcement by the police power of the state, judicial representation of the audience and its legitimate communicative interests and powers is an important determinant of the conditions of political knowledge and action for citizens in a developed market polity.

The thesis argues that in considering the rights of citizens in mass communication contexts, liberal political theory and liberal legal practise are in contradiction. This contradiction derives from the Court's systematic conflation of property rights and the functioning of the market with speech rights and the functioning of the institutions of citizenship and self-government. It is further argued that this contradiction can only be fully explained and understood from the point of view of critical theories of law and communication.

The thesis then analyzes a selection of mass media decisions by the U.S. Supreme Court, using an interpretive approach drawn from social theory rather than from formal legal methodology. It considers this body of law as a social phenomenon linked to and capable of revealing a great deal about other social processes and structures. Themes explored in the caselaw include the Court's definition of communication; its distinction between political and commercial speech; its approach to questions of public function, trusteeship, competition and state action; and its doctrines concerning citizens' rights to

initiate, to reply to, and to receive both paid and unpaid communications in mediated and direct contexts of interaction.

In these cases there is an apparent correlation between the forms of rights allocated to mass media audiences and the economic role of audiences as a factor in commodity exchange. The thesis concludes that the Court's discourse on this topic misrepresents and distorts audiences' communicative and political interests, even as defined in liberal theory, and that this necessarily entails a deterioration of the conditions of public self-expression and collective self-government for the citizens to which it applies. Questions for further study in this area are noted.

As regards the individual, it is clear that he relates even to language itself as his own only as the natural member of a human community. Language as the product of an individual is an impossibility. But the same holds for property.

Language itself is the product of a community, just as it is in another respect itself the presence of the community, a presence which goes without saying.

Karl Marx: Grundrisse (1858)

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This study's shortcomings are, of course, my own responsibility.

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CHAPTER ONE:

INTRODUCTION

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to ensure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'. (1)

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 thought to get itself accepted in the competition of the market. (2)

THE PROBLEM:

Most people are familiar with the phrase 'free speech rights', and there are many occasions on which it is quite artlessly invoked. Dismissal of a civil servant for divulging undenied unsavoury facts about a government's actions, or news of a teacher disciplined for critical supplements to the curriculum, may lead us to ask "What about their free speech rights?" This usage perhaps expresses surprise that telling the truth as one sees it might be a punishable offense. At the same time it is also possible to be

¹ New York Times Co. v. Sullivan, 11 L. ed 2d 686 [1964] at 700, Justice William Brennan for the Court (quoting Justice Felix Frankfurter for the Court in Roth v. United States, 354 U.S. 476 [1957]).

² Abrams v. United States, 250 U.S. 616 [1919], Justice Oliver Wendell Holmes, dissenting.

routinely cynical about 'free speech rights'. There is often no great surprise in finding that 'speech rights' have not prevented a court's injunction against a union's secondary picket, a broadcaster's rejection of a controversial advertisement, a newspaper's refusal to publish a letter.

Both the ingenuous and the worldly are common sense responses. North Americans exercise by right a remarkable everyday freedom of expression. They generally may speak their minds, unmolested, on street-corners and in classrooms, they may at least mail their letters to editors without expecting a visit from the police, and occasional public opportunities even arise to ask their elected representatives the most embarrassing questions they can devise.

At the same time certain denials of speech rights are broadly accepted in a liberal democracy: the security of the state, the safety of the public, the protection of property and reputation all furnish grounds for limiting the reach of expressive rights. A well-known formulation of such a limit is that "no one may falsely shout 'Fire!' in a crowded theatre". Most legal activity in the area of free speech rights is directed at determining exactly where these limits are to be drawn in controversial instances. Setting the norm for an actionable case of seditious speech, for example, or of obscenity, will divide judicial opinion across a notoriously mobile and imprecise line.

Such variations in judicial opinion are not my central concern here. Rather, this enquiry, in examining the allocation of free speech rights in the contemporary mass media, asks a more general set of questions about the balance of expressive powers achieved among contending political interests by constitutional rule-making. Evaluation of this balance of expressive powers inevitably takes us beyond legal opinion and into

the realms of political theory, the political economy of mass communication, and the critical analysis of discourse. When court-made law on mass media speech rights is analyzed in these terms I believe one is led to an unmistakable conclusion: the general citizenry of North America has no rights to express itself in the mass media. In other words, among the many forms of speech rights recognized by Canadian and U.S. courts there are no citizen rights to initiate speech or to reply to speech, whether as editorial or paid advertising content, in the public forum of the mass media.

This is not to say that occasional opportunities for such speech do not occur; it is only to say that, appearances to the contrary, expressive rights in the mass media are not incorporated into the package of civil, political and social rights of citizenship enjoyed in North America (3). And what is even more interesting than this apparent occlusion in the constitutional vision is that the inaccessibility of the mass media to our communicative purposes makes sense to us, goes unremarked, seems an obvious and common sense' feature of the social world we inhabit. For this reason it seems necessary at the outset to elaborate briefly on the problem of speech rights in the media and the approaches I shall take to their analysis in the main body of this thesis.

Speech rights in direct interaction with others in a public place -- for purposes of a meeting or rally, say, or while distributing a leaflet -- are typically equated first of all with a notion of the legitimate and effective power of individuals to express themselves and to disseminate that expression. That power is indeed substantial. Freedom of

³ For a discussion of the development of civil, political and social rights of citizenship in western societies see T.H. Marshall, "Citizenship and Social Class", in Class, Citizenship and Social Development, (1949), Chicago: University of Chicago Press, 1977. Marshall's excellent discussion is, however, somewhat flawed by its almost evolutionary line of argument. He downplays the extent to which the expansion of citizenship rights in the west had to be won in various forms of social and political struggle (e.g. the female franchise).

expression as the citizen's right to receive a leaflet or to listen to a public speaker is a secondary inflection, if only because it seems to us to be wholly beyond legitimate regulation. The preventive detention of a speaker at a public rally, for example, would be a highly controversial event, but state action against her audience to prevent their attending and listening has become nearly unimaginable in our society. While this aspect of communicative freedom was not always so widely assumed or automatically respected, and was in fact won through long political struggle, it is now so seldom challenged in contexts of direct interaction that it forms only a background issue.

On the other hand, in the mass media (surely the dominant arena of public opinion in the developed world) the range of expressive powers available to individuals can easily be seen to be much more limited. The communicative use of physical public spaces -- such as streets, parks and shopping malls -- public spaces which are not organized by their owners as profitable communications media -- rests in the public domain, available with relative ease to most kinds of spontaneous civic use. But expressive use of the mediated arena of mass communication for public discourse and debate tends to be a discretionary service in capitalist societies. It is usually privately controlled and available only to selected clients, even when it utilizes publicly-owned resources such as radio frequencies. Moreover, in the mass media this is a background issue, a secondary inflection of 'free speech', while the foreground conflicts are centred on questions of citizens' rights to receive particular views, programs, formats and channels. Thus, as C. Wright Mills has observed (4) the vast expansion of communicative resources in this century may have generated a reduction in opportunities for citizen participation in public debate relative to the available means.

⁴ C. Wright Mills, The Power Elite, N.Y.: Oxford University Press, 1956, Chapter 13.

This new 'enclosure of the commons', like that in 17th-century England, has been legitimated and enforced after the fact by the institutions of the state. As in that earlier enclosure this one follows upon changes in the scale and organization of trade and production, and the needs of market producers for control of relevant resources. But unlike the earlier privatization of communal agricultural resources, the realization of commercial value from mass public communication opportunities became the dominant cultural practice before any extensive tradition of communal use of these resources could be established (5).

Given this commercial tradition of controlled access to mediated communication (and in this respect the tradition within liberalism of state participation in control of the media is unexceptional) we might say that the relationships which obtain between speakers and listeners in the mass media are in a sense modes of public interaction 'indigenous' and 'natural' to a developed commercial culture. It is of course upon these relationships that the realization of commercial (or political) advantage depends. Critical media analyses of various aspects of these relationships (6) yield an aggregate picture

⁵ Raymond Williams makes the same observation on other grounds in Television, Technology and Cultural Form, N.Y.: Schocken Books, 1975. William Meckling, however, considers that broadcasting frequencies are still managed in "the same manner as the commons were on feudal estates in the Middle Ages": Meckling, "Management of the Frequency Spectrum", 1 Washington University Law Review 26 [1968].

⁶ There are a large number of studies relevant to one or another aspect of the relational structure of mass media. Good examples include: David L. Altheide, Creating Reality: How TV News Distorts Events, London: Sage, 1976; Debra Clarke, "Second-Hand News: Production and Reproduction at a Major Ontario Television Studio", in Communication Studies in Canada, Liora Salter, Ed., 20; Peter Dreier, "Capitalists v. the media: an analysis of an ideological mobilization among business leaders", in Media, Culture and Society 4, #2, 1982, 111; Todd Gitlin, The Whole World is Watching, Berkeley: University of California Press, 1980; John Hartley, Understanding News, London: Methuen, 1982; Armand Mattelart, "For a Class and Group Analysis of Popular Communication Practises", in Communication and Class Struggle, Vol. 2, Armand Mattelart and Seth Siegelau, Eds., N.Y.: International General, 1983, 17.

which might be summarized as follows: they are characterized on the media side by the communicative dominance of aggrandized personalities through a hierarchical structure of professional specialization, private control and exclusionary access; and on the audience side by the communicative subordination of a statistical field of unseen, separated, serially quantized 'receptors'.

If we examine the relevant American caselaw it becomes evident that the allocation of speech rights in the mass media is not designed to correct -- or even acknowledge -- this communicative imbalance. I analyze this state of affairs later in the thesis through a review of the political and social purposes of free speech guarantees as articulated in liberal political philosophy and jurisprudence, a survey of the actual allocation of expressive rights in the mass media in U.S. constitutional discourse, and a critically-informed assessment of the adequacy of these allocative practices to their stated purposes.

In conducting this study I was unable to find any complete or adequate judicial rationale for the anomalous and widespread exclusionary access so characteristic of public mass communication in the paradigm instance of the United States. On the contrary, the **common** doctrinal grounds for the adjudication of First Amendment conflicts in both direct and mediated communication contexts are frequently asserted by the highest courts. As I understand it, the courts imply that citizens' lack of expressive rights in the media carries out the same First Amendment purposes for which they are granted such rights in face-to-face encounters. The most important First Amendment doctrine is the linkage between authentic self-government and unconstrained freedom of expression in the public arena, and this principle is unfailingly rehearsed in the judicial discourse in decisions in both contexts.

Vestigial arguments do arise in the caselaw which point vaguely at the technical characteristics of mass communications as the explanation of these anomalies. For example, in commenting on the FCC's 'Fairness Doctrine' requirements in a 1969 case the U.S. Supreme Court noted that "there are substantially more individuals who want to broadcast than there are frequencies to allocate". (7) But arguments based on technological capacity are as frequently contradicted in these decisions. I will indicate areas of contradiction and ambiguity on the topic in these texts.

More frequent, and certainly closer to the mark, are those holdings which find private property rights implicated in the different results in the two contexts. This is the locus of most speech rights conflicts in both mediated and direct interaction. The very first Supreme Court judgement under the First Amendment, the 1895 Davis decision, (8) affirmed with unusual clarity the priority of property rights under the Fifth and Fourteenth Amendments over First Amendment rights.

But it would be a clumsy jurisprudence indeed which regularly found that media owners' property rights have an unqualified and absolute priority over citizens' rights to opportunities for political expression. Instead, as I will demonstrate, jurists generally perform a much more accomplished rhetorical feat: they find that the priority of property rights in the context of mass communication is the unfettered right of all citizens to freedom of expression. They similarly find that the expressive requirements of democracy necessitate these holdings. The private media themselves find the

⁷ Red Lion Broadcasting v. Federal Communications Commission, 395 U.S. 367 [1969]; see Chapter Five.

⁸ Commonwealth v. Davis, 162 Mass. 510 [1895]; see Chapter Four.

constitutional doctrines to be fairly bursting with moral force, and frequently drape themselves in the provided mantle of expressive freedom, striking the pose of democracy incarnate. To critique this ranking and allocation of rights is therefore to inquire into the manner in which the rights of citizens in the audience are represented in the constitutional discourse.

A NOTE ON THEORY AND METHOD:

Free speech rights are understood in democratic theory to be essential to the maintenance of an informed citizenry, and to distinguish tyranny from self-government in a significant manner. In liberal democratic jurisprudence all citizens are guaranteed equal rights. These are simultaneously political and legal propositions. But such general and fundamental purposes and broad entitlements stand in contrast with the detail, precision and specialization which characterize the practices and products of the institutions of law.

Legal practitioners conceive of law as an institutional mechanism for the control of social relations through an internally logical structure of procedural and preceptive doctrine, impartially applied to verifiable facts. The profound human ramifications of legal procedures and the importance of testable evidence, logic and impartiality in its established practices require legal practitioners to draw narrow conclusions and to be careful 'not to read beyond the four corners of the page'.

Social theorists analyze law as itself a social phenomenon linked to and capable of revealing much about other social processes and structures. In a social analysis of law it is necessary to read well beyond the page, and to subject the controlled elegance of jurisprudence to the more uncertain -- but more inclusive -- frameworks of social theorizing. This is not to say that evidence, logic and impartiality are irrelevant to social enquiry, but simply that they are subject both to more reflexive conditions of enquiry and to more broadly interpretive goals. Effective legal analysis is governed and certified by rules internal to the legal system; the social analysis of law enjoys no such methodological certitude.

This study shares the latter orientation and makes no claim to be a legal analysis. Rather, through a review of some relevant approaches in political theory and an examination of textual and historical features of selected caselaw, it offers a (provisional) view of the functional relations between the institutions of commercial mass communication and the institutions of law and the state. And because it examines the texts which define mass communication in the law, it also describes some of the fundamental conditions of political knowledge and action for citizens in a developed market polity.

The questions raised about freedom of expression in the mass media in the following pages derive from two traditions of social analysis. To enquire into the purposes and uses of speech rights -- the basis of their social value -- and to ask how they are produced and how they are distributed, is to raise questions of political-economy. And to focus on the relation between human utterance and human agency -- on the ways in which we use our expressive powers to structure the social world and to influence other

actors in that world -- is to raise questions of ideology. In this thesis these concerns meet in the problematization of the audience's speech rights in the mass media (9).

'Freedom of expression' is a central notion in the regime of rights and freedoms guaranteed in many jurisdictions: the Canadian and U.S. constitutions, state or provincial codes in both these countries, and the European Convention of the Common Market signatories all make prominent mention of such rights. Article 19 of the Universal Declaration of the United Nations likewise guarantees 'free speech' as a universal human right. In all of these jurisdictions, court cases in which 'free speech rights' are invoked are the source of authoritative judicial enunciation of the political, social and economic dimensions of communications processes. Political and economic themes in the study of communication are densely interwoven in the body of American legal texts considered in the succeeding chapters of this thesis (as the opening quotes illustrate). This study's concern with the political-economy of speech rights is advanced by disaggregating these themes and showing how they are employed in the legal discourse.

My other concern -- with questions of ideology -- is advanced by tracing the representation of actors and interests in the judicial discourse. Conflicting claims to

⁹ I do not intend a facile distinction between these approaches, but propose rather to treat them as adjacent and overlapping 'layers' of interpretation. A 'political economy of speech rights' confers the important virtues of historical specificity and concrete location on the overall analysis. At the same time a pure political economy cannot help but find objective structures and processes correlative to its defined object, and the very concreteness of the structures thus discovered may too easily overwhelm the practical intent to comprehend how they might be transformed. The critique of political economy -- the study of ideology -- reasserts the (partial, dialectical) agency of the human subjects from whose activities these discovered structures are precipitated. Its task is to reveal the hidden conceptual frameworks linking the structures of particular institutions and practices to the interests of particular actors. The actors whose interests I have chosen to place in the center of my analysis are those I take to be the most general (or, in Hegelian terms, most 'totalized') in this context: the interests of the audiences of the mass media.

speech rights or regulatory powers, consonant with the different interests of the actors involved, are adjudicated in the courts by a process of textual interpretation: the meanings imbedded in testimony, statutes and legislative documents, academic and professional studies, and most importantly, other caselaw decisions, must be weighed and evaluated by jurists, and this is their special skill. These texts are frequently contradictory in their representation of actors and interests. The interpretive efforts of jurists, however, have a literary authority which far surpasses that of any other analyst, in that they command enforcement by the police power of the state. To make constitutional law is to both enunciate and to enforce a political philosophy. The representation of different social actors and interests in the courts' discourse is a part of the effective determination of their real social power.

The appellants in the cases I select for discussion include: the owners and editors of publishing and broadcasting firms; their actual and prospective advertiser-clients; government departments and quasi-judicial regulators; and readers, listeners and viewers of the media. Cases involving individual citizen-appellants in direct, unmediated contexts of speech rights dispute are also described for comparative purposes. Both the theoretical and case-study chapters which follow attend primarily to 1) the accommodation of these different interests in the judicial discourse; and 2) the discursive strategies by which conforming definitions of these different interests are produced -- as 'justice' -- by the courts.

It would be intellectually gratifying, and far easier, if questions of political-economy and questions of ideology -- of 'base' and 'superstructure' -- could be neatly separated and separately addressed here. But mass communication is in fact a prime example of an area of inquiry in which both concerns must be held in mind at the same time. The

point of connection between these concerns is power, and especially the multiplication of power: in these materials we have an opportunity to look at the 'overdetermination' (10) of social structure resulting from the confluence of economic and discursive power.

Economic power is a fairly well-understood category, but what is meant here by 'discursive power'? To say that communication is an interactional, or 'dialogical' phenomenon -- that it requires the activity of more than one participant -- is a potentially redundant assertion. But it is possibly less obvious that communicative 'freedom' is a feature of the structure of that interaction. Communication exhibits the property of 'freedom' to the degree that interlocutors may participate in defining and employing the rules of 'standing', turn-taking, and other procedures (including, for example, the control of speech which injures other participants) governing their communicative interaction. (This approach to defining 'free speech' will appear in the juridical discourse itself under the rubric of the 'structural' (or 'affirmative') model of the First Amendment - see chapter Four.) Not only as a formal element of a particular political system, but also as a general description of the allocation of communicative

¹⁰ Louis Althusser (Lenin and Philosophy and Other Essays, London: New Left Books, 1977) borrows this notion from Freud for his structural-marxist account of the mechanisms by which apparently subjective action is called forth and determined in economic ("in the last instance") processes. Freud used the term to describe certain features of the mechanism of dreams; the two most important of these, to Freud, were 'condensation' and 'displacement'. 'Condensation' refers to the plurality of latent elements gathered into any manifest dream element; 'displacement' refers to the process by which manifest elements come to 'stand in' for latent elements by a chain of associations. 'Overdetermination' accounts for the numinous quality of dream images through the multiplication of meanings: it is both the direct condensation of several latent elements in a single manifest dream image, and the indirect displacement of additional latent elements by their secondary condensation through the elements of their chains of association. See Sigmund Freud, The Interpretation of Dreams, Vol. 4, Standard Edition of the Complete Psychological Works of Sigmund Freud (24 Vols.), London: Hogarth Press, 1953-74. While 'overdetermination' is a useful notion in considering structures per se, I do not subscribe fully to the structuralist view, as should be apparent from the balance of the discussion.

power, 'free speech' is consequently understood throughout this study as a fundamental political notion. The justices amply and kindly support this view.

In speech act theories human utterances are commonly understood, in addition to their representational and expressive functions, as instruments in the negotiation of social power. Steven Lukes' three-level model (11) is apposite for consideration of the relation between speech and power. Lukes proposes that we distinguish between:

- 1) the power to cause an event to take place (for example, a judge's order to a bailiff to remove an unruly defendant from the courtroom);
- 2) the power to prevent an action taking place (the same judge's imposition of a ban on media publication of the trial's progress);
- 3) the power to authoritatively define the situation -- to produce the definitions which other social actors must employ to understand the situation in which they act (as when the judge rules on whether a particular line of argument or examination will be permitted).

Alone among these levels of power, the third -- the most invisible and pervasive -- always and necessarily takes the form of a symbolic action; this is not true for the first two. Jurists' texts and utterances may mobilize, in symbolic form, all three levels of power at once; but because of their normative function they are always examples of the third level of power.

¹¹ Stephen Lukes, Power: A Radical View, London: MacMillan, 1974.

It is in treating questions of language and power and their relationship that the notion of ideology is most clearly invoked. John Thompson (12) asserts that the analysis and critique of asymmetrical relations of social power, and the attempt to comprehend the manner in which such relations structure human action and contribute to its unintended outcomes, are fundamental (and frequently absent) terms in the study of ideology. He therefore defines ideology as "the ways in which meaning serves to sustain relations of domination" (13). This is the definition of ideology I propose to use in this study, with a friendly amendment to "sustain or contest", since the understanding of actors subject to domination is not epistemologically privileged in any obvious way. Concordance of belief, intention, action, and outcome may be the desired product of an altered social order; but better knowledge of the social world is often the promise, rather than the accomplished fact, of struggles against domination.

Thompson articulates the commitments of this 'interpretive' (or 'hermeneutic') approach to political discourse when he invokes

the deep and ineliminable link between theory and practice in that sphere of social inquiry where subjects capable of action and reflection are among the objects of investigation. (14)

Many studies of the subjective dimensions of mass communications analyze the actual activities and attitudes of audience members in their uses of mediated messages'

¹² John B. Thompson, Studies in the Theory of Ideology, Berkeley: University of California Press, 1984.

¹³ Ibid; 130 and passim. Among the dozens of working definitions of ideology of which I am aware, I believe Thompson's is the most alive to the necessity of accounting simultaneously for the symbolic agency of human actors and for the historical limit conditions imposed by the social structures they thereby produce. His is therefore a political definition, that is, a definition uniquely suited to the study of social power.

¹⁴ Ibid; 145.

(15). But this present study aims at revealing the interactional structure of mass-mediated communication by analysis of the corresponding legal structure of mass media 'free speech rights'. The notions of 'speech' (or 'communication'), and of speech 'freedom' have been animated in a preliminary way: communication is interactive; communicative freedom is a feature of the structure of interaction. But the notion of 'rights', upon which the relevance of a legal approach to these concerns is predicated, is still innocently sleeping. I propose to let it slumber awhile, and in fact to try to enter its dreams, in order to demonstrate that liberal jurisprudence is an originating site of a much wider, populist discourse which sustains relations of communicative domination in the mass media as freedom. The analysis in the following chapters develops the argument that the structure of interaction sanctioned by the courts' discourse misrepresents, 'represses' or effaces significant parts of the audience's communicative interests. It is appropriate therefore to characterize this analysis of the liberal ideology of free speech as a study of the image of the audience as it appears in the discourse of law.

FREE SPEECH IN THE CANADIAN MASS MEDIA

I am (and plan to remain) a Canadian, and I am studying in a Canadian university; the textual analysis undertaken later in this study is rather determinedly focused on U.S. law, and readers shall probably wonder why. The short answer is that this body of legal

¹⁵ for a good example see David Morley, The Nationwide Audience: Structure and Decoding, London: British Film Institute, 1980.

theory is widely accepted in Canadian legal circles as a paradigm for the disposition of expressive rights. Our existing (and self-consciously prudent) common-law tradition in this area will almost certainly be augmented in the course of interpretation of the Canadian Charter of Rights and Freedoms. Influential arguments have been advanced for following the U.S. precedents (16); other commentators see grounds for variation away from them (17), but still expect that such departures from U.S. precedent, in Canadian courts, will have to be carefully justified.

An even more current reason for my focus on U.S. legal discourse has to do with the Free Trade Agreement between Canada and the United States. In recent public debate the likely impact of the deal on the interpretation of our new Charter and Constitution has gone largely unexamined. Most discussion of the impact of Free Trade on our national economy and culture proceeds by modelling its specific effects on various industries. Legal institutions and their activities are not in any literal sense an 'industry' -- the utilities they produce (the various elements of 'justice') are not supposed to be allocated by economic criteria (18) -- but law and legal traditions are a fundamental part of national culture. Constitutional law, especially, is intended to

¹⁶ See e.g. Robert J. Sharpe, "Commercial Expression and the Charter", 37 University of Toronto Law Journal 229 [1987].

¹⁷ See Jerome A. Barron, "Public Access to the Media Under the Charter: An American Appraisal", in The Media, The Courts, And The Charter, Philip Anisman and Allen M. Linden, eds.; Toronto: Carswell, 1986; 177-207.

¹⁸ But see the work of U.S. Judge Richard Posner, whose application of cost-benefit analysis to legal questions is inspired by the 'Chicago School' of laissez-faire economic theory; e.g. his textbook The Economic Analysis of Law. Much of the work of economist R.H. Coase has been devoted to applying the same radical conservative premises in the field of First Amendment law; see e.g. Coase, "Advertising and Free Speech", in Advertising and Free Speech, Allen Hyman and M. Bruce Johnson, Eds., Lexington, Mass.: Lexington Books, 1977, 1-35.

encode an accepted political and moral contract between the state and its citizens as well as allocate areas of jurisdiction among political institutions.

A significant purpose of the Free Trade Agreement is to 'harmonize' policies, regulations and laws affecting commercial activities on both sides of our common border with the U.S. This is a matter of very great importance to firms in both countries who already trade across this political boundary, or are in a position to expand beyond their national markets. In this context of a new Constitution and, possibly, a new set of trade rules, our courts can be expected to look beyond Canadian and other common law precedents and consider U.S. constitutional doctrines in their deliberations on difficult cases -- especially those inflected with commercial significance. How does this apply to the area of mass communications?

The First Amendment to the U.S. Constitution, adopted in 1791, states:

Congress shall make no law... abridging freedom of speech or of the press.

The Canadian Charter of Rights and Freedoms, in force only since 1982, addresses the same topic in these words in Section 2. (b):

Everyone has... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

The Canadian constitutional guarantee has been subjected to judicial interpretation in relatively few decisions; U.S. citizens' communication rights, on the other hand, are addressed in a truly enormous body of caselaw and comment which covers most of the conceivable circumstances of litigation.

When this study was first conceived my research questions included the following: 1) What are the likely directions of doctrinal development in the interpretation of Section 2. (b) of the Canadian Charter? 2) Is there any reason to expect (or way to help bring about) a constitutional right of access to the mass media in Canada? On initial inspection there was relatively little existing speech rights caselaw in Canada (including both pre- and post-Charter decisions). My early findings were that the Canadian decisions diverged from the U.S. tradition in the predictable direction of granting regulatory powers to government agencies a good deal more readily. This tendency is a widely-noted characteristic of both the English- and French-Canadian legal traditions and political cultures.

But as I focused my questions onto mass communications cases, and as more Charter cases were decided, I discovered a new pattern: Canadian courts were citing and following U.S. precedents to produce a body of Canadian mass media decisions which has a marked fidelity to U.S. doctrine. Some examples:

- In the 1986 Irwin Toy case (19), U.S. 'commercial speech' precedents were cited as effective constitutional barriers to the Quebec government's attempt to prohibit TV advertising aimed at children. In other words, with the Canadian courts following U.S. legal doctrine, a Canadian province cannot regulate toy advertising aimed at children on TV.

¹⁹ Irwin Toy Co. v. Attorney-General of Quebec, 32 DLR (4th) 641 [1986].

- In the National Citizens' Coalition case in 1984 (20), an Alberta court found the Canadian government's restrictions on third-party political advertising unconstitutional. While acknowledging the government's argument against the NCC that unequal political advantage would be given to the wealthy by prohibiting the regulation of third-party advertising, the court cited and effectively followed a contrary U.S. precedent (21).

- In Gay Alliance Towards Equality v. Vancouver Sun (22) the Supreme Court overturned the rulings of the B.C. Human Rights Commission and the B.C. Court of Appeal that the Sun must not discriminate against the publication Gay Tide by refusing its classified advertisement for subscribers. This case, decided before the Charter came into force, established that Canadians have no enforceable right to advertise their views in newspapers. Its constitutional force is probably guaranteed by the Canadian Supreme Court's reliance on the U.S. Supreme Court's landmark decision in the Tornillo case (23), which it quoted in the following style:

The choice of material to go into a newspaper, and decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgement.

²⁰ National Citizen's Coalition v. Attorney-General of Canada, 11 DLR (4th) 481 [1984].

²¹ Buckley v. Valeo, 424 U.S. 1 [1976].

²² 97 DLR (3d) 577 [1979].

²³ Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 [1974], quoted 97 DLR (3d) at 590 (emph. added).

Similar reasoning was used by the U.S. Supreme Court in a 1973 decision (24) to deny U.S. citizens a right to buy TV advertising. In Canada, a citizens group attempted in 1976 to discover whether they had a right to buy TV advertising, but their expedition was permanently lost in the fog of CRTC proceedings (25). If such a case did come to court, however, it would be nicely anticipated by the U.S. decision.

Consider: by following U.S. doctrine, the Sun case says the government may not require media outlets to publish an advertisement; and the NCC and Irwin Toy cases say (also following U.S. caselaw) that the government may not prevent the broadcasting or publication of an advertisement. According to the Canadian courts, then, the (mostly private) owners of media outlets are lawful -- and powerful -- regulators of citizen expression. This is consistent with the practical effects of U.S. doctrine, and in the following chapters we will explore the reasoning on which it rests.

Consider further the effect of the 1976 U.S. Supreme Court decision followed in the NCC case. This decision permits unregulated third-party political advertising. As a result, according to many U.S. commentators (26) ordinary citizens in the U.S. have little incentive to participate in the electoral process, and this shows up in their very low election turn-outs. Candidates and elected office-holders pay less and less attention to constituency associations or party policies. Instead and by necessity candidates must try to please private, third-party publicity and advertising clubs ("PACs" -- Political Action Committees) who increasingly compete through the mass media for control of public

²⁴ CBS v. Democratic National Committee, 412 U.S. 94 [1973].

²⁵ CRTC, Seminar: Advocacy Advertising, April 1977.

²⁶ see for example Philip M. Stern, The Best Congress Money Can Buy, New York: Pantheon, 1988; Barry Sussman, What Americans Really Think, New York: Pantheon, 1988.

opinion -- a public who may not themselves speak in the mass media. In my view this process is necrotic for the voluntary democratic institutions of citizenship. Candidates for U.S. political office must answer to those sponsors who can afford -- and to whom the corporate media are willing to grant -- political advertising opportunities.

We can see that the adoption of U.S. constitutional precedents in the speech rights area is no insignificant matter. Because of these developments in the course of Canadian constitutional interpretation I've come to suspect that the Free Trade Agreement will be a strong signal to the courts to abandon, to some degree, the value-premises at the heart of political and cultural difference between Canada and the U.S. I mentioned earlier the traditionally different approach of the Canadian judiciary to the general question of governmental regulatory powers. Another example of cultural difference is the Canadian legal tradition of collective rights (27), and this is a central principle in our language laws. The notion of collective rights is entirely foreign to U.S. constitutional theory (and to U.S. political culture). Closer economic integration with the U.S. will endanger this tradition as it comes into conflict with commercial interests -- and with no reference to the text of the Free Trade Agreement necessary. The seminal decision of the Supreme Court of Canada in December 1988, subordinating French language rights in Quebec (rooted in law since shortly after the conquest) to the advertising powers of commercial litigants, is an excellent example (28). Given that this case was heard some eighteen months before, it is interesting to speculate on why the Court reserved its decision until after the Federal election, and on whether a different election outcome would have produced a different reading of our "fundamental freedoms".

²⁷ Pierre Carignan, "De la notion de droit collectif et de son application en matiere scolaire au Quebec", 18 Themis 1 [1984]; Michael McDonald, "Collective Rights and Tyranny", 56 University of Ottawa Quarterly, 2 [1986].

²⁸ Attorney-General of Quebec v. Chaussures Brown (unreported at this date).

Aside from the issues and cases noted above, a number of current public matters in Canada are affected by constitutional questions regarding communication freedom and regulation. A short list of these would include:

- the new Broadcasting Act nearly passed into force by the last Parliament and likely to be resurrected in some form in the next;
- the tobacco advertising prohibitions in recent Federal legislation, which manufacturers are challenging in the courts;
- the continuing conflict over language laws in Quebec, in other provinces, and federally;
- client solicitation by professionals in several provinces;
- film, video and book censorship;
- the distribution of 'hate literature';
- proposed CRTC open line program regulations, and abuses of that format in New Brunswick and B.C.;
- debate on the freedoms of civil servants with respect to partisan political activities;
- conflicts over labour pickets, boycotts, 'hot-lists' and press-workers' embargoes;
- interpretation of the new Copyright Act;
- the changing regime of transborder data flows under the FTA;
- attempts to regulate the film distribution industry federally, and in Quebec;
- various incidents in which employee freedom of expression has come into conflict with employer claims of intellectual property.

It became apparent to me in considering these issues that to understand the development of Canadian mass communications law in the post-Charter era I had to look closely at U.S. 'free speech' doctrine: the Canadian cases simply do not recapitulate the full doctrinal flowering of the U.S. law by which they tend to be decided. That literature has certainly a commodious potential for many more full-length studies; I have

approached only a portion of it, and with a specialized set of questions. Nevertheless U.S., rather than Canadian speech law has become the topic area of my thesis. My original questions about the development of the Canadian law are therefore not addressed further in the following chapters. I believe, however, that studying these U.S. texts will prove increasingly relevant to students of Canadian cultural and communications policy.

PLAN OF THESIS

In Chapter Two the fundamental principles of liberal political philosophy as they relate to 'freedom of expression' are reviewed. The 'rule of law' -- the legality of the state itself, and the maintenance of an accepted structure of political institutions and rules -- is found to be logically premised, within liberal theory, on an interactional 'free speech principle'. An important element of liberal political philosophy is its imbrication of democratic and market processes. These are formally distinguished in the area of communication, using the conceptual apparatus of liberalism. The 'free speech principle' emerges here as a pivotal point of disaggregation of market and polity: a liberal critique of the commercialization of mass communication then emerges.

The liberal critique is unable to account for the liberal state's own actual production of law. In search of a more adequate explanation of the distribution of speech rights in the mass media Chapter Three reviews critical literatures on law and communication. The first section surveys marxist approaches to the institutions of law in a capitalist state; the second section critically examines the organization of mass communication in the context of market exchange. The economic role of audiences and

the allocation of legal rights in mass communication emerge as key problems in the critical paradigm.

The problems raised by both the liberal and marxist conceptual frameworks can only be laid to rest by an historically specific case study. The textual analyses of legal cases which form the central chapters (chapters Four, Five and Six) may be read as a critical history of the development of citizens' speech rights in U.S. commercial mass communications systems. The distribution of rights is explored through the reported decisions and dissents of U.S. judges in selected mass media free speech cases and comparative cases of direct, face-to-face communication:

Chapter Four examines the context of these decisions set by pre-mass media First Amendment caselaw, reviews some early and fundamental mass media cases and doctrines, and explores cases supporting the 'structural model' of communication enunciated by some justices.

Chapter Five looks at key media access cases, in which the audience's speech rights become the explicit topic of the juridical discourse.

Chapter Six is a study of the audience's speech rights as further developed in recent 'corporate and commercial speech' caselaw.

This brings the caselaw history up to the present.

Chapter Seven, the concluding chapter, reviews the description of interests and the allocation of rights in the liberal discourse on mass communication and justice,

summarizing the instance of speech rights in the mass media as a case in point for a more general critique of rights. Finally, taking advantage of the speculative license of a concluding chapter, an alternative conception of the political role of citizens in the mass media is advanced under the rubric of 'radical pluralism'. It is suggested that no model of social communication employed in communicative rule-making can be value-free: our very definitions of what 'communication' is have unavoidable entailments with respect to the concentration or diffusion of social power.

CHAPTER TWO:

SPEECH, PROPERTY AND THE STATE IN LIBERAL-DEMOCRATIC THEORY

The connection between law and politics is most explicit in constitutional decisions. Here political values are finally brought to bear as the decisive factors in conflicts which have resisted resolution by any and all of the prior technical and bureaucratic instruments the judicial system has available. No-one has any sort of 'right' to have their case heard on its constitutional merits: national supreme courts freely select which cases they will hear, and their decisions are subject to no form of review. In their deliberations on the meaning of a Constitution -- the primary political document of a state -- constitutional courts may even review and overturn the legislated law of elected governments. The legality of a constitutional state and the enforceability of its statutes rest, in theory, on their conformity with the political principles enunciated in the Constitution and developed in court decisions. To rephrase Clausewitz, law is simply politics by other means.

This chapter explores a liberal-democratic framework for thinking about the constitutional discourse on communication and justice. It simultaneously introduces some key concepts used by jurists in their decisions. The four sections which follow in this chapter explore two complementary approaches within liberal political philosophy to the appearance of speech rights in law (1). Each approach is first discussed in abstract

¹ I am indebted in the general lines of reasoning pursued in this chapter to the formulations of Frederick Schauer, whose illuminating treatment of Mill I partially recapitulate; and Philip Soper, whose project of integrating the distinct assumptions of Lockean 'natural' law and Benthamite legal positivism has allowed me to dispense with their separate exegesis. Frederick Schauer, Free Speech: A Philosophical

terms, and then followed by a separate section in which its 'fit' to the structure of speech rights in commercial mass communication is assessed. These two theoretical approaches are:

1) the relation between speech rights and the 'rule of law'. In this approach the basic political interests at play in any instance of communicative rule-making in a pluralist society are expressed in the vocabulary of jurisprudence.

2) the relation between speech rights and 'liberty'. The 'libertarian principle' is a central political idea sustaining market exchange. The 'free speech principle' emerges here as a fulcrum for the conceptual separation of the spheres of market and polity.

The applicability of these two approaches is not necessarily confined to formally democratic polities, but they are applicable especially to varieties of self-government. The chapter may therefore conveniently be read as referring to speech rights in liberal democracies. The terminology and assumptions of liberal political philosophy, with all its mixed metaphysical and utilitarian inflections, has been uncritically adopted in this chapter because it is the anomalous relationship between liberal political theory and liberal legal practice in the area of speech rights which is under consideration here. By comparing theory and practice in this way a liberal critique of the commercialization of mass communication is brought into view.

Enquiry, Cambridge University Press, 1982; Philip Soper, A Theory of Law, Harvard University Press, 1984.

COMMUNICATION AND THE 'RULE OF LAW'

For a Rotinese [inhabitant of the southernmost island in the Indonesian archipelago] the pleasure of life is talk -- not simply an idle chatter that passes time, but the more formal taking of sides in endless dispute, argument, and repartee or the rivalling of one another in eloquent and balanced phrases on ceremonial occasions.

Three hundred years of Dutch records for the island provide an apt chronicle of this attitude towards speaking... If a young administrator could weather the storms of the litigious Rotinese he was due for promotion. The Rotinese, in turn, obliged the Dutch by reviving all old litigation to welcome each incoming administrator.

I was fortunate to arrive on Roti late at night and therefore did not become involved in dispute until early the next morning. (2)

In any political society we can identify kinds of organized behaviour that resemble what we know as 'law'. The adjudication of marital conflict by village council in Bali; the judicial activity of the Indic kings of Thailand in respect to debt, inheritance, theft, quarrels or treason; or the complex certification of various ranks of official character witnesses by the 'sarica' courts of Islam are functionally similar institutions, as Geertz has magisterially demonstrated (3). In all societies the uncountable benefits of agreement and coordinated effort require some forms of normative regulation of conflicts among individuals and groups.

An underlying assumption of the jurisprudence of the advanced capitalist societies is that law is a neutral institutional mechanism of disputes resolution and enforcement

² James J. Fox, "Our Ancestors Spoke in Pairs: Rotinese Views of Language, Dialect and Code", in Explorations in the Ethnography of Speaking, Richard Bauman and Joel Sherzer, Eds., N.Y.: Cambridge University Press, 1973, 65.

³ Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective", in Geertz, Local Knowledge: Further Essays in Interpretive Anthropology, New York: Basic Books, 1983.

whose authority is derived from the most widely shared values of a politically organized society (4). The internal consistency of its various decisions and its willingness to account for their normative basis links a legal apparatus to the social value-system which it functions to sustain⁵. Some source of regulatory authority in resolving social conflict is widely taken as necessary for the ongoing operation of all other organizations in a society, and the institutions of law therefore are accorded legitimacy in the use of coercive force. The normative authority of the institutions of liberal law give them, in fact, their claim to a **monopoly** on licensing the use of overt force.

It is the intention to serve the best interests of society as a whole, rather than any particular or partial interests, that constitutes the authority of law as superior to all other secular authority. It is the claim of legal institutions that they insure the 'rule of law', rather than the rule of particular actors and interests. Law then cannot be defined simply as coercive order (the enforcement of arbitrary rules). History certainly provides examples of the monopolization of state force unaccompanied by any defensible public interest rationale (e.g. Haiti under Duvalier, or Caligula's Rome), but precisely because such governments fail to seek the public interest they fail the test for legality.

The members of such a society may even cooperate with arbitrary rules to avoid coercive sanctions, but if they consent to those rules only to avoid sanctions and without any sense of moral obligation to regulate their own behaviour in accordance with them, those rules do not have the legitimacy and authority of law. 'Law' stands as a separate concept from 'government': governments can be legal or not legal, but legal government

⁴ see for example H.L.A. Hart, The Concept of Law, Oxford: Clarendon Press, 1961; E. Ehrlich, Fundamental Principles of the Sociology of Law, (1936), W.L. Moll, Trans., New York: Arno Press, 1975.

⁵ Hart, *ibid.*

creates moral obligation on its citizens, by means of its pursuit in good faith of the public interest.

It is of course nearly certain that members of any society will disagree frequently about how the 'public interest' is to be served. It may even be possible in some circumstances to demonstrate conclusively that the 'public interest' requirement has not been met. Neither of these eventualities render government illegitimate: there is always the strong possibility of the state committing errors or oversights in its efforts to define and enforce the common good, but if it can demonstrate sincerity in its pursuit of that end its monopolization of force meets the minimum conditions of legality. It is the good faith of the state's actions which establishes the moral obligation of its citizens to respect its laws.

In this formulation law is the antithesis of naked power because, by aiming to serve the welfare of society and all its members, it creates an obligation for citizens to regulate their own behaviour. And it is tautological that in a society ruled by an accepted legal code most people do not encounter the institutions of law -- the police, the prisons and the courts -- with any great frequency. Most citizens regulate their own behaviour with tolerable success, and the legal apparatus is only deployed against the small minority who withhold their consent or deny their obligation to obey the law.

The right of citizens to communicate is a vital element in the foundations of legal authority. Soper (6) suggests that the 'right to discourse' is one of only three 'natural' rights (by which he seems to mean 'rights necessary and sufficient to establish legal

⁶ Soper, 1984 (ibid), 140.

obligation'), alongside security of the person, and equality before the law. There are at least three ways in which speech rights function to secure the rule of law.

First, determination of the 'public interest' (so notoriously difficult to define) is quite clearly furthered by free and open discussion. Without unhindered public discourse the various private interests (of which the 'public interest' is understood in liberal theory, e.g. Bentham, to be the vector sum) may be literally unknowable. If, on the other hand, all citizens know that the frank expression of their opinions is permitted and will not expose them to sanctions, at least some among them will take up the task of analyzing, criticizing and crafting alternatives for any policy proposal.

We have, as J.S. Mill pointed out, no certainty "that the opinion we are endeavouring to stifle is a false opinion...All silencing of opinion is an assumption of infallibility" (7). Protection of opportunities for the introduction and debate of conflicting opinion, on the other hand, is the state's greatest available resource for determining the full range of its policy options.

Second, the state's demonstration of good faith requires, not merely its assertion of sincerity, but its respect for the concomitant good faith of, and potentially corrective influence of, dissenting citizens. This in turn requires the state to provide opportunities for normative challenge and a generally successful normative defense in justification of its policies (or, even more convincing, a willingness to alter its position in response to strong arguments). Such opportunities are the best guarantee of the validity -- or at the least, the plausibility -- of its policy choices.

⁷ John Stuart Mill, "Of the Liberty of Thought and Discussion", On Liberty, London: Oxford University Press, 1971, 24.

Third, the all-important obligation on citizens to respect the law is established by the right to discourse even for those citizens who remain unconvinced of the propriety of the policies subsequently enacted by the state. If no dialogue respecting the public interest and no normative justification by the state of its policies has taken place, dissenting citizens may legitimately conclude that they are not obligated to respect the good faith of government or the legality of its actions. Conversely, if those conditions have been met, the moral autonomy of the citizens's obligation is intact, and her self-respect in conforming to the law's requirements is preserved, even if the outcomes appear erroneous to her, because the process of policy determination has demonstrated the government's good faith. In these circumstances the citizen's dissent from the law and her obligation to it are reconciled without loss of autonomy or self-respect: she can obey, in good conscience, a law to which she is substantively opposed.

To sum up, liberal theory makes a global claim that the right (and opportunity) of citizens to speak freely, and to be heard publicly in their discourse about the public interest, and about the state's actions in regard to the public interest, are necessary to establish the good faith of government and the moral obligation of citizens which together are the hallmark of a legally governed society. The result might well be untidy and cacophonous, as the Dutch administrator found out, but this social cost is arguably good value if it purchases legal government and a law-abiding citizenry.

COMMERCIAL MASS COMMUNICATION AND LEGAL OBLIGATION

The analyses in chapters Five through Seven will flesh out the details of the situation that must be merely outlined here: that is, the structure of speech rights produced by the courts in the U.S. commercial mass media (and in most liberal market polities) appears inconsistent with the abstract principles of political morality and necessity just described. One is hard-pressed to identify any legally sanctioned right of citizenship to speech opportunities in the print or broadcast media for discussion of public policies. The media are certainly the most significant forum of public opinion in the democratic states, and yet persistent challenges by large and broadly supported organizations (such as the Democratic Party in the U.S.) or branches of government (such as U.S. State Legislatures) have failed to secure even narrowly construed forms of access. Demands for paid access have fared no better than demands for free access. At the same time the law has explicitly recognized the right of audiences to receive what private media organizations choose to offer them, largely free of public regulation, and effectively without regard to the 'balance' of views or interests represented. As it stands in the U.S., governments may neither prohibit nor require the private provision of mediated speech opportunities (barring extremely narrow and now apparently invalid broadcast circumstances, detailed in Chapter Five).

The notion of "hearer-centred speech rights" (8) -- the 'right to receive' -- as the appropriate form of the public's right to discourse in the context of mass communication can be criticized on moral and political grounds from within liberal theory. The 'right to receive' privately selected mass media contents without the 'right to reply' to them fails

⁸ Burt Neubourne, Free Speech - Free Markets - Free Choice: An Essay on Commercial Speech, New York: Association of National Advertisers, 1987.

to ensure the state's interests in protecting political speech rights. The core of these interests of the state are related to the generation of policy consensus and political consent, through opportunities for dissent and dialogue. No legal mechanism exists in these interpretations of constitutional communication rights to ensure that dissenting opinion-holders are even representatively sampled, much less given direct access to audiences of other citizens in the mass forum.

This is even more true for the forms of purchased access represented by advertising, than it is for the 'free' access sometimes granted in the editorial contents of mass media. Media firms in Canadian and U.S. jurisdictions are not required to grant any form of citizen access, paid or unpaid (9). Their exemption from access requirements is generally grounded in an extremely vague judicial recognition of their exercise of "journalistic responsibility" and "editorial integrity". Since journalists and editors have no power to publish or broadcast material rejected by their employers (or to refuse material accepted by their employers), this rationale is subordinate to the media owner's

⁹ Only one single and ancient U.S. decision (Uhlman v. Sherman, 22 Ohio N.P., N.S., 225, 31 Ohio Dec. 54) dating from 1919, affirmed only in a single lower court and rejected since then by numerous higher court decisions has found a citizen right of access to the press, and even then not on constitutional grounds. This is the net result of literally hundreds of test cases brought forward in the U.S. on this question. The present author is unable to find even this much authority for access -- paid or unpaid -- to the Canadian press.

In broadcasting the situation is more complex, but the result substantially the same. In the U.S. the FCC's 'Fairness Doctrine' seemed in the early '70's to promise a new era of broadcast access, but the policy has been abdicated by the Commission since then, and the constitutional grounds on which it was originally upheld were not based on an access rationale. See Chapters Five and Six. In Canada, a recent CRTC policy paper on "Balance in programming on community access media" (CRTC Public Notice 88-161, 29 September 1988) gives the tenor of the situation here when it states that although licensees in the Canadian broadcast system are "not obliged to provide time to complainants, a licensee may choose to satisfy the balance requirement by offering a complainant the opportunity to present a differing viewpoint" (ibid, p. 11, *emph. added*). The 'balance requirement' is the only policy on which an access claim could be erected in Canadian broadcasting, and 'community access media' are the only licensees explicitly charged with any citizen access role.

property rights. It does not encode independent 'journalists' rights' superceding or standing as counterclaims to the access claims of citizens. But while news reporting and editorial comment do tend to be selected to portray some range of views on issues of public concern, no such attempted 'balancing' of advertised opinion is visible (although in some disputes broadcasters have preferred to remove existing advertising rather than accept 'counter-advertising' or fight court challenges (10).

This may be attributable in part to the fact that while non-advertising contents are expenses to media firms, selected on the basis of their cost-effective appeal to audiences, advertising is the major revenue source of commercial media, and revenues are only likely to be declined if their acceptance is going to entail other, unacceptable costs. Acceptance of 'counter-advertising' by a media firm, however, would not likely be well received by large, long-term clients. Absent this set of financial constraints, even pure product advertising -- advertising for alcohol or tobacco or children's war toys, for example -- could be 'balanced' by privately-sponsored advertising against those products, if the public interest aspects of their availability were controversial. But a 'right to receive' implies neither a right to dissenting 'counter-speech', nor a responsibility for media firms to 'balance' the claims and propositions made in their advertising or other contents. The print media have no legal obligation to balance their non-advertising content. The balance requirements to which broadcasters are theoretically subject (via administrative law --see Chapter Five) may also be unconstitutional under current doctrine, precisely because they are not predicated on the citizen's right to speak or reply to speech. In any case the U.S. 'balance' regulations have certainly not been enforced in recent years, and as they now stand may be unenforceable, legally and

¹⁰ See Vancouver Sun, "Forests Forever...", 29 October 1988, p. A2; "CBC...", 2 November 1988, p. A1; "Forest Industry...", 3 November 1988, p. A8.

practically. Speech rights predicated on the audience's singular 'right to receive' (but not reply) are therefore inadequate to the state's interest, under the 'rule of law', in protecting speech about matters of public interest.

The fact that these current speech law interpretations are so conveniently correlated to the economic interests of media owners and their advertiser-clients suggests another moral problem with the model of mass media speech rights under discussion. It is clearly in the interests of advertisers that counter-claims about their commercial activities and products be disallowed as far as practicable. But for the liberal state to countenance private determination of the boundaries of public interest debate is to put its own good faith pursuit of the public interest in question. As with the state's own activities, the mere appearance of self-interest in matters of public concern addressed by advertisers and private media owners is sufficiently corrosive of any presumption of good faith (for media owners, for advertisers and for the government, as regulator) to require justificatory opportunities for dialogue.

The 'right to receive' mass media contents is a suspect construction of the audience's speech rights in a final and encompassing way. We have noted that toleration of dissenting opinion and normative justification of state policy are necessary to establish citizen obligation and consent to the law, in liberal theory. But obligation and consent to communications law is a special case in this description of political morality: securing consent to a particular regime of speech rights becomes a fundamental element in the organization of political power, because it simultaneously secures consent to a particular procedure for the legitimation of other policies. The justification of communications policies and laws then requires -- by the rule of law -- an exhaustive and very inclusive heuristic discourse about discourse.

Because the commercial mass media, in the western liberal democracies, are the primary means of organizing and conducting public debate, and because the question of speech rights allocation is one in which the media themselves have a pecuniary interest, the apparent consent of citizens to the current model of speech rights may have only a spurious legitimacy. I would argue that affirmation of the 'right to receive' (without a 'right to reply') grants the private owners of media firms control of public debate about speech rights (and about other policies as well), and leaves them free to construct the very norms by which citizen consent and obligation -- in any area of policy -- are to be justified. This is a good example of Lukes' third category of power, noted earlier (11). It is a largely invisible, but deeply inequitable allocation of political privilege and power to private interests, and therefore inadequately models good faith pursuit of the public interest.

THE FREE SPEECH PRINCIPLE

It has been noted how, in liberal democratic theory, free speech and the state's obligation to maintain the 'rule of law' are connected in a fundamental way. Different provisions in law are derived, however, from different normative rationales for the judgements which uphold them. Liberal democratic theory invokes the 'public interest' as a normative principle fundamental to legal government; we could also say that democratic government relies on an independent principle of self-government, that equal treatment

¹¹ Supra, Introduction.

by courts and police is necessitated by the independent principle of citizen equality, and so on. This section distinguishes the free speech principle from the key principle sustaining commercial activity -- the principle of liberty.

The principle of liberty is the idea that all activities not expressly prohibited are permissible. Furthermore, no regulation or constraint of individual actions which do not occasion demonstrable harm to other individuals or to their interests or the exercise of their rights can legitimately be enacted or permitted by government (12). The freedom to own and enjoy the use of lawfully acquired private property or to enter into private contracts for the exchange of property are justified by appeal to the principle of liberty. The very fact, however, that we distinguish freedom of speech without similarly enumerating all other possible liberties implies that speech liberties have a different rationale from the liberty to own and use private property. The fact that we distinguish speech freedoms from other freedoms means that we think government regulation of speech requires a different method of analysis and/or stronger justification, than government regulation of other activities.

The foremost exponent of the principle of liberty, J.S. Mill, implicitly recognized the distinct character of the free speech principle. His essay On Liberty (13) is largely concerned with demonstrating that only the containment of their effect on others

¹² This notion of a private sphere of action which public authority must protect and refrain from encroaching upon is of course central to liberalism. J.S. Mill (ibid) was a later, utilitarian theorist in the liberal tradition originating with John Locke's anonymous pamphlets on the political philosophy of natural rights in the late 1600's. See John Locke, Second Treatise of Government, (1690), C.B. Macpherson (ed.), Cambridge: Hackett Publishing, 1980, 8-14.

¹³ Mill, 1971 (Ibid).

justifies the state's regulation of individual actions. But in Chapter Two of that work Mill makes a separate argument for speech liberties.

Mill asserts an 'ultimate good' flowing from the exercise of speech liberties, which is found precisely in the effects on one another of individuals' speech acts. The prevention of armed robbery, for example, is a justified constraint on private conduct because of its effects on others. But the suppression of opinion is not a justified constraint on private conduct, despite its effects on others: the effects on others of freely expressed opinion are always desirable. The ultimate good served by speech freedoms is the discovery of truth. "Were an opinion a personal possession of no value except to the owner" states Mill, "it would make some difference whether the injury [of suppression] was inflicted only on a few persons or on many."

But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error. (14)

To Mill the potential adverse effects of speech liberties were, because of the ultimate good they serve, always less serious than the adverse effects of their constraint.

Mill's insight can be stated in contemporary terms that are more amenable to our concern with the constitutional court's theory of mass communication. The free speech principle is distinct from the principle of liberty because speech, in Frederick Schauer's useful terminology (15) is an 'other- regarding' act, which does have an effect on others,

¹⁴ Ibid, p. 23-4.

¹⁵ Schauer, 1982 (ibid).

or at the very least, is intended to. Schauer distinguishes the principle of liberty as applying only to those acts which genuinely do not have demonstrable effects on others - 'self-regarding' acts. Acts which can be shown to be 'other-regarding' are not excused by the principle of liberty from government constraint (16). Because speech acts do have or are intended to have an effect on others, and yet are held to be exempt from government regulation, the normative principle which justifies this state of affairs is a separate and independent principle from the principle of liberty.

I noted earlier that communication is by definition an interactive phenomenon requiring the participation of more than one 'communicator' (17). Communications which have no effect on others cannot really be demonstrated to have taken place: the most we could say about a completely ineffectual communication (a verbal remark addressed to a deaf person whose back was turned, for example) would be that communication was unsuccessfully attempted.

¹⁶ Here is another legal academic's formulation: "The liberal theory of rights and political justice is premised on the belief that individuals possess a pre-political sphere of pure autonomy and freedom that does not depend for its existence upon the state: individuals are independent and complete entities who interact with others out of a grudging necessity to better satisfy their self-regarding wants and preferences. Accordingly, the major function of a liberal charter is to police the boundary that separates the political and the collective from the pre-political and the individual -- to contain the state so as to prevent it from intruding, in its utilitarian zeal, upon the "natural" realm of individual liberty." Allan C. Hutchinson and Andrew Petter, "Private Rights/Public Wrongs", unpublished paper, Osgoode Hall Law School/ University of Victoria, emph. added.

¹⁷ This is axiomatic both in traditional social psychology and in newer systems theory approaches. The former approach, now known as 'symbolic interactionism', has its roots in the pragmatic philosophy of William James and John Dewey and was powerfully developed by George Herbert Mead in the first four decades of this century. See B.N. Meltzer and J.W. Petras, "The Chicago and Iowa Schools of Symbolic Interactionism" in T. Shibutani, (ed.), Human Nature and Collective Behaviour, Englewood Cliffs: Prentice-Hall, 1970, 3-17; Erving Goffman, Frame Analysis, N.Y.: Harper Colophon, 1974. For a systems theory approach see Paul Watzlawick et al., Pragmatics of Human Communication, N.Y.: W.W. Norton, 1967.

Successful communication may also have a harmful effect on others without necessarily being proscribed. For example, a new contender for a well-paid electoral office might truthfully communicate with voters in such a manner as to replace the incumbent, and cause her the loss of income and status. The intent of such communication is to effect others' actions (the voters); the communicative action harms the interests of another (the incumbent office-holder); and yet the principle of free speech, especially as it is used in a liberal democracy, requires the opportunity for such conduct.

While many of the actions which can be justified by the principle of liberty, such as exchanges of private property, involve or require interaction and communication, the part of the activity protected under the principle of liberty is the 'self-regarding' part: the political freedom to exchange property, for example, safeguards the personal acquisition and use of property as unregulated private conduct when it takes place without harmful effect on others. If sufficient harm to others by such an activity can be demonstrated, it may become 'other-regarding' and be legitimately constrained (or monopolized) by the state.

Thus where the principle of liberty demands that we protect certain conduct which does not effect others, the free speech principle in liberal democratic theory requires us to protect certain activities despite their effect on others. The principle of free speech asserts that communication is less subject to regulation than other conduct which effects, or is intended to effect, others' interests. The regulation of speech by government action (and the toleration of speech constraints by government inaction) therefore require different, or stronger, justifications than the regulation of different kinds of 'other-regarding' conduct.

This is not at all to say that speech freedoms are always of higher priority than other rights and freedoms. Questions of how much freedom speech rights confer in particular situations, or of the relationship between free speech and any other values, are separate questions from the independence of the principles on which they rest. The free speech principle may in some cases give rise to very weak rights in comparison to other rights which their exercise may jeopardize. The point here is simply that the free speech principle imposes a distinct restraint on government actions, and triggers unique and valid demands for government protection, independent of the limitations arising from other principles, such as the principle of liberty.

Schauer summarizes the distinctions between 'libertarian' arguments and 'free speech' arguments as follows:

- 1) libertarian arguments do not explain protection of other-regarding conduct.
- 2) rejection of libertarianism does not entail rejection of the free speech principle.
- 3) identification of harm caused by speech is not in itself enough to justify regulation. (18)

In weighing the relative claims of free speech and other social values jurists identify four distinct grounds for the protection of speech rights (19). These are the purposes which must be weighed when speech rights come into conflict with other rights.

¹⁸ Ibid, p. 11-12.

¹⁹ These grounds are frequently cited by both jurists and legal academics, and derive partly from Mill's argument and partly from caselaw. Schauer analyzes them at length, but see also, for example, Sharpe, 1987 (ibid); Neubourne, 1987 (ibid).

The first is the 'argument from truth'. Speech rights are held to further the discovery of true propositions through their protection of opportunities for the expression of all propositions as potentially useful contributions to debate. As Mill observed in the passage quoted earlier, the public expression of both truth and error furthers the process of the discovery of truth, as well as its dissemination and acceptance. The argument from truth assumes the permanent possibility of fallible judgement, and prescribes open debate as the best available corrective.

The second claim which may be made for protecting speech is the 'argument from democracy'. This is not totally separated from the argument from truth, as social 'truths' are usually far from transparent and can at least equally be the product of debate as other desired kinds of knowledge. Thus the often-mentioned linkage between democracy and an informed citizenry -- the reliance of effective self-government on a population equipped with relevant knowledge -- is only one of the services performed by speech rights for democracy. The production of what will count as relevant information in a political conflict is just as much an outcome of the communicative opportunities of a society as is its distribution. And opportunities for knowledge of others' opinions (irrespective of their truth-status), circumstances conducive to development of the fullest range of policy options, and the citizen's obligation to conform to the law created by her opportunity to participate in policy formation (the last two explored earlier in this chapter) are all generated by the protection of speech rights.

The third claim for speech rights protection is the area of closest overlap between the free speech principle and the principle of liberty: the 'argument from self-expression'. Here it is not the other-regarding character of speech acts for which protection is claimed, but the self-regarding interest of speakers in their individual development as creative beings. Where this is extended into a claim for the beneficial

effects of public creativity on individual others or on society generally, it becomes a claim for the protection of an other-regarding activity, but it also ceases to be a pure argument from self-expression and partakes of the justificatory claims of the argument from truth. An individual's interest in pure self-expression does not demonstrably require a public opportunity to speak.

The 'argument from peaceful social change' is the fourth claim for protection of communicative rights. This claim relies on the notion that speech rights give the collectivity of ordinary citizens the potential of exerting a powerful influence on policy choices, and is thus closely related to the argument from democracy. The argument from peaceful social change claims, quite simply, that where the people's desire for change in government policy is sufficiently strong, protected speech, by allowing the strength of these desires to be known and to be effective, may save the polity the experience of otherwise likely or inevitable communal violence.

These four arguments form a very powerful set of potential claims for the protection of speech rights. Considering these arguments, it is perhaps unsurprising that 'free speech' is an idea of such widespread rhetorical force, or that the liberal democratic state would wish at all costs not to appear to violate it. It is perfectly possible to imagine circumstances in which libertarian claims to the private enjoyment of property ought to prevail over speech rights claims -- but it is also quite easy to see how in other circumstances even modest libertarian claims might become justifiably subordinated to these strong and fundamental purposes. The claims might become justifiably subordinated to these strong and fundamental purposes. The next section explores how these separate claims are advanced and ranked in the context of commercial mass communication.

COMMERCIAL MASS COMMUNICATION AND LIBERTY

To understand the existing regime of mass communication speech rights in liberal democratic societies it is necessary to analyze the relation between the free speech principle and the principle of liberty, because it is the latter which is really being invoked by the advocates (advertisers and media firms) of a 'hearer-centred' model of speech freedoms. Their claim -- for the audience member's singular freedom to receive mass media contents -- is a claim for a self-regarding, libertarian freedom. Invoking the free speech principle in the mass media would require a claim for everyone's equal freedom to engage in a protected other-regarding act: the freedom to initiate and reply to mass media contents. But media and advertisers claim that citizens' 'right to receive' (and not to speak) in the media context is protected by the principle of free speech.

The determination of the relative strength of the claims which flow from these different principles in the commercial media context is a subsidiary question. From the preceding section's discussion one could generalize to the following two propositions: 1) property may not be lawfully held or actions undertaken, in at least some circumstances, when they depend on the curtailment of others' speech; 2) speech may in some circumstances be lawful despite its effects or constraints on others' property or actions. A test of some sort would have to be devised to determine when the libertarian claims, and when the free speech claims, were the stronger. Consistent with the principle of liberty, this is not necessary for assigning rights to property whose possession and use may require different curtailments of the activities of others. The consumption of a meal, for example, quite transparently requires the denial of any other person's

consumption of that meal, but the freedom to deny this is precisely what is guaranteed for property owners when only the principle of liberty is applied to the dispute. We can imagine a starving social democrat attempting to apply the principle of equality to this situation in order to claim half of the meal -- and we can surmise that a court would find the claims of liberty overwhelmingly stronger in this situation!

The profitable sale of mass communication opportunities by commercial media firms is different. Making such sales relies on the constitution of audience members as receivers, and not contributing participants in the communicative event (the contribution of audience members as consumers is addressed below). Control of the topic and format, and exemption from requirements to debate their assertions are part of the value of such opportunities to advertisers. Strong grounds for exemption from government regulation of the communicative event also enhances its market value. The propriety of this activity could of course be argued purely on libertarian grounds, with the courts deciding whether or not the principle of liberty which sustained media property-owners' claims was a weaker or a stronger rationale than the actual or potential free speech claims of audience-members. But what media firms argue and, as I hope to demonstrate later, what the courts find compelling in their arguments, is that this organization of commercial communication is required by the free speech principle (and also by the principle of democracy). The liberties connected to the use of private property are not absent from this equation: rather, the protections which flow from the principle of liberty and those which flow from the free speech principle are quietly added together to produce an extraordinary set of legal privileges for the media firm.

Free communicative exchange can be distinguished from the libertarian market exchange of property in another significant and instructive way. Market exchange

entails each party relinquishing one utility in favour of another. (Whether or not the exchange is equal is a separate matter, and is not addressed here.) Two parties who communicate both end up with the information they began with and the information contributed by their interlocutor -- and sometimes with new information neither of them possessed in the first place! -- even if both parties perform this exchange in a market and sell exclusive re-sale rights. Even when one party offers money (and no information) and the other party information, the second party retains the information imparted, and both parties acquire any new information discovered in the process of the transaction.

It is also difficult to imagine how the process of communicating information could legitimately be assigned as property to any one party. The costs of the process arising from the use of privately-owned utilities might of course give rise to legitimate contractual claims against users, but this does not transfer the communication itself to the ownership of the provider of such facilities. (And in fact, exclusionary arrangements for use could give rise to actionable other-regarding harm under the principle of equality.) In other words, no matter what financial transaction accompanies a communication, some part of the communication is not comprehended by its characterization as property.

Protection of whatever legitimate property or self-expressive characteristics speech may display is already given by the principle of liberty. Because it is the (other-regarding) way in which communication differs from (self-regarding) property-oriented activity which is distinguished by the free speech principle, it is logical to presume that it is the non-property or public character of speech which the free speech principle protects. Speech is then 'free' to the extent that its claims for protection -- against

both government and private (but government-protected) constraint -- are upheld over claims made under other principles.

Real situations may call forth justifications based on several independent principles. Thus a particular claim (the freedom of individuals to own and operate television sets in their private homes, say) may be justified primarily as an instance of the principle of liberty, while still being an exercise in the communicative pursuit of a truth. But the convergence of principles in one instance may be succeeded by their opposition in another. Without judging which should take precedence, one can see from the above discussion that commercial mass communication is an instance in which an opposition exists between the claims which flow from these two principles.

The advocates of commercial speech rights in fact firmly equate three notions: advertising (other-regarding speech), free enterprise (self-regarding activity) and democracy (collective self-determination) are all held to have mutually-reinforcing purposes. I have suggested several of the arguments by which liberal democratic theorists hold the free speech principle and the principle of democracy to be fundamentally linked and partially co-extensive. The inclusion of the notion of free enterprise as serving the same purposes is another matter.

A characteristic formulation of the view which links all three of these was given by communications lawyer Burt Neubourne in his recent deposition (on behalf of the Association of National Advertisers) to a U.S. Congressional Committee holding hearings on a bill to regulate tobacco advertising:

"The enjoyment of liberty is the result of...constant respect for the personal autonomy and innate dignity of the individual. The linked experiments in political

democracy and consumer sovereignty that characterize free societies are premised on a leap of faith in the capacity of the individual to assimilate information and to make rational, informed choices." (20)

I will show later how the U.S. Supreme Court echoes lobbyist Neubourne's conflation of democracy and free speech with free enterprise in many of its recent First Amendment texts. In these later discussions we will again encounter the following quote, but consider here just which free speech arguments (for protection against government regulation of pharmaceutical advertising) are mobilized in this 1976 decision (21): "The consumer's interest in the free flow of information" the Court said "may be as keen, if not keener by far, than his interest in the day's most urgent political debate."

Advertising, however tasteless and excessive it may sometimes seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

While these three political principles of free speech, liberty and democracy may indeed be linked in some instances, it was suggested above that the principles of liberty and free speech have no necessary connection -- one may even subscribe firmly to the principle of free speech without any logical entailment regarding the general principle of liberty -- and vice versa. Market liberties and political democracy may similarly be linked in some instances, without either being a necessary precondition of the other. (The contemporary political culture of Chile is a sufficient example of these assertions.)

²⁰ Neubourne, 1987 (ibid), 50.

²¹ Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 [1976].

The logical relation between the democratic and libertarian principles will not be explored further here, except to cite C.B. MacPherson's historical and logical demonstration (22) that liberalism may lead a robust existence without democracy: pluralist values, including both speech freedoms and the franchise, were adopted belatedly and by slow degrees in elite-ruled liberal polities as they became necessary to secure government through the consent of various sectors of the population.

Commercial speech advocates 'discover' the linkage of these three principles by the techniques of analogy and metaphor. Democracy follows from the political choices of citizens, who cast their ballots after receiving political information; and this is analogous to the paradigm instance of liberty, which consists in the market choices of consumers, 'voting' their dollars after receiving commercial information. Democracy is in this view almost a species of market exchange, and the sovereignty of the people a special case of consumer sovereignty (23). 'Democracy', then, is assimilated to a rather passive notion of 'market choice', and 'speech' is of course assimilated to the far more scientific and message-centred notion of 'information'. On simple inspection this model can be seen to rely on a very attenuated version of both democracy and communication: the role of citizens in both activities is conceived in passive, receptive terms, and there is apparently little room for the dissenting question, the civic-minded protest or the engaged debate. The dimensions of the market process in this model, though, have expanded considerably into the space left by a shrunken public sphere.

²² C.B. MacPherson, The Life and Times of Liberal Democracy, Oxford: Oxford University Press, 1977.

²³ see Gary A. Mauser, Political Marketing, New York: Praeger, 1983.

The argument that political freedom of speech is an essential element of democracy is a truism in liberal democratic theory. But in determining the proper weight of the claims of liberty and of free speech, in the high-intensity media environment we face, it is necessary to consider whether the current distribution of speech rights in the mass media advances, or harms, the vital social purposes served by the constitutional guarantee of freedom of expression. I have emphasized that in Canada and the U.S., citizens have no rights to expression in the mass media, either by way of paid advertising, or by way of rights to initiate or reply to non-advertising contents. This is broadly premised on the claimed deleterious effects such infringements of media firms' speech rights would entail. Under the further rubric of the audience's 'right to receive', the control of public discourse is increasingly ceded to private hands. Both access and content regulation of that private power are disallowed under current constitutional interpretation. Affirming the audience's 'right to receive' media communications without a corresponding 'right to reply' to them, further augments both the property rights and the speech rights of media corporations and their clients (by granting them nearly total freedom from citizen intervention in or government regulation of their communications) but does not extend the effective freedom of expression of the broad mass of citizens. It may be more likely to create an increasingly homogeneous and artificially-structured environment of political discourse, and if this is true it is hardly evidence of an effective model of the free speech principle.

In this century the structure of communications processes in our society has changed dramatically. The rise of mass media in their contemporary forms has radically altered the political, cultural and economic landscapes of most societies, and especially the liberal democracies. The mass media have created vast new markets, sources of employment, and incentives for technological innovation. They have also taken up a

number of new and central roles in the arrangements by which we put democracy into action;

- they are the basic, society-wide source of political information;
- they form the major link between citizens and government;
- they share in setting political agenda;
- they make interpretive judgements which have broad authority and persuasive force;
- their judgements are especially influential on political officials, who need the visibility and credibility they can offer. (24)

These political functions of mass communication in a contemporary democracy can be marked off from its function in the market. The audience's interest in the media's commercial functions may accurately be described as its interest as consumers; but this is not their only interest in mass communication, and in some circumstances their political and commercial interests may be entirely divergent. That which is desirable to consumers in a market may, after all, be injurious to the political rights of citizens in a democratic polity. For example, the offering, for money, of favourable judgements by trial judges would damage the rights of all citizens to equal treatment before the law. The illegality of such actions does not lessen the example's force, for it is precisely the legality of removing a different prerogative from the public realm to a sphere of private determination, which is at issue.

The fact that much of our system of mass communication is privately owned does not mean that it has no public role or responsibility beyond disseminating its owners' views of events, or that the mass of private citizens' freedom of expression is best

²⁴ Arthur Siegal, Politics and the Media in Canada, Toronto: McGraw-Hill Ryerson, 1983, 14-16.

guaranteed by placing media firms beyond regulation. It is not legitimate in a democracy to sell utilities such as political influence, and it is a noxious idea that the agenda of democratic institutions and electorates should be governed by non-accountable private interests.

One theme in the discussion of the relevant caselaw in chapters Four through Six will be this question of how the separate claims of speech and of liberty should be weighed in the context of citizen expression. In that discourse one of the few comments on the social consequences of excluding citizens from speaking roles in the mass media was given in U.S. Supreme Court Justice Brennan's eloquent dissent in a 1973 case denying American citizens the right to purchase broadcast advertising (considered in detail in Chapter Five):

The failure to provide adequate means for groups and individuals to bring new issues or ideas to the attention of the public explains, at least to some extent, the development of new media to convey unorthodox, unpopular, and new ideas. Sit-ins and demonstrations testify to...the inability to secure access to the conventional means of reaching and changing public opinion. [By] the bizarre and unsettling nature of his technique, the demonstrator hopes to arrest and divert attention long enough to compel the public to ponder his message. (25)

This is a variant of the argument from peaceful social change. According to Justice Brennan the inequality of public opportunities for expression in the mass media was part of the explanation for the high levels of political confrontation and civil disobedience the Court was then witnessing. Brennan was prepared (more than any of the other Justices) to enlarge the public function of the privately owned media in order to preserve the

²⁵ Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 [1973], Brennan dissenting, note 27.

continuity of legal authority (the 'Rule of Law') and ensure that the legal conditions for peaceful social change were in place.

Brennan found authority in Mill for his view that the law itself, since antiquity, had required citizen access to the public forum of expression as a condition of its own legitimacy. Mill, discussing Roman jurisprudence (in On Liberty), describes Cicero's forensic methods in this way:

Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest and do their very utmost for them. (26)

²⁶ Mill, *ibid*, 47, *emph. added*.

CHAPTER THREE: CRITICAL PERSPECTIVES ON LAW AND COMMUNICATION

The initial equality of natural rights, which consisted in no man's having jurisdiction over another (sic) cannot last after the differentiation of property. In other words, the man without property in things loses that proprietorship of his own person which was the basis of his equal natural rights. Locke insists that disparity in property is **natural**, that is, that it takes place "out of the bounds of society, and without compact". Civil society is established to protect unequal possessions, which have already in the natural state caused unequal rights. In this way Locke has generalized the assumption of a class differential in rights in his own society into an implicit assumption of differential **natural** rights. (1)

Chapter Two examined the liberal-democratic arguments for state protection of citizen expression. It was argued that, although encoding convincing and even noble value premises, these fundamental principles of liberal political philosophy and jurisprudence didn't seem to account for jurists' actual decisions in mass media cases. While the demand that bourgeois law live up to its own principles has a tempting and subversive pedigree, the failure of fact and norm to coincide is so systematic in this area that it requires further analysis. Why do citizens in capitalist democracies, with their elaborate communicative infrastructures, not have the discursive rights necessary -- by liberal theory -- to effective self-government?

Critical perspectives on liberal-democratic social formations (including especially marxist and neo-marxist approaches) substitute historical analysis of the organizations of civil society and the state for the ahistorical -- and thus formally idealist -- assumptions

¹ C.B. MacPherson, "The Social Bearings of Locke's Political Theory", in Judith N. Shklar, Ed., Political Theory and Ideology, London: MacMillan, 1966, 71.

of liberal political theory. Such approaches have in common a functional analysis of the role of economic (or allocative) relations and practices in the determination of cultural and political relations and practices. Of course, both the state institutions of law and the civil institutions of communication contain both allocative and ideological practices, and the analysis of the structure, function and interaction of these institutions is consequently replete with complexity and tension.

The organization of this chapter is similar to the last: first a summary of the necessary abstractions of legal theory (necessarily abstract because the state itself, in both liberal and marxist theory, is an abstraction from the primary relations of civil organization); then a look at the concrete historical forces which, Marxist writers argue, have shaped commercial communications organizations and practices. The arguments summarized in the first section of this chapter -- all historical materialist positions -- critique the jurisprudence of a capitalist social formation, and explore its relation to the system of commodity exchange. The second section reviews some critical perspectives on the specific property and exchange relations obtaining in the mass media sector.

In critical theories of law, rights -- in the present case, speech rights -- are conferred on 'legal persons' by the state and not by 'natural justice'. The common claim of these approaches is that the pattern by which rights are distributed is better explained by reference to innovations in commodity production and concomitant changes in property relations and class power than by considerations of moral claim. A critique of the liberal notion of 'rights' is thus initiated here (and revisited in the concluding chapter). In a sense the example of mass media speech rights serves simply as a contemporary case in point for this general critique of rights. But this is a signally important case because, as noted in Chapter Two, rule-making about communications

processes plays a central role in producing the rules and norms by which other policies are decided.

Capitalist legal ideology, following Althusser (2) is understood in the discussion which follows as arising in conjunction with, and as formally structured by the allocative practices of the capitalist mode of production. But in distinction from Althusser (and following Plamenatz (3)) the argument is aired that legal ideology is a discursive structure which is also prerequisite to the capitalist mode of economic production, rather than only a post facto form of appearance of it. This is consonant with Marx's account of the development of the capitalist mode of production:

Bourgeois society is the most developed and the most complex historic organization of production. The categories which express its relations, the comprehension of its structure, thereby also allow insights into the structure and the relations of production of all the social formations out of whose ruins and elements it built itself up, whose partly still unconquered remnants are carried along with it, whose mere nuances have developed explicit significance within it. (4)

Notwithstanding the materialist critique, the normative flavour of liberal legal discourse on 'rights' must be seen as central to its ability to effect obligation on and consent from citizens: the moral pronouncements of jurists resonate with social power because they unite tradition and current practice. Dissident individuals confront a system in which ethical norm, economic interest and coercive force are powerfully unified through the mutual accommodations of state and market. In this context such individuals have every incentive to question and redefine their own values in conformity with it.

² Louis Althusser, "Ideology and Ideological State Apparatuses", Lenin and Philosophy and Other Essays, London: New Left Books, 1977.

³ J. Plamenatz, Man and Society, Vol. 2, London: Longman, 1963, 274-93.

⁴ Karl Marx, Grundrisse, Harmondsworth: Penguin, 1973, 104-5.

But full acquiescence to capitalist relations then requires -- one could almost say 'legally requires' -- that social actors understand their unequal economic relations as just, and therefore the allocative function of liberal law is in permanent tension and contradiction with its ideological function. Its ideological function is to secure consent to (or the recognition of justice in) capitalist property relations; its allocative function is to continually redefine those relations in conformity with the developing requirements of the capitalist economy as a whole. This conflict is expressed in the critical literature on law as a debate between 'economic determinist' and 'class instrumentalist' positions.

An identical tension between economic and political functions is played out in the institutions of mass communication. The second section of this Chapter begins with a brief examination of the historical development of the mass media themselves, addressing the conditions of development of media firms in exchange-oriented markets and focussing on their role in linking production and consumption: their distributive function. This is followed by a more extended review of some recent and relevant exchanges between marxist researchers in the political-economy of mass communication. Known as the 'Blindspot Debate', these contributions raise in explicit form in the context of commercial communication the difficult questions of political legitimation, class power, and the allocation of rights already uncovered in the discussion of critical perspectives on the law.

LAW, CIVIL SOCIETY, AND THE RELATIONS OF PRODUCTION

The aim [of the State] is always that of...adapting the 'civilization' and the morality of the broadest popular masses to the necessities of the continuous development of the economic apparatus of production...But how will each single individual succeed in incorporating himself into the collective man (sic), and how will educative pressure be applied to single individuals so as to obtain their consent and their collaboration, turning necessity and coercion into 'freedom'? (5)

Marx and Engels: Law as a Reflection of the Relations of Production

For Marx, it was the destruction of feudal European society with its various 'estates' -- each with its own economic and political role and characteristic internal rules of obligation, ownership, succession, etc. -- that gave rise to 'civil society', with its emphasis on the individual and its radically new conception of individual, privately transferable property. In this atomized social environment the law was thought by Marx to provide the major link between the individual and the community, to secure the coherent functioning of the emerging urban market, and to remove and abstract the institutions of the state ('political society') from responsibility for the conflict and immiseration generated by capitalist relations of production. (6)

Marx and Engels described the institutions of law as fully within the ideological 'superstructure' of a social formation, a 'reflection' of the 'real' relationships between

⁵ Antonio Gramsci, Prison Notebooks, Quintin Hoare & Geoffrey Nowell Smith (Trans.), N.Y.: International, 1971, 242.

⁶ See Karl Marx and Friedrich Engels, "The Relation of State and Law to Property", in The German Ideology, Marx and Engels Collected Works, Vol. 5, London: Lawrence and Wishart, 1975, 89. See also Karl Marx, "Preface", to A Contribution to the Critique of Political Economy, London: Lawrence and Wishart, 1971.

people which obtained and were given their form in economic production. The feudal mode of production, for example, was seen as 'organically' linked to (or 'giving rise to') its characteristically local, informal and customary rules of tenure, inheritance, and obligation. This was contrasted with the capitalist mode of production, in which the bonds of communal tradition, first at work, later in the family, are broken and replaced by the relations of atomized individuals to impersonal and 'neutral' mechanisms of state and market, and are 'reflected' in law in a vast panoply of legal rules and codes and an elaboration of professional roles and specialized courts and other institutional structures (notably the public prisons and police).

Marx' and Engels' writings on law were ambiguous on such questions as whether there could also be reciprocal effects of the 'superstructure' on the 'base'; of how direct and hydraulic -- or indirect and 'relatively autonomous' -- the mode of production's determination of the law might be; or of whether 'uneven development' as between different areas of law and economy was possible and what its effects might be (7). But both in their early and their later writings they strongly asserted the primary causal force of productive relations on legal and political practices. This view is clearly stated in a well-known passage from one of Marx' relatively later (1859) works:

In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of the material life conditions the general process of social,

⁷ For an extended study of the Marx-Engels texts on these questions see Paul Phillips, Marx and Engels on Law and Laws, Oxford, Martin Robertson, 1980. Phillips shows that in their explicit writings on law Marx and Engels were more forceful in asserting an 'economic determinist' argument than in some of their other writings. This ambiguity is visible, for example, in the quote from Grundrisse on p. 74 above.

political and intellectual life. It is not the consciousness of men that determines their existence but their social existence that determines their consciousness... [C]hanges in the economic foundation lead sooner or later to the transformation of the whole immense superstructure. In studying such transformations it is always necessary to distinguish between material transformation of the economic conditions of production, which can be determined with the precision of natural science, and the legal, political, religious, artistic or philosophic -- in short, ideological forms in which men become conscious of this conflict and fight it out. (8)

Collins (9) points out three conceptual problems in the economic determinist theory of law:

1. - it offers "no analysis of the relation between law and other social institutions -- all parts of the superstructure are characterized as a direct reflection of the mode of production";
2. - it contains "no explanation of why law is needed to express the relations of production."
3. - "The role of law in controlling relations outside the processes of production is not addressed." There is no "detailed explanation of the mechanisms by which social practices are transformed into legal systems... Crude materialist theories of law aim to demonstrate that there are constraints of functional compatibility or correspondence between legal rules and modes of production. In this task they are

⁸ Marx, A Contribution to the Critique of Political Economy, *ibid*, 20-1.

⁹ Hugh Collins, Marxism and Law, Oxford: Oxford University Press, 1984, 23-4.

moderately successful as long as their account is restricted to laws intimately bound up in the relations of production." (10)

And a "deeper problem" in 'crude materialist' theories of law, for Collins, is that they contain no explanation of "how conscious action is determined by the material base." (11)

Lenin and Class Instrumentalism

The 2nd generation of marxist theorists, most notably Lenin, focused on the class character of the state and of the legal apparatus. The function of the law was seen as identical to the function of the state: the suppression of subordinate class interests by the ruling class. Conflicts between the interests in a class-divided society, seen as inevitable by marxists, raised the problem of explaining the stability of the social order and the relative infrequency with which these structural conflicts of class interest were internally resolved by directly coercive measures. The 'class instrumentalist' view understood law as a consciously employed tool for the domination of society by that group -- the 'ruling class' -- who occupy a privileged place in the relations of production: the ownership of the means of production. 'Class instrumentalism' postulated that, rather than some unexplained, unconscious and 'organic' link between the relations of economic production and the ideational forms produced in other social institutions, the

¹⁰ On this point see also Phillips, *ibid*, 187-99.

¹¹ Collins, 1984 (*ibid*), 25.

members of the ruling class used -- and had to use -- the surplus of wealth and power which accrued from their privileged place in the relations of production to secure political control over other social classes. "In short, the economic base determines the legal superstructure, not instantaneously and mechanically, but through a process of class rule in which the participants further their interests through the legal system." (12)

This mode of explanation, sometimes under the rubric of 'conflict theory', has attracted much support among modern marxist theorists of law. In its more forceful variants it asserts that law always serves the direct and planned interests of the ruling class, is always therefore a coercive institution whose function is the suppression of other social classes, and is effective because it is backed up by the more overt coercion of military force. This version of marxist theory on law provided a much more direct route for criticism of liberal theories of law. In these, as I have noted in the last chapter, the authority of law is supposed to derive from its disinterested and neutral adjudication of a system of rules which apply equally and fairly to all, and which proceeds from the recognition of a set of original and ahistorical personal rights vested in every (legally recognized) individual. Class instrumentalism contests this view of law by insisting that the evocation of equal and individual rights simply preserves the existing relations of production, privileges of wealth and power, and class structure of society through a set of ancillary social institutions whose claim to independence from ruling class control is wholly specious. (It also concentrates wonderfully the attention of jurists on the cogency of governments' claimed needs for legal sanctions against revolutionary speech.)

¹² Collins, *ibid*, 29.

Collins (13) finds that the class instrumentalist view offers solutions to the three problems he found in the economic reductionist model. First, "it supplies a description of the links between different parts of the superstructure... [by] securing the interests of the ruling class [along with] the state and the military forces." "Second, there is a clear view of the functions of law in terms of coercion to back up rules which serve the interests of the dominant class."

Finally...the mechanism linking the material base with the legal superstructure is pinpointed. The determining force of the relations of production upon the conscious acts of legislation is provided theoretically by the concept of a social class. If it is historically true that the dominant social class, that is a group in a special position in the relations of production, has always pursued its interest by using the legal process instrumentally, then it follows that the material base does indirectly determine the content of law. (14)

Two substantial problems remain. If class instrumentalists assert that the laws which are enacted are those which advance the interests of the dominant class, are they implying that members of the dominant class are all more or less perfectly prescient and in agreement about what measures best serve their long-term interests, as defined by historical materialism? If so, how did they acquire this absolute knowledge and collective unity of intention (especially given their traditional hostility to marxist accounts of the dynamics of class-divided societies)? Or, equally problematic, are they merely asserting that the laws enacted by the dominant class serve their perceived self-interest? If so, could accumulated misapprehension of their 'real' interests lead to a system of legal rules which were poorly articulated to their base of privilege in the relations of economic production, and even undermined this privileged position? Or is

¹³ Ibid, 30.

¹⁴ Ibid.

some other, invisible mechanism of equilibration of 'base' and 'superstructure' active here?

Secondly, there is the great difficulty of defining the relations of production without resort to the notion of law:

The crucial process of the extraction of surplus value from labour could not occur without a reliable framework of rules similar to the contract of employment... There is the problem of defining the relations of production so that they do not include significant elements of the superstructure... It is impossible to maintain that the material base determines the form and content of the legal superstructure when the material base is itself composed of law. (15)

Both of these caveats about the class instrumentalist view of law raise again the problem of consciousness: in the first case the question 'How does the ruling class know how to rule?'; in the second case, 'How is law, as an ideological practice, to be accounted for within the relations of economic production?'

Gramsci and Class Struggle in the Superstructure

Gramsci, often described as the seminal marxist "theorist of the superstructure", had a lively appreciation of the role of the institutions of law and politics (and of schools,

¹⁵ Ibid, 33-4. The same thing can of course be said of other 'superstructural' institutions: public educational institutions, for example, prepare the labour force to perform the tasks demanded by employers, and stream individuals into the training their class roles will require. Can the relations of production be defined so as to exclude this practical formation of productive labour?

press, party, church, and the other 'superstructural' institutions) in the continuing development of the productive forces in a capitalist system. Gramsci's strategies for revolutionary change (he was an early leader of the Italian CP) focused on ideological struggle in, and working-class domination of the 'superstructural' institutions of civil society. It is worth noting that his use of the term 'civil society' was different from Marx' in inferring not only the private and non-state sphere of relations, but also the possibility in that sphere of developing non-alienated, self-regulating social and political organizations.

Gramsci described law as having two specific and closely-related roles:

Through 'law' the State renders the ruling group homogeneous, and tends to create a social conformism which is useful to the ruling group's line of development. (16)

If every State tends to create and maintain a certain type of civilization and of citizen (and hence of collective life and of individual relations), and to eliminate certain customs and attitudes and to disseminate others, then the Law will be its instrument for this purpose. (17)

For Gramsci the role of law was always an educative one, though this was always a "negative and repressive" education (18). It had only two subjects on its curriculum. The first was the 'elimination of certain customs and attitudes and dissemination of others', that is to say, the suppression of resistance to the expansion of capital into new sectors of commodity exchange, replacing use-value-oriented types of production. The second was the 'creation of social conformism' along lines to which the dominant class can also subscribe, that is, the articulation of a moral justification for the existing

¹⁶ Gramsci, *ibid*, 195.

¹⁷ *Ibid*, 246.

¹⁸ *Ibid*, 258.

relations of production at every stage of development of the capitalist mode of production.

Gramsci's notion of the 'ruling group's' hold on state power and the law was different from Lenin's. In his view the importance in an advanced capitalist polity of winning the consent of the subordinate classes to the further development of market relations rendered the direct rule of the capitalist class ambiguous. Gramsci was not directly challenging Lenin's views, for his analysis was focused on the revolutionary conditions in urbanized, industrialized states. Rather than naked class instrumentalism, he hypothesized that in developed capitalist countries the ruling class ruled -- and enacted its laws -- so as to meet some of the real interests of subordinate classes who had been recruited as allies (e.g. professionals). Retaining overall, long-term control over the direction of a national economy by this method required that the immediate interests of particular dominant class elements must sometimes be sacrificed to the needs (economic or ideological) of the 'hegemonic alliance' or 'bloc'. His revolutionary strategy was to construct and cement a new 'historic bloc' through class struggle within the institutions of the superstructure as a part of, rather than a postscript to, the transformation of capitalist relations of production.

If we refer back to the criticisms that were raised by Collins about Lenin's 'class instrumentalist' view of law we can discern some responses in Gramsci's arguments. In response to the question 'How does the ruling class know how to rule?', he says that the capitalist ruling class' interest is known by the direction of development of market relations. In response to the question of how the relations of production are to be

defined he proposes they are defined in law to include the representation of ruling class interests as moral relations.

In Gramsci's view the entire capitalist social formation is an "ensemble of relations" with complex reciprocal influences between the institutions of base and superstructure, and with a class character rooted in the capitalist mode of production but stabilized and perpetuated by bourgeois dominance of the superstructure. Denial of obligation and consent by a class alliance led by the workers and peasants, and their development of a superstructure which redefines and legitimates new relations of production which better reflect their interests, are the key to the destabilization and overthrow of capitalism. Gramsci concludes that if law did ever manage to express the real interests of the popular classes, it would disappear:

A class claiming to be capable of assimilating the whole of society, and which was at the same time really able to express such a process, would perfect this conception of the State and of law, so as to conceive the end of the State and of law -- rendered useless since they will have exhausted their function and will have been absorbed by civil society. (19)

Cohen's Defense of Determination by the Base

Subsequent marxist theorizing about law and its institutions has continued to focus on questions of 'base and superstructure': are laws 'expressions', ('reflections', etc.) of

¹⁹ Ibid, 260. On this point see also Plamenatz, 1962 (ibid), 351-87.

the relations of capitalist production? Or do legal institutions and practices exert their own determining forces on economic relations? Are laws in fact superstructural, or do they embody rules and norms prerequisite to capitalist production? One point of debate turns upon the analysis of the appearance and recognition in law of new market relations. (This coincides with Gramsci's emphasis on the relation of law to the "line of development" of market relations.) It is apparent that not all commodity exchanges are initially 'legal' but are in the first instance coercive. It is also apparent that many new processes and products give rise to extensive litigation over property rights (20). Does the law's retroactive sanction of new coercive or exploitive economic relations show it to be, after all, a simple 'reflection' of the economic base?

Gerald Cohen gives a strong account of the base/superstructure model (21). Cohen examines the marxist claim that the non-economic institutions of a social formation constitute a 'superstructure' in that they are explicable in function and form by their relationships to the economic 'base'. While leaving aside the question of whether **Ideology** is part of the superstructure, Cohen makes the institutions of law central to his analysis. Cohen studies the treatment of the notion of property rights in Marx's texts. He observes that the particular relations of production of a capitalist mode of production seem, in Marx's account, necessarily to include the legal relations of which property rights are composed.

Cohen postulates that the legal concept of a 'right' is inadequate to the accurate description of productive relations, explaining Marx's own use of the legal terminology of

²⁰ For a telling example in the field of communication property rights see Bernard Edelman, Ownership of the Image, London: Routledge & Kegan Paul, 1979.

²¹ G.A. Cohen, Karl Marx's Theory of History: A Defense, Princeton: Princeton University Press, 1978.

property rights by suggesting that "there was no attractive alternative. Ordinary language lacks a developed apparatus for describing production relations in a rechtsfrei manner." (22) Cohen suggests a substitution of the term 'power' for the term 'right' in describing the relations of production, and further suggests that the coincidence of legal rights with effective power stabilizes productive relations which are often organized in the first instance by coercion. In (and only in) a law-abiding society legal rights may appear to precede production relations: an individual's economic power is effective because it is legal. But the structure of rights in such a society "obtains because it secures a matching structure of [economic] powers". (23) Cohen is thus able to defend the base/superstructure model with respect to the institutions of law by his assertion that "bases need superstructures":

Might without right may be impossible, inefficient, or unstable. Powers over productive forces are a case in point. Their exercise is less secure when it is not legal. So, for efficiency and good order, production relations require the sanction of property relations. Hence men fight, successfully, to change the law so that it will legitimate powers they either have or perceive to be within their grasp, and lawmakers alter the law to relieve actual or potential strain between it and the economy...If production relations require legal expression for stability, it follows that the foundation requires a superstructure. (24)

Cohen examines the appearance of coercive force along the same lines: just as law "can look more fundamental than the economy" (25) so too can coercion appear to underlie the structure of the economy. But both law and coercion function, for Cohen,

22 Ibid, 224.

23 Ibid, 232.

24 Ibid, 231.

25 Ibid, 233.

to sustain the precedence of market development and expanded exchange over traditional rights in a capitalist mode of production:

when productive forces 'come into conflict' with property relations it is because the forces conflict with the production relations those property relations formulate and protect. The solution is either a change in production relations in violation of the law, with the law later falling into line, or a change in law which facilitates a change in production relations. History is full of both solutions. (26)

Pashukanis and the Commodity-Exchange Theory of Law

The Soviet jurist Pashukanis, writing in the period after the Russian Revolution, was the only marxist to attempt a positive theory of law (27), all other marxist theorists (sampled above) taking as their task its criticism. Pashukanis was convinced of the vital and autonomous role of law in a capitalist social formation. He argued that widespread and automatic respect for rights, most importantly property rights, was so crucial for the operation of a system of commodity exchange, with its built-in centrifugal conflicts of interests, that the legal system acquired central importance and had to be understood in terms of its own specific practices (28).

The central feature of bourgeois law, in Pashukanis' view, was its recognition (in legal discourse and by the activity of legal institutions) of autonomous individuals defined

²⁶ Ibid, 234.

²⁷ E.B. Pashukanis, Law and Marxism, C.J. Arthur (Ed. & Trans.), London: Ink Links, 1978. See also I.D. Balbus, "Commodity Form and Legal Form", 11 Law and Society Review 571, 1977; Roger Cotterell, "Commodity Form and Legal Form", 6 Ideology and Consciousness 111, 1976.

²⁸ See also Althusser, 1977 (ibid).

by their possessions. The focus of law on the individual as the possessor of rights, and its enforcement (as necessary) of mutual recognition of rights produces, in civil society, a strong vindication of the autonomy of the individual. This authoritative description of the individual person as recognized by the state legitimates, reinforces and extends the atomized relations between people in commodity production.

For Pashukanis legal institutions have their own structure which corresponds to, but is not reducible to, the structure of capitalist production. In the same sense in which the commodity is the form in which the products of capitalist production appear, the form of bourgeois law is visible in its production of rights. Rights are then produced by the legal system, in response to each development of the productive forces and the relations of production, to secure real and prior relations of possession. The rights thus created by courts and legislatures make the relations of production effective because they are themselves forms of property bestowed equally on all citizens. In a mode of production in which social identity is constituted by unequal possession, the possession of rights as property secures the identity and consent of each juridical subject.

Paul Hirst points out that Pashukanis' theory of law is similar in structure to Locke's (29). For Locke, rights are derived from an a priori law of nature, apprehended by human beings through their use of 'natural reason': human beings are

²⁹ On Law and Ideology, Atlantic Highlands, N. J.: Humanities Press, 1979, 157-63. The relevant text from Locke is the Second Treatise of Government, *ibid.* And for another influential derivation of legal right from 'natural' possession see also G. W. F. Hegel, The Philosophy of Right, (1820), T.M. Knox (Ed. & Trans.), London: Oxford University Press, 1967.

created by God and are His property; as such they are forbidden to injure one another, since to do so is to violate God's right of possession. Law, apparently founded on God's will, is based on property right. (30)

Locke theorizes that God has granted "men" (sic) the use of the earth and the possession of themselves and their own attributes, including their labour and the products of their labour. But government and law, which protect their rights to the products of their labour and enforce their obligations to respect the equivalent rights of others, are derived from the status of men as God's property and their origin as the fruits of His labour. God is the original possessive individual: His identity (along with everyone else's) is secured by property law.

Thus, says Hirst, both Locke and Pashukanis conceive of law as the recognition of a prior state of property ownership: for Locke, the 'state of nature' given by God; and for Pashukanis the relations of production given by capitalism. In both theories these prior conditions of property ownership are the origin of particular subjective identities: the subject is constituted by, respectively, God's labour, or her own labour under determinate social conditions. In both theories law confirms that subjects' identities originate in the possession of property, and produces their minimally necessary possession of themselves - by producing their rights.

³⁰ Hirst, *ibid.*, 158. See also C.B. Macpherson, The Political Theory of Possessive Individualism, London: Oxford University Press, 1962.

In the foregoing critical perspectives on law two modes of explanation predominate:

law is understood variously as the regulation of individual property and economic activity, or as the regulation of the struggle between classes which, in marxist theory, the private ownership of productive property inaugurates. In some instances these modes of explanation are combined in a single theoretical approach (e.g. Gramsci's) and in other instances they are in competition (as between the 'class instrumentalist' and 'commodity-exchange' theories of law). These different approaches were reviewed, not so that we might choose between them -- for I believe all of them make a distinct contribution to understanding the phenomenon of law -- but to underline the complexity of the law's social functions and its linkages to the other institutions of base and superstructure. In fact what emerges most clearly from reviewing them together is perhaps the futility of choosing definitively between the models they offer. For can we say that Gramsci, for example -- the 'theorist of the superstructure' -- has in any sense displaced the role of property relations in the organization of class struggle? Or that Cohen, who defends the notion of 'determination by the base', is able to do so without relying on the notion of class power?

These two modes of explanation are useful in different ways. In the first -- the various analyses of the functional relation of civil law to the operation of the economy -- the law was theorized to encode the existing conditions under which production takes place, to give expression to particular relations of production and roles in production. Here the expression of the relations of production in the form of rights is a consequence of its function, as ideology, within economic production. In the second mode of explanation the function of law is explicitly related to the function of the state as instrument of class rule: criminal law, especially, is the "form in which individual and

collective acts of resistance by the subordinate classes are repressed" (31). It is not necessary to collapse ideological and coercive functions together to recognize that civil and criminal law may both have a functional relation to the operation of the capitalist mode of production.

In the area of constitutional law of communication the former function of law -- as ideological condition of development of the economy -- is salient, in my judgement (at least in the chosen context of contemporary North America). But this is by no means its exclusive function. As in the critical literature on law, the critical literature on communication contains a spirited debate over the relative explanatory power of 'class instrumentalist' and 'commodity-exchange' perspectives. The next section concludes our theoretical preparation by exploring some critical views on the economic organization and political function of the mass communications media.

THE "FREE MARKETPLACE OF IDEAS"

Economic Necessity and the Consumer

Primary among the characteristics of capitalist markets is their expansionary tendency. Since capitalist production is organized explicitly for the maximization of surplus, the efficient capitalist will seek, not the greatest correspondence of production and need, but the stationing of capital where it will expand the fastest. Free enterprise

³¹ Hirst, 1979 (ibid), 97.

economists like to speak of the 'utility-maximizing behaviour of self-interested individuals' as the appropriate motor of wealth-creation and public policy alike. This force, translated on the consumption side as 'consumer sovereignty', is said to automatically result in the close correspondence of production and need without public planning or incentive (the 'invisible hand' of the market). Competition among profit-seeking producers to satisfy consumers will drive investment where consumers' purchasing behaviour has dictated.

Enterprises in a true laissez-faire market are potentially in competition for everything: for clients and market share, loan capital and shareholders, skilled personnel and cheap labour, favourable locations and regulations, raw materials supplies and technological advantage. Only continual growth guarantees that a firm will be able to compete in all these areas.

They are in competition for all these utilities because they must seek a surplus, not by increasing prices, but by reducing their factor costs for each product below the costs of competing products. In general, factor costs are most effectively reduced by growth in the rate and scale of production. Failure to achieve a surplus prevents growth, which in turn impedes the ability to reduce factor costs, and so on in an expanding or contracting spiral of exchange. There is no 'steady-state' -- there is only growth and survival, or weakened competitive positions leading to assimilation into other firms, or business failure. (32)

³² Of course, as Theodore Levitt suggests, "mere survival is a so-so aspiration... The trick is... to feel the surging impulse of commercial mastery... the visceral feel of entrepreneurial greatness. A vigorous leader is driven onward by his own pulsating will to succeed. He has to have a vision of grandeur, a vision that can produce eager followers in vast numbers. In business, the followers are the customers." "Marketing Myopia", Harvard Business Review 38, #4, 1960, 56.

Thus, as G.A. Cohen shows (33), a capitalist economy has an inherent bias towards increased output. The expansion of production so efficiently brought about in a capitalist economy cannot lead to an equilibrium state of output and an equitable reduction in necessary toil as the economy reaches the point of reliably meeting basic needs (however defined). Since cessation of growth would cause a flight of capital which would bankrupt leveraged and equity-financed firms alike, it would collapse the economy and halt production. To prevent such a collapse, output (whether considered from a macro- or a micro-economic perspective) must continually be expanded, and therefore consumption must also continually increase. (Competition can produce a different, inequitable 'reduction in toil' through the unemployment caused by escalating investments in technological innovation, relocations of plant, etc. War is a noted laxative for the consumption blockages thereby produced.)

Market firms see both natural resources and non-market practices as the source of labour and materials (including cultural materials) for the manufacture of commodities. Non-market cultures are also important potential commodity sales markets. But non-market practices may also form a barrier against the extension of the market. Even in developed market cultures law and government policy (e.g. policies to promote agricultural or energy self-sufficiency, cultural subsidies, protection of religious observances, minority language rights) may constitute significant barriers to output expansion, and growth. Communications firms are the cutting edge for the penetration

³³ G.A. Cohen, 1978 (ibid), 297-326.

of market practices into new cultural contexts, and the expansion of established markets

(34).

The keystone in the architecture of neoclassical economic theory is the notion of the utility-maximizing consumer. The modern consumer was 'invented' during the crisis of overproduction in the capitalist countries in the Great Depression of the late 1800's, and was the new basis of industry thinking by the early 1920's (35). Although urbanization, advances in transportation and machine-processes, and other aspects of industrialization had already brought enormous increases in the rate and scale of output of industrially-produced commodities, and were accompanied to a degree by lower unit costs, these new conditions only exacerbated the conflict between labour and capital. The new scale of production was not matched by the low-paid industrial workforce's scale of consumption, and this led to a severe depression and a war over the control of markets.

The industrial countries made industrial use of the cheap labour of their populations in this period, but in a sense finished commodities had not yet fully penetrated their cultures. Household re-manufacturing of basic commodities into finished goods for direct use -- lumber and nails into housing, textiles into clothing, flour into bread -- was routine. Also, the household economy often dealt with cyclical unemployment in the industrial economy by retaining features of the 'putting-out' system, in which part of the

³⁴ See for example Herbert Schiller, "Whose New International Economic and Information Order?", Communication 5, 1980, 299; Fred Fejes, "Media Imperialism: An Assessment", Media, Culture and Society 3, 1981, 281; J.O. Boyd-Barrett, "Cultural Dependency and the Mass Media" in Gurevitch et al, Culture, Society and the Media, London: Methuen, 1982, 174.

³⁵ see Stuart Ewen, Captains of Consciousness: Advertising and the Social Roots of the Consumer Culture, New York: McGraw-Hill, 1976. The original statement of this industrial strategy is Edward L. Bernays, Propaganda, N.Y.: Horace Liverwright, 1928.

family's collective labour went into independent craft production (36). The continuing educative and regulatory roles of the church in the early period of industrialization reflected the continuation of early and pre-capitalist modes of community life and organization existing side by side with the industrial state (37).

But in the mass media, industry found the means of extending its rationalization of the production process outside the factory and into the home and the community. The first tool of this generalization of market relations was the newspaper publishing industry, and film, radio and TV were organized for commercial purposes as they appeared. Newspapers in particular were markedly transformed by commercial pressure, evolving from limited-circulation organs of partisan political opinion into mass-appeal vehicles for the distribution of market information and the brand-name messages of the nascent advertising industry (38).

The immediate payoff to all industry from this use of the media was the prospect of managed, rationalized, controlled demand for a growing range of industrial products (39).

³⁶ See David Brown and Michael J. Harrison, A Sociology of Industrialization, London: MacMillan, 1978, for an analysis of the European transition; for an excellent treatment of U.S. industrialization see Harry Braverman, Labour and Monopoly Capital, N.Y.: Monthly Review Press, 1974.

³⁷ See also Tom Kemp, Industrialization in Nineteenth-century Europe, London: Longman, 1969; Peter Mathias, The First Industrial Nation: An Economic History of Britain 1700 - 1914, London: Methuen, 1969

³⁸ Ewen, 1976 (ibid); John Hartley, Understanding News, London: Methuen, 1982; Gillian Dyer, Advertising as Communication, London: Methuen, 1982.

³⁹ "Commercial propaganda is part and parcel of the mass-production process... Business could no more operate without advertising than it could without the automatic machine or the assembly line." Edmund D. McGarry, "The Propaganda Function in Marketing", Journal of Marketing 23, #2, 1958, 139. For an extended treatment of demand management see J. Galbraith, The New Industrial State, Boston: Houghton Mifflin, 1967.

If demand could be brought up to a level which matched the productive capacity of industry and be predicted for each commodity, investment risks would be drastically reduced.

Through the massive propagation of their new vision of an industrial cornucopia flowing endlessly into the lives and homes of workers-become-consumers (backed up by a huge expansion of the credit mechanism, and underpinned by the massive development of state education) the leaders of industry transformed the industrial proletariat into the 'sovereign' consumer. The replacement of domestic production of household goods and family and community-based forms of recreation with market goods and entertainments provided industry with its needed market growth. It also reinforced the consumer's identity on a daily basis. The commercial sponsorship of spectacles and the recruitment of schools and other public institutions to boosting the new norms of consumption inflected them with patriotic significance. But the mass media were the key to forming consumers who not only knew what, where, and for what price new commodities were available, but were also equipped with a vision of the part they could play in living a satisfying social and personal life.

The popular culture of the marketplace drew workers and their families into the market process not only in their working hours but also in their consumption and recreation activities. This now well-tested process continues apace in the ongoing extension of market practices in the less developed nations, and also in the continuing intensification of the media environment in the developed world (40).

Through their role in the distribution of commodities the mass media themselves have become leading sectors of profit and growth in the civilian economy, and this has triggered further intensification of the media environment as media capitalists' own market competition heats up. The media sector has become one of the most profitable because of its unique function as a factor in production. Media firms are not the direct producers of the goods they help distribute through advertising: they are part of the apparatus of distribution, or circulation of goods, in this way somewhat like railways or shipping lines. But "in so far as circulation itself creates costs... it appears as itself included within the production process" (41). As the number of consumers (and the geographic scale of the market) for a given product rises, its unit cost of factory production drops, and therefore the proportion of the total costs of the delivered product taken up by its distribution, including media costs, rises. But unlike the distributive economics of railways and shipping lines, the saturation of a market with similar products also increases the media costs of distribution, as producers struggle in the media to maintain their low factory costs by maintaining or increasing market share. Moreover, increasing geographic scale dampens the velocity of circulation, and the concomitant inventory costs are best offset by predictable market share, again secured by media and information-gathering expenditures. "Thus the creation of the physical conditions of exchange -- of the means of communication and transport -- the annihilation of space by time -- becomes an extraordinary necessity" for capitalists:

⁴¹ Karl Marx, Grundrisse, (1858), Martin Nicolaus, Trans., Harmondsworth: Penguin, 1972, 524.

Only in so far as the direct product can be realized in distant markets in mass quantities in proportion to reductions in the transport costs, and only in so far as the means of communication and transport themselves can yield spheres of realization for labour, driven by capital; only in so far as commercial traffic takes place in massive volume -- in which more than necessary labour is replaced -- only to that extent is production of cheap means of communication and transport a condition of production based on capital, and promoted by it for that reason. (42)

The Political Economy of Media Organizations

The communications sector has an essentially distributive economic function, and this function can readily be perceived as achieving proportionately greater importance in capitalist markets at each new stage of their geographic growth and regional and international integration. This is the central role of communications firms at the extensive margin of the market. The development of mass communication as an apparatus of distribution is also the key to the continuation of market growth at the intensive margin of the market: each intensification of the market -- each further commoditization of experience -- must overcome distributive barriers which are in essence not so much geographic as they are cultural and communicational.

But this focus in the last section on questions of commodity exchange and market structure did not address the topic of 'class instrumentalism' -- the media's possible function as a direct political instrument of a dominant class. This question has been addressed by Herbert Schiller in a manner which takes account of the macro-economic analysis. Schiller argues that the continuing development of communications technologies, which furnish "the most up-to-date means, in a long historical process of mechanization,

⁴² Ibid, 524-5; *emph. in text.*

to achieving an edge in world-wide competition" (43) may decisively change the relation between the private power of corporations and the public power of the state. Schiller's analysis suggests that through the expansion of the communication and information sectors a global transformation is taking place in the relation between the economic sphere of the production and circulation of goods, and the traditionally non-valorized areas of politics, law and cultural expression. In his more recent work (44) he develops this line of inquiry to take account of crisis indicators -- investment, employment, interest rates, trade balances and capacity utilization rates -- explaining government/corporate policy in the communications sectors within the frame of large-scale economic crisis management and planning.

The media function, in Schiller's analysis, as agents of political legitimation.

Although this function has been considered in a large number of other studies, Schiller is perhaps unique in modelling the media as profitable agents of legitimation. It is argued in much of the critical literature of communications that the consent of the plurality of working, enfranchised citizens to business agenda is a 'product' directly manufactured in the mass media. For example, Chomsky and Herman (45) present voluminous evidence of corporate and state intervention in the agenda of the media. By a combination of misinformation and missing information citizens are manipulated, in this view, towards electoral support for the dominant order. Deviating points of view are held to be actively suppressed. But despite the evidence that such manipulations do take place

⁴³ Herbert Schiller, Who Knows: Information in the Age of the Fortune 500, Norwood: Ablex, 1981, 140.

⁴⁴ Herbert Schiller, Information and the Crisis Economy, New York: Oxford University Press, 1986.

⁴⁵ see for example Noam Chomsky and Edward S. Herman, The Washington Connection and Third World Fascism, Boston: South End Press, 1979.

during specific crises, this model significantly fails to address the real "normal" day-to-day activities of journalists and editors, and the divergent interests and competitive environment of the various 'capitals' who are supposed to have organized this intervention.

Tuchman (46) and Gans (47) offer exemplary responses to the first of these objections. They examine the institutional environment in which political information is produced, and suggest that news is more or less unconsciously encoded by journalists in a manner which reproduces the dominant ideology among their sources. A complementary approach to the study of the media production process is offered by Altheide (48), who finds that the news gathering and selection routines of most commercial media firms imitate the news reporting practices of other media firms. While this is efficient both in terms of costs and in terms of competition for mass audiences, it of course tends to emphasize the apparent importance of whatever is reported. No malevolent intention on the part of journalists, editors or media owners is required, in this model, to end up with the kind of political discourse we have: just the 'invisible hand' of the market. The particular images and texts which reach us as news are then the rational expression of the institutional structure of media enterprises, which in turn conform to the broader requirements of capitalist production.

The second objection to class instrumentalism -- the divergent interests of competing capitalists -- is partly addressed in Altheide's model, and also by work such as

⁴⁶ Gaye Tuchman, Making News: A Study in the Construction of Reality, New York: The Free Press, 1978.

⁴⁷ Herbert J. Gans, Deciding What's News, New York: Vintage, 1980.

⁴⁸ David L. Altheide, Creating Reality: How TV News Distorts Events, London: Sage, 1976.

Murdock's and Golding's (49), who focus on the relation of economic power to political power as represented in the composition of national elites. Through their analysis of the structure of ownership and control in the media sector of the economy Murdock and Golding are able to make a strong case that media enterprises function quite effectively, within the structural constraints of the market, as mouthpieces for the policy initiatives of their owners and executive managers -- who tend to be full members of the elites. As such, their competition for profits in no way precludes cooperation in the reproduction of the ideological conditions necessary to the expanded circulation of capital. Murdock approvingly quotes Ralph Miliband to this effect:

Making money is not at all incompatible with indoctrination... the purpose of the 'entertainment industry', in its various forms, may be profit; but the content of its output is not by any means free from ideological connotations of a more or less definite kind. (50)

Dallas Smythe has offered another way of analyzing the mass media (51) which focuses directly on the property exchange relations obtaining within mass communication, rather than on the content, professional routines, or ownership of the media. His project foregrounds the role of the audience in a manner which has attracted

⁴⁹ Graham Murdoch and Peter Golding, "Capitalism, Communication and Class Relations", in Mass Communication and Society, James Curran, Michael Gurevitch and Janet Woollacott, Eds., London: Edward Arnold, 1977, 12-43; Graham Murdoch, "Large Corporations and the Control of the Communications Industries", in Michael Gurevitch et al, Culture, Society and the Media, London: Methuen, 1982, 118-150.

⁵⁰ Murdoch and Golding, 1982, *ibid*, 144, quoting Ralph Miliband, The State in Capitalist Society, London: Quartet Books, 1973, 202.

⁵¹ Dallas W. Smythe, Dependency Road: Communications, Capitalism, Consciousness and Canada, Norwood: Ablex, 1981.

controversy; this debate is known as the 'Blindspot' debate, after the title of Smythe's inaugural paper on the subject (52).

The point of departure for Smythe's theory is the fact that the great bulk of mass communication is supported by revenues from the advertising industry. When a radio listener or TV watcher turns on their set they in general are able to receive a variety of program offerings at no charge. Similarly the cost to a reader of a newspaper is less than its cost to the publisher in ink and paper alone: even if the publisher is thought to have sold the materials at a loss to the reader, the contents of the newspaper are supplied free. Most other media -- magazines, cable TV, much public broadcasting, opera, ballet, symphonies, theatre and film -- derive at least part of their revenues from advertising of one sort or another, so that the user receives these texts and programs at less than their cost. Two questions arise: what is the advertiser buying?; and what kind of transaction is taking place between the media firm and its audience members?

Consider the case of free commercial broadcast television. There is no sense in which the audience member can be said to have bought anything but a television set. The media firm itself sells nothing to its audience members, receives no revenue from them. There is absolutely no economic transaction between the media firm and the watcher, and there is likewise no contract between them, implied or otherwise. It cannot then be said to be in the business of selling information, or programs, or messages, or even opinions or points of view to audiences: although its programmes are very expensive to produce, it receives absolutely no revenue from their sale (unless to

⁵² "Communications: Blindspot of Western Marxism", Canadian Journal of Political and Social Theory, 1 (3), 1977, 1-27.

another broadcaster). The relationship between broadcaster and watcher is, apparently, simply a communicative relationship, not an economic one.

From its advertisers, on the other hand, it receives virtually all of its operating revenue. There is an economic transaction, and a contractual relation, between broadcaster and advertiser -- something is sold and something is bought. That something, says Smythe, is audiences.

Or, more precisely, he says it is 'audience-power'. The broadcaster's revenue is derived from advertising, and profits are found in the difference between that advertising revenue and the costs of producing (or buying) programming. When, therefore, a commercial TV station produces or buys programming -- a movie, for example, or the evening news -- and broadcasts it, complete with ten or twelve minutes of advertising, what product has it brought to the market? What has it produced and sold for more than its cost? Smythe's answer is: it has produced and sold 'audience-power' to advertisers.

Smythe argues that advanced capitalist economies are markets for organizations which produce 'audience-power' as a factor of production in the same way that they provide markets for suppliers of raw materials, machinery and wage labour-power. Mass audiences are the key to the management of consumer demand, and the commercial mass media are the industry which produces this audience-power for sale to other enterprises, mass-manufacturing it to customer specification. The audience is itself the commodity produced by commercial media for exchange in the market.

It is easy to show that it is specifically audience-power, and not broadcast airtime, that broadcasters sell to advertisers: if you are an ad agency executive placing TV commercials for a soft-drink-manufacturing client it is not x seconds of airtime that you will be offered, but a choice of audiences of different descriptions at x dollars per thousand per second. Because you will pay for the entire metered audience of the commercial you will choose a time which contains the highest proportion of your targeted audience.

Because the 'bottom line' for the commercial media organization is the revenue it earns from advertisers for access to the audience, it must be able to guarantee the number of audience-members in order to set a competitive price. And because the advertiser is interested in particular kinds of audiences, ones which have the income level and 'lifestyle' characteristics of their expected customer groups (for whom they have carefully constructed their advertising messages), the media firm must also be able to show what kinds of people are in the audience. Audience survey firms, such as Nielson or the Bureau of Broadcast Measurement, provide the reliable and independent means of gathering this vital information from the audience.

The (purely statistical) opportunity for 'freedom of expression' provided by a Nielson survey is admittedly a narrow one, consisting simply of the binary message that one is, or is not, attending the medium. But this is precisely the message the media firm, and the advertiser, need in order to proceed with their end of the interaction. The information that targeted groups are continuing to pay attention is sufficient to elicit more reports and programmes, and more advertising; and the message that they have ceased to listen, watch or read is sufficient to stimulate a remarkable flurry of programme cancellations, secondary research, new programming, and so on. The corollary

to the 'right to receive' -- precisely capturing the audience's role in commercial mass communication -- is the common-sense exhortation: 'if you don't like it, you can always turn it off!'

Without this monitoring of the audience's response (however vegetative) media and advertisers (including political advertisers) would be at a complete loss, not only as to how to price their transaction, but as to whether anything was even being exchanged, economically OR communicatively. There is a good deal of sophistication in the monitoring, as well. In the case of soap operas, for example, producers may combine ratings and demographic information with the direct responses available from letters and phone calls to aid in the shaping of sequential episodes of a programme series. Advertisers also employ open-ended forms of direct interaction with audience members, such as the 'focus group', to assess more creatively the targeted consumer's response to their messages. But if all of this careful 'listening' by media organizations indicates that an insufficiently affluent audience is on the other end of the transmission, the result is to try to evict them from their chairs. Jhally (53) gives an example of this: CBS cancelled a number of prime-time, HIGH-ratings programmes in the late 1960's, such as "Andy Griffith" and "Ed Sullivan" -- because their very large audiences were found to be mostly elderly, rural and low-income.

The debate which followed Smythe's analysis of the 'audience-commodity' focused on his very provocative notion of 'audience-work' or 'audience-power'. Smythe himself has more recently qualified the notion (54), emphasizing that the price mechanism between

⁵³ Sut Jhally, "Probing the Blindspot", Canadian Journal of Political and Social Theory, 6 (1-2), 1982, 205.

⁵⁴ Dallas W. Smythe, "Radio: Deregulation and the Relation of the Private and Public Sectors", Journal of Communications, Winter 1982, 192-200.

media firms and advertisers -- the real site of economic exchange -- is the more significant feature of his theory. But some of his interlocutors in the 'Blindspot Debate', notably Jhally and Livant, have continued to develop the notion of an actual property or activity of the audience which is altered by its valorization in economic exchange. In this view labour's exploitation by capital is, in the media context, capital's appropriation of some of the value to itself of the audience's activity in attending to and acting upon media messages (55). The economically most important and communicatively most effective messages, according to Smythe's analysis, are those of advertisers, and he adduced data to show that this was so. Jhally's use of Smythe's argument (56) extends an axiology of the work of the audience in a form analogous to Marx' labour theory of value.

The recent tendency of media holding firms to diversify into publishing and broadcasting, and into both subscriber and ad-based media (with likelihood of cross-subsidization at various points) should be noted. The mix of advertising and subscriber revenues is an effective hedge against fluctuations in volatile consumer markets. This strategy of diversification also helps media firms stay current in an environment of rapid and unpredictable technological change -- think of, for example, the convergence of digital image processing and storage media, and the emergence of new satellite and optic cable services. Cross-ownership has also been explained more

⁵⁵ Jhally, 1982) *ibid.*; Sut Jhally, The Codes of Advertising: Fetishism and the Context of Meaning in Modern Society, Doctoral dissertation, Simon Fraser University, 1984; Bill Livant, "The Audience-Commodity: On the Blindspot Debate", Canadian Journal of Political and Social Theory 3 (1), 1979, 91-106; Bill Livant, "Working at Watching: A Reply to Sut Jhally", Canadian Journal of Political and Social Theory 6 (1-2), 1982, 211-15; Sut Jhally and Bill Livant, "Watching as Working: The Valorization of Audience Consciousness", Journal of Communications, Fall 1986.

⁵⁶ Jhally, 1984, *ibid.*, 158-198.

straightforwardly (57) as a result of the better rationalization of plant and personnel and vastly easier cost-recovery possible for all chain media firms (and the fact that as a consequence of this, there really is nothing more profitable in which media firms could legally invest their huge profits).

Whatever growth strategy mass communication firms pursue, as Smythe points out, audiences make a further contribution to their economies. In the case of broadcasting he shows that, by purchasing and maintaining all of the receiving apparatus, audiences contribute by far the largest part to financing the broadcast plant. This contribution is an important factor under present conditions of rapid technical innovation, with its very high capitalization requirements.

In the 'Blindspot Debate' Jhally's and Livant's contributions were speculative elaborations on Smythe's thesis. The sharpest attack, and thus the other side of the debate proper (also on the left, it should be noted), came from the British doyen of studies in the political-economy of communications, Graham Murdock (58). Murdock engaged Smythe on the implications of his proposal for theorization of the relations between base and superstructure in a capitalist mode of production.

In his original 'Blindspot' article (59) Smythe criticized the western tradition of marxist analysis for its primary emphasis on the function of the mass media as part of the ideological superstructure and its inattention to the media's integration into the

⁵⁷ Canada, House of Commons, Royal Commission on Newspapers, Ministry of Supply and Services, 1981.

⁵⁸ Graham Murdock, "Blindspots About Western Marxism: A Reply to Dallas Smythe", Canadian Journal of Political and Social Theory 2 (2), 1978, 109-19.

⁵⁹ Smythe, 1977, *ibid.*

economic base. "The first question that historical materialists should ask about mass communications systems" he says, "is what economic function for capital do they serve?"

(60) In response Murdock, while crediting the insight and power of Smythe's economic analysis, discerns three "important omissions" from it:

1. "He drastically underestimates the importance and centrality of the state in contemporary capitalism" (61). Murdock suggests that at the same time as falling profitability fuels concentration of ownership in several sectors, including communications, it also causes structural crisis requiring the intervention of the state in economic policy. "The result is an indissoluble but contradictory relationship between the centralized capitalist state on the one hand and concentrated monopoly capital on the other" (62).

2. Murdock asserts that Smythe's attention on the exchange relations between media firms and advertisers leads him to underestimate the independent part played by commercial forms of culture in the relay of dominant ideology. He points to the existence of media such as the film, recording and popular fiction industries, which do not rely directly on advertising revenues, as evidence that the media are also "in the business of selling social order and structured inequality and packaging hope and aspiration into legitimate bundles" (63). (He does not, however, give much time to Smythe's argument that these are best understood as elements of a larger system

⁶⁰ Ibid, I, emph. in original.

⁶¹ Murdock, 1978 (ibid), 111.

⁶² Ibid, 112.

⁶³ Ibid, 113.

of 'cross-marketing' organized primarily to realize the circulation and expansion of capital.)

3. Murdock also criticizes Smythe on the grounds that he fails to show how class conflicts are played out in the realm of mass communication. Murdock lists demands for national ownership, public interest accountability and regional and community production objectives for media systems, and struggles between media owners and production personnel, between intellectual and technical workers in the media and between media firms and citizens' organizations as some of the indicators of class struggle in communication.

By raising these concerns -- the relation of state and economy, the mechanisms of ideological reproduction, and the appearance of class struggle -- Murdock takes a class instrumentalist position against what he sees as Smythe's extreme economic determinism. It should be said, however, that Murdock is offering this critique as a corrective, rather than as the embodiment of a full and self-sufficient materialist theory of communication. Here, as in his other work (64), he has tried to bring the two positions together:

mass communications systems... play a double role in reproducing capitalist relations of production. They complete the economic circuit on which these relations rest and they relay the ideologies which legitimate them... Therefore it is not a question of choosing between theories of ideology and theories of political economy, but of finding ways of integrating the two into a more adequate and complete account. (65)

64 1982, *ibid.*

65 1978, *ibid.*, 113-4.

A different point raised by Jhally (66) perhaps goes furthest towards untying this theoretical knot. He asks: who owns the audience-commodity? This question planted the seed for this thesis, because the audience's status as commodity is equally a question of law as of economics, in the sense that the commodity forms in communications industries must be consonant with the legal forms of property rights in communications law to be legitimate and enforceable in civil society.

Jhally's question about ownership ("the most vital issue", "the most ambiguous and problematic one") was accompanied by an example. In 1971 the CRTC gave cable companies permission to substitute Canadian commercials for the advertisements carried on their U.S. feeders, and in 1973 Rogers Cable Co. began to delete ads from Buffalo station broadcasts.

Three Buffalo stations immediately threatened legal action... The Buffalo stations were threatened with the loss of their Canadian audience, meaning that this audience could not be sold to advertisers, thus resulting in a loss of advertising revenue. While the programmes of the American stations would be used to produce the audience commodity, the selling would be done by Canadian cable operators. As one broadcasting consultant put it: "substitution is plain stealing." (67)

Livant analyzed Jhally's example, noting that if the situation had been reversed by deleting and substituting for U.S. programmes, but keeping the U.S. advertisements, "there would be no theft at all". About the question of ownership he asks

Why is it most vital...? Because to sell a thing you have to own it. And why most ambiguous and problematic? Because it is unclear what the commodity is. (68)

⁶⁶ 1982, *ibid.*

⁶⁷ Jhally, 1982, *ibid.*, 206.

⁶⁸ Livant, 1982, *ibid.*, 212.

Michael Lebowitz (69) is in a state of disbelief resembling that of a mugger's victim. "How much credibility" he asks, "can be assigned to a paradigm which starts from the assumption that the media sells what it can never have property rights over the audience?"

Ultimately the blindspot paradigm collapses on the point that if media-capitalists sell an audience to industrial capitalists it must first of all be theirs to sell. The begged question then becomes: how did this commodity become the property of the media capitalists in the first place? What is the transaction in which the property rights over the disposition of "watching-power" were transferred from the original owners, the audience, to the media-capitalists? How is the contract specified -- and how is it enforced? (70)

Are audiences composed of individuals possessing themselves and their own property (and communication) rights, or are audiences commodities produced by media firms? The importance in liberal political theory of unfettered communication as the guarantor of an informed citizenry and democracy's main bulwark against tyranny is incommensurable with a view of the audience as itself a commodity. And yet Smythe's persuasive account of the political economy of the commercial media insists that audiences are produced by media firms for profitable exchange with advertiser clients, and that this is the main economic activity of such firms. Does the relevant jurisprudence -- the regime of rights and freedoms obtaining for mass media audiences -- confirm or repudiate this theory?

Before concluding this discussion it is appropriate to address directly the question of 'technological determinism'. To what extent is the organization of mass media systems

⁶⁹ Michael A. Lebowitz, "Too Many Blindspots on the Media", Studies in Political Economy 21, Autumn 1986, 165-73.

⁷⁰ Ibid., 171.

a result of private or public policy choices, and to what extent is it prefigured in the character of the technology itself?

The mass media systems we have seem 'natural' to us -- it is difficult to imagine them taking any other form than that of a (seemingly) one-way conduit for a narrow range of socially- and institutionally-approved opinion (even though most people also readily criticize them for 'bias', or triviality, or philistinism). But the media systems we have were developed in a particular historical matrix of market forces, institutional pressures and policy goals. I would argue that the forms of media we have and the uses to which we put them do not simply reflect the intrinsic capabilities or limitations of the technologies involved: they are also the product of our choices in policy and law.

The introduction of radio broadcasting provides a good example, as Smythe (71) and Jhally (72) explain. The original application of radio, beginning at the turn of the century, was to coded transmission for merchant shipping and military naval operations. During WW1, governments invested heavily in research and development of radio technology, especially voice transmission; and the military sub-contractors who undertook this work (such as General Electric, Westinghouse and AT&T) began developing a civilian market for their radio products after the war. At first the main commercial objective was the manufacturers' sale of the hardware:

"The first radio stations were established by RCA to provide programmes that would stimulate the SALE OF SETS...There was no advertising on these stations, programming being viewed as a 'public service'...Between 1922-25 RCA sold over \$83,000,000 worth of sets to the public." (73)

71 1981, *ibid.*

72 1984, *ibid.*

73 Jhally, 1984, *ibid.*, 167.

Many small North American entrepreneurs who started early radio stations simply sold blocks of transmission time to whoever wanted to buy them. The broadcasting (as opposed to radio hardware manufacturing) industry became more organized when some stations began to sell local advertising, and therefore to seek higher-quality programming which would attract local audiences and advertisers. Many of these stations eventually affiliated to the NBC network, set up by RCA to sell them this higher-quality programming. RCA thus found a way to profit both from the sale of sets, and from the sale of programming.

But radio broadcasting did not become a major commercial concern until the emergence of the CBS radio network. Unlike its rival NBC, CBS had no affiliation with a manufacturer, and so it evolved a revolutionary business strategy: instead of being an adjunct to the sale of radio sets, it began to sell radio audiences. CBS arranged to give away free, unsponsored, high-quality, network-produced programming to affiliates at a time when NBC was augmenting its revenues by selling programming. In return for its guaranteed free programming CBS received an option on part of its affiliates' schedules for sponsored network shows, which permitted it to guarantee coast-to-coast audiences to national advertisers. With adjustments, such as the replacement of sponsored programmes with spot advertising, the sale of audiences has remained the revenue basis of commercial radio (and TV) ever since.

In the same period after WW1 there were serious attempts made in most of the industrial nations to have radio broadcasting brought wholly or partially under public control, as a non-commercial medium of communications. In the U.S., after the wartime operation of the radio system by the Navy, it was returned (after a good deal of

Congressional conflict) wholly to the private sector. In the U.K. the publicly-owned BBC was given a monopoly on radio services, supported by user license fees, rather than by advertising. Canada eventually adopted a hybrid of these two models, setting up the publicly-owned, license-fee-financed CBC network in 1932 alongside the rapidly growing private commercial radio system (including, by that point, four U.S. network affiliates in Montreal and Toronto).

This brief sketch of the rise of commercial radio illustrates the kind of historical circumstances in which mass communication has become equated with the audience's 'right to receive' commercial programming and advertising. It was not the technology of radio which determined whether sets, programmes or audiences would become the dominant commodity in broadcasting; or whether airtime would be available equally to all interested purchasers; or whether, indeed, it would be a public or private service: these were policy choices. It is predictable that, from the point of view of a business which sells audiences to advertisers, 'communication' would become pragmatically understood as the transmission of messages from speaker to hearer, and that media firms would support a regulatory regime in which the commodity -- the audience -- would acquire the right to hear, but not the right to speak. But this commercial preference does not thereby satisfy the constitutional purposes.

CONCLUDING NOTE:

The Relation of Media and Media Law to Base and Superstructure

We have now assembled the elements of a critical standpoint from which to read and evaluate the discourse of communications law on the subject of the audience and its rights and legitimate interests. The failure of liberal political theory to account for liberal judicial practice in this area (problematized in Chapter Two) has been theorized in two different ways in marxist theories of law and marxist theories of communication:

1. the 'class instrumentalist' position, which emphasizes the ideological and coercive agency of capitalists as a class, and their conscious use of legal institutions and media organizations to advance their class interests; and
2. the 'commodity exchange' position, which emphasizes the structural determination of the activities, products and institutions of law and communication by the exigencies of commodity exchange, expanded circulation and market growth.

These were not in all cases competing theories -- some sources, such as Gramsci (for law) or Murdock (for communication) tried to integrate them as potentially complementary approaches. But terminological entanglements around these very abstract concepts -- particularly 'base', 'superstructure', 'political economy' and 'ideology' -- persisted. Murdock, for example (74), characterized the debate in communication studies as polarized between "theories of ideology" and "theories of political economy", thus

⁷⁴ See quote for Note #66.

revealing, through his attempt to understand the institutions of communication as simultaneously part of the base and part of the superstructure, a possible assumption that 'superstructure' and 'ideology' are uniquely correlated. Cohen was more careful (in his analysis of law and property) to eschew judgement on whether ideology is only part of the superstructure, even while arguing that "bases need superstructures" to stabilize their economic arrangements. Pashukanis, Plamenatz and Hirst suggested in different ways that while one of the products of the legal superstructure is the ideology of property rights, this ideology is a requirement of capitalist relations of production and might therefore be conceived as also part of the base:

Possession and commodity relations in large part take their form from and are differentiated by legal institutions, rules and rights. Possession and exchange have both economic and legal conditions of existence" (75).

Mapping this account of legal function onto Smythe's analysis of the media, it's possible to see that the operation of the ideology of property rights within the economic organization of communication systems -- as a condition of operation of their economy -- accounts in a powerful manner for the media's function and structure. The audience-commodity is perhaps the archetypal commodity-form of a particular stage of development of the capitalist mode of production: the 'information economy'. Like the labour-commodity, the audience-commodity has a fantastical and illusory existence, defying common-sense, and yet it exists, not as 'pure' ideology (based only on the power of belief) but also as the practical and visible expression of a real and existing set of material economic relations. If we wish to examine the interaction of the institutions of law and communication, and to account for the legal forms in which property rights in communication make their (ideological) appearance as real and legitimate social relations,

⁷⁵ Hirst, 1979 (ibid), 155-6.

Smythe's formulation offers, I believe, the most dynamic way of looking at these questions.

I do not mean here simply to pretend to decide the question unequivocally for the commodity-exchange mode of explanation, and against class instrumentalism in all its variants. I do mean to propose, as an interpretive framework for the caselaw analysis which follows, that contemporary communications law encodes the conditions under which profitable communication may take place, and that it gives expression to particular 'relations of communication' and roles in communication. The expression of the relations of production (as 'relations of communication' - see Marx *supra* on distribution as included within production) in the form of rights is a consequence of the function of law, as ideology, within economic production.

Historically, the function of communications law as the expression of class power was more salient before the modern emergence of highly profitable communications industries, as will be apparent in Chapter Four's discussion (76). It is therefore convenient to distinguish between criminal law of communications (e.g. sedition), which is clearly related to the function of the state as instrument of class rule, and the civil communications law regulating and legitimating commercial relations. While both may reach constitutional adjudication, only the latter is considered in the caselaw analysis below. The discourse of commercial communications law, however, easily mobilizes the authoritarian inflections of state power in difficult and ambiguous cases, and this instrumental presence behind the curtains of civil law could usefully be understood as 'overdetermining' the ideological force of property relations.

⁷⁶ But see, for example, Dennis v. United States, 341 U.S. 494 [1951].

In summary, then, the institutions of law and media are in a state of complex interaction in which both directly contribute to commodity exchange and expanded circulation and both have a general function in stabilizing, legitimating and easing the further development of the capitalist social formation. As institutions of the superstructure the media do of course relay and amplify ruling class ideology as articulated in the institutions of the state and the law; but within that they also relay that part of ruling class ideology which is most vital to their own relations of production -- the comprehension of speech rights as property rights. Thus, by reproducing the legal superstructure's legitimation of their own productive requirements, the media help produce as superstructure the ideological conditions of their own economic activity as base. Furthermore, communication as legal property thereby becomes, over time, a prerequisite of capitalist production-in-general. This reciprocal influence of base and superstructure between the institutions of law and media serves several other purposes as well: the legitimacy and common-sense obviousness of law-in-general is reinforced; citizens are educated for their changing economic roles; and ideology-for-profit in the media serves as an model for the exchange-valorization of other superstructural activities.

In the last analysis 'base/superstructure' is of course only a metaphor, and not necessarily a very illuminating one: can we really learn much from equating a complex and rapidly changing global historical process to a building with an elevator that goes up but not down and an attic stuffed with antiques? The great danger of the base/superstructure metaphor is that it predisposes us to ignore the possibility of more complex reciprocal effects among 'levels' and 'instances' of the social formation, and to explain everything by reference to an institutional structure rather than the dialectical interaction of structure and (individual or collective) agency.

This brings us to the other side of our concern with the audience and its representation in the legal discourse. I was careful in the Introduction to identify ideology, not as the determination of subjects by a (linguistic) structure, but as a correspondence of the discursive and political practices of social actors. In the context of mass media the communicative relations between representatives of the dominant groups (as privileged speakers) and the subaltern classes (as their audiences) are clearly structured to legitimate and reproduce capitalist relations of production. But these are not only structural relations: they are also real and existing conditions of political action and class conflict. The purpose of a political economy of communications law, then, is not only to show how the audience's interests and rights are determined by its economic function and structure: the more important purpose is to render the other side of the dialectic -- the resistance of citizens to these relations -- more visible and more effective (77).

⁷⁷ This concern informs a large and separate tradition of study examining the relation between media and popular movements. Probably the single most voluminous area of this literature is that on the labour movement. There is also a history of labour-owned or -affiliated press, broadcasting and even film initiatives, and these inflect to some degree the radical interpretation of mainstream media content and structure, as well as furnishing a separate set of materials and practises for analysis. These remarks about the study of labour and the media apply equally to the study of relations between media and other popular movements. Similarly-oriented practical initiatives, theoretical assumptions and secondary literatures exist for religious and ethnic minority, anti-war, women's, and other popular movements.

On popular movements and the media generally see: James Curran, Jake Ecclestone, Giles Oakley and Alan Richardson, Eds., Bending Reality: The State of the Media, London: Pluto, 1986; John Downing, Radical Media: The Political Experience of Alternative Communication, Chicago: South End Press, 1984; Gardner et al, 1979; Robert A. Hackett, "For A Socialist Perspective on the News Media", Studies in Political Economy, 19, 1986, 141-56; Marc Raboy, Movements and Messages: Media and Radical Politics in Quebec, David Homel, Trans., Toronto: Between-the-Lines Press, 1984; Armand Mattelart and Seth Siegelau, Communication and Class Struggle, 2 Vols., New York: International General, 1983.

CHAPTER FOUR:

THE CONTEXT OF MASS MEDIA SPEECH RIGHTS

This chapter is intended to serve as an introduction to the history, the language and the logic of the U.S. Supreme Court's decisions in the speech rights area. Its method of exposition is to attempt provisional answers to some disparate, basic questions which arise from reading these judgements.

Probably the most succinct summary of the current direction of U.S. First Amendment caselaw is that offered by Canadian Supreme Court Chief Justice Brian Dickson. He discerns two trends: the "obliteration of any meaningful distinction between 'political' and 'commercial' speech", and the "rejection of a right of access" to the mass media (1). These are the subjects, respectively, of Chapters Six and Five. The rest of Chapter ~~Four~~ gathers together some of the textual threads which make up the 'whole cloth' background to current U.S. mass media doctrine: the definition of mass communication; the relationship of the speech and press clauses in the Constitution; the notion of corporate speech; the minority arguments by which the public function of private media has been affirmed; and the lineaments of the stillborn 'structural model' of the First Amendment.

¹ Gay Alliance Towards Equality v. Vancouver Sun, 97 D.L.R. (3d.) 577 (S.C.C.) at 600 [1979].

FREEDOM OF SPEECH: EARLY FIRST AMENDMENT CONFLICTS (2)

Although the First Amendment to the Constitution was adopted in 1791, the first US Supreme Court decision addressing citizens' rights of free speech was not heard until more than one hundred years later, in the 1897 Davis case (3). Reverend Davis, a black minister, was convicted of breaking municipal bylaws for preaching his anti-racist Gospel in a Boston public park by the Massachusetts Supreme Court. That Court's 1895 decision (4) was unanimously upheld on appeal to the US Supreme Court. The Massachusetts Court's opinion, written by Justice Oliver Wendell Holmes, dismissed Davis' First Amendment argument, affirming the greater constitutional priority (under the Fifth and Fourteenth Amendments) of the city's property rights as owner of the park. Holmes drew this analogy:

to forbid public speaking in a highway or public park is no more an infringement of the rights of the public than for the owner of a private house to forbid it in his house. (5)

In 1919 Holmes, now a Federal Supreme Court justice, began with Justice Louis Brandeis to articulate a new notion of the First Amendment by co-authoring the first of their famous series of free speech rights dissents. These dissents included the

² I am indebted to two very useful treatments of early First Amendment caselaw: David Kairys, "Freedom of Speech", in The Politics of Law, David Kairys (ed.), N.Y.: Pantheon, 1982, 140; and David Rabban, "The First Amendment in its Forgotten Years", 90 Yale Law Journal 514 [1981].

³ Davis v. Massachusetts, 167 U.S. 43.

⁴ Commonwealth of Massachusetts v. Davis, 162 Mass. 10.

⁵ Ibid.

controversial Abrams (6), Gitlow (7) and Whitney (8) cases, all concerning the speech rights of radical minorities. Their eloquent defense of a normative or 'natural-law' right of free speech in the Constitution achieved its first majority on the bench with the 1931 Stromberg case (9), in which the Supreme Court reversed a state conviction against the operators of a Young Communist League summer camp for expressing themselves by flying a red flag. In the same year the Court made its first ruling against state censorship of the press (10).

The Hague case, in the late thirties, gives the tenor of Holmes' and Brandeis' reasoning (11). Hague arose from the CIO's (Congress of Industrial Organizations) organizing drive following the passage of the National Labour Relations Act in 1935. The CIO brought suit against a New Jersey mayor for preventing, rather forcibly, their public meetings and pamphleting. In Hague a majority concurred with Brandeis and Holmes that

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. (12)

⁶ 250 U.S. 616 [1919].

⁷ 268 U.S. 652 [1925].

⁸ 274 U.S. 357 [1927].

⁹ 283 U.S. 359.

¹⁰ Near v. Minnesota, 283 U.S. 697 [1931].

¹¹ Hague v. CIO, 307 U.S.496 [1939].

¹² Ibid.

What happened between 1895 and 1939 to cause, not only a reversal of the doctrines of the Supreme Court and its main speech-rights spokesperson, but also their representation as legal rights from "time out of mind"? Briefly, what 'happened' was the development and increasing level of organization among the anti-racist and civil rights movement, the 'first wave' of the women's movement, the anarchists, the Knights of Labour, the IWW and the CIO. During this period all of these movements organized large-scale struggles focused explicitly on the related issues of free speech and free association, including persistent challenges and appeals through the courts. The cases that established popular rights to free public expression of political views in the US were brought forward and fought in the courts (and on the streets) by coalitions of liberal and left organizations in the first decades of this century, notwithstanding the Supreme Court's rhetoric of 'ancient liberties'. As David Kairys writes:

[N]o right of free speech, either in law or practice, existed until a basic transformation of the law governing speech in the period from about 1919 to 1940. Before that time, one spoke publicly only at the discretion of local, and sometimes federal, authorities, who often prohibited what they, the local business establishment, or other powerful segments of the community did not want to hear... The primary periods of stringent enforcement and enlargement of speech rights by the courts, the 1930's and the 1960's, correspond to the periods in which popular movements demanded such rights. (13)

In the early speech rights struggles the new judicial champions of the rights of popular movements to express their anarchist and socialist views defended this position by the metaphorical equation of free speech with laissez-faire capitalism. In this formulation the superiority to other political systems of a social order founded on market exchange was evident especially in its tolerance of criticism. This oft-repeated metaphor

¹³ David Kairys, 1982, (ibid), 141.

first appeared in Holmes' dissent in the 1919 Abrams case (14). In that case a number of immigrant Jewish anarchists were convicted under the Espionage Act for distributing a leaflet condemning U.S. counter-revolutionary intervention in the Soviet Union. The Government successfully argued that their actions could adversely affect U.S. war efforts. Holmes' brilliant (and ironic) attempt to defend the leafleters read, in part:

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 thought to get itself accepted in the competition of the market. (15)

While claiming continuity with and using the rhetoric of the "architects" of First Amendment doctrine -- Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter and Learned Hand -- U.S. jurists have in recent decades consolidated a significant re-interpretation of the First Amendment as it applies to the enormously influential, and still rapidly developing mass communications context. The "immemorial" scope, purpose and meaning of the constitutional guarantee has been, once again, substantially revised to match changing social conditions.

THE DEFINITION OF MASS COMMUNICATION

The long-standing practice of US lawyers and jurists is to use 'freedom of speech' precedents in 'freedom of the press' cases, and vice versa: the distinction depends largely

¹⁴ Abrams v. United States, 250 U.S. 616 [1919].

¹⁵ *Ibid*, Holmes dissenting.

on the circumstances of the case (and the actor invoking the freedom). Similarly the legal meaning of 'speech' and 'press', taken together, really extends to all forms of communication. Cases have been heard concerning such disparate media as sound trucks, lawn signs, rallies, performances, bus ads, pickets and the insides of billing envelopes mailed by public utilities, as well as the more conventional print, broadcast and film media. Justice William O. Douglas made clear the common constitutional status of mass media in a 1973 case:

TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of 'press' as used in the First Amendment. (16)

Consider, further, this statement by one of the architects of First Amendment theory, Justice Frankfurter, in 1946:

Freedom of the press...is not an end in itself but a means to the end of a free society...The purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it...The liberty of the press is no greater and no less...than the liberty of every citizen of the Republic. (17)

In summary, then, 'freedom of the press' is, in most First Amendment theory, a special case of 'freedom of speech'; and 'speech' means 'communication'. In the cases considered in the following sections and chapters these conventions may be taken as implicit, unless otherwise noted.

While these are fairly widespread conventions throughout First Amendment caselaw, the doctrines that develop out of actual cases in different media can be startlingly various and contradictory. In a 1952 motion-picture industry case, Justice Tom Clark

¹⁶ Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 [1973].

¹⁷ Pennkamp v. Florida, 328 U.S. 331 [1946], Frankfurter, J., concurring.

remarked on this, stating that "Each method [of expression] tends to present its own peculiar problems" (18). This echoed Justice Robert Jackson's assertion three years earlier that each medium "is a law unto itself" (19). Several justices have, for example, developed 'separate function' theories specifically for the newspaper industry, suggesting that the press clause in the First Amendment should be interpreted as distinguishing the purpose of press freedoms from -- rather than including them in -- the rationales for free speech. In other cases 'public function' theories have emerged which posit public rights inherent in the operations of the private media. Yet other cases justify a variation of the regime of rights in the broadcasting industry away from that in the publishing industry. All of these doctrines are considered in detail in later sections of this chapter.

In the concluding chapter I will discuss in general terms the way human communication is theorized in First Amendment caselaw. In that discussion a consideration of the unique characteristics of legal communication itself will help explain the models jurists employ; here I wish only to alert the reader to a significant feature of the model of social communication they prefer in mass media cases. Legal norms in the area of speech rights ought to be applied to the most plausible extant facts, if the vitally important decisions of jurists are to be logically valid, accepted as just by the plurality of citizens, and have something like their intended results. But in examining the caselaw it becomes evident that jurists and lawyers pay little attention to the findings of social scientists who study communication.

¹⁸ Joseph Burstyn Inc. v. Wilson, 343 U.S. 495 [1952].

¹⁹ Kovacs v. Cooper, 336 U.S. 77 [1949].

Here is a recent legal definition of communication drawn from an eminent communication lawyer's submission to a U.S. Congressional committee concerning a bill to ban tobacco advertising. Typical of the legal texts, the entire question of what communication is was settled in a single sentence:

Speech, as a process, involves three participants -- a speaker, one or more hearers and, increasingly in modern society, a conduit acting as a go-between, delivering and amplifying the speaker's message to ever larger audiences. (20)

Now, communication, as it is understood by social scientists, is not in any simple sense the 'sending and receiving of messages', or not if we mean that a 'message' is a discrete object or event encoding a 'correct' meaning, or that failure to take the intended meaning necessarily constitutes misinterpretation of a message. Up to the early 1950's this was the dominant paradigm in the sociology of communications. Known now as the 'transmission' or 'bullet' theory, it assumed that the 'reception' of a message was essentially passive and that a speaker more or less 'fires' a self-evidently meaningful message into the listener's awareness. The communicative power of the message was a function of its objective content. The only variables in this model were "Who says what, through what channels of communication, to whom, [with] what results." (21)

Researchers in this tradition, attempting to isolate the effects of various message contents and channels, soon found that new variables "emerged in such a cataract that

²⁰ Neuborne, 1987, *ibid*, 2.

²¹ Bruce L. Smith, Harold D. Lasswell and Ralph D. Casey, Propaganda, Communication and Public Opinion, Princeton: Princeton University Press, 1946, 121.

we almost drowned" (22). Writing on the efforts up to 1960 to apply the 'bullet' theory to mass communications, Klapper enumerated these previously disregarded variables:

[A]udience predispositions, self-selection, and selective perception;... various aspects of contextual organization; the audiences' image of the sources; the simple passage of time; the group orientation of the audience member and the degree to which he values group membership; the activity of opinion leaders; the social aspects of the situation during and after exposure [to the message] and the degree to which the audience member is forced to play a role; the personality pattern of the audience member, his social class, and the level of his frustrations; the nature of the media in a free enterprise system; and the availability of social mechanisms for implementing action drives...

"Almost every aspect of the life of the audience member and the culture in which the communication occurs", Klapper wrote, "seems susceptible of relation to the process of communication effect." (23) This expanded view of the process of social communication contained a tacit political challenge. Its emphasis on the importance of familial, ethnic, class and subcultural influence was highly corrosive of prevailing assumptions about the 'naturalness' of the beliefs and values of economically dominant groups in society.

Klapper and his colleagues concluded that the most they could claim about message 'effects' was that "some kinds of communication on some kinds of issues, brought to the attention of some kinds of people under some kinds of conditions" might reinforce

²² Joseph T. Klapper, The Effects of Mass Communication, N.Y.: MacMillan, 1960, 3.

²³ Ibid.

existing values and opinions (24). "Seeking simple and direct effects of which mass communication is the sole and sufficient cause" (25) was a fruitless venture.

Social scientists, then, recognized some decades ago that the 'receivers' of communications are engaged in complex and purposive activities, and that those activities, as well as innumerable features of the context in which they take place, are important factors in the construction of the meanings of 'messages'. They accordingly abandoned the 'transmission' or 'bullet' theory. It continues, however, to lead a vigorous life in the policy arena.

The question of how jurists and legislators define communication -- the theory of communication implicit in their decisions and policies -- is a recurring one in this thesis. What, in **communicational** terms, are the objectives of the relevant constitutional guarantees? From where is the court's model of communication drawn? What judicial notice is taken of the **structure** of a given communicative situation? What communicative roles and relationships are sanctioned by the courts?

The interpretations that emerge in various disputes, examined below by way of introduction to the issues, language and logic of the caselaw, differ in subtle ways -- that have large consequences! Among these differences a framework of First Amendment theory which questions the 'free market' model and offers a justification for greater state intervention in the mass media gradually emerges. Several Supreme Court justices -- notably Frankfurter and, more recently, Brennan -- have called for a focus on the

²⁴ Bernard Berelson, "Communications and Public Opinion", in Wilbur Schramm (ed.), Communications in Modern Society, Urbana, Ill.: University of Illinois Press, 1948, 172.

²⁵ Klapper, *ibid*, 257.

structure of rights allocated among the interests in mass communication. This more 'interactional' interpretation of the First Amendment, considered at the end of this chapter, accords far better with the evidence from the social sciences, and forms a judicial challenge to the dominance of the 'transmission' model.

A 'SPECIAL FUNCTION' FOR THE PRESS?

Supreme Court Justice Potter Stewart advanced a 'separate function' thesis, in 1975, by suggesting that the free press clause gives -- and should give -- unique constitutional protection to the press:

The publishing business is...the only organized private business that is given explicit constitutional protection...The primary purpose of the constitutional guarantee of a free press was...to create a fourth institution outside the Government as an additional check on the three official branches. (26)

Stewart's thesis was considered, and rejected, by a Supreme Court majority in its reversals of Herbert v. Lando (27) and First National Bank of Boston v. Bellotti (28). In

²⁶ Potter Stewart, "Or of the Press", 26 Hastings Law Journal 631 [1975]. See also V. Blasi, "The Checking Value in First Amendment Theory", American Bar Foundation Research Journal 523 at 561, [1977]. And compare this to another model which advances a separate 'unified theory' of press rights as an emanation of the property rights of copyright holders: Nadel, 2 Fordham Urban Law Journal 183 [1983].

²⁷ 441 U.S. 153 [1979].

²⁸ 435 U.S. 765 [1978]. Although, without subscribing to Stewart's separation of 'speech' and 'press' clauses, the courts had already accorded a special constitutional role to the press within their view of the purposes of speech rights -- see e.g. New York Times v. Sullivan, 376 U.S. 254 [1964]; Miami Herald Publishing

Lando the lower court had attempted to fashion an extension of editorial and journalistic privilege from Stewart's theory on the press clause, but the Supreme Court explicitly rejected this argument.

First National Bank of Boston v. Bellotti

Bellotti (29) raised some different inflections of the issue: whereas Lando (and Sullivan) considered special First Amendment protection for media professionals in the exercise of their special role (which was the basis on which Stewart invoked the 'separate function' thesis), Bellotti's reasoning turned on a comparison of the First Amendment rights of private media corporations and private non-media corporations (30).

In this case the Supreme Court struck down a Massachusetts statute preventing non-media business corporations from using the mass media for political advertising to influence the outcome of state referenda. A group of large corporations with business interests in Massachusetts had repeatedly frustrated the state government's attempts to

Co. v. Tornillo, 418 U.S. 241 [1974].

29. Ibid.

³⁰ See also J. Skelly Wright, "Politics and the Constitution: Is Money Speech?", 85 Yale Law Journal 1001 [1976]; Wright, "Money and the Pollution of Politics", 82 Columbia Law Review 609 [1982]; S. Carter, 93 Yale Law Journal 581 [1984].

See also Mark Tushnet, "Corporations and Free Speech", in The Politics of Law, David Kairys, ed., N.Y.: Pantheon, 1982, 253. According to Tushnet the market fundamentalists have misappropriated the First Amendment much as they did the Fourteenth. In the aftermath of the Civil War the Fourteenth Amendment was enacted to give special legal force to the defeat of slavery. Blacks were meant to acquire civil personhood by its guarantees of Federal civil rights (for example, due process) jurisdiction over the States. But a perhaps unplanned outcome was that corporations have very successfully used its provisions to assert their own legal personhood, and their civil rights.

win a tax referendum by undertaking major advertising campaigns against it. In response the legislature attempted to make such advertising illegal (unless the vote directly affected their "business, property or assets").

Justice Powell's opinion for the court located the constitutional role of the press in speech rights terms:

The press cases recognize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate. (31)

Powell's opinion also rejected Stewart's implicit claim for a hierarchy of corporate speech rights, affirming the equal First Amendment rights of non-media corporations:

If the speakers here were not corporations, no one would suggest that the state could validate silence of their proposed speech. It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual. (32)

Chief Justice Burger wrote a separate concurrence in *Bellotti* in which he extended Powell's formulation of the role of the press. Burger repudiated Stewart's complaint that without a separate interpretation of the press clause, the First Amendment was redundant:

The speech clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the press clause focuses specifically on the liberty to disseminate expression broadly... Yet there is no fundamental distinction between expression and dissemination. The liberty encompassed by the press clause, although

³¹ Bellotti, *ibid.*

³² *Ibid.*

complementary to and a natural extension of Speech Clause liberty, merited special attention [by Madison's committee in the Continental Congress] simply because it had been more often the object of official restraints. (33)

Burger raised another objection to special status for the press. By articulating a unified theory of the First Amendment (speech and press rights as serving the same democratic purposes) he simultaneously buttressed the court's findings in *Lando*, and Powell's argument for recognition of the speech rights of ordinary business corporations. Note that in this argument the court's ability to rule on who was and who was not a journalist becomes ambiguous:

The... difficulty with interpreting the press clause as conferring special status on a limited group is one of definition. The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England -- a system the First Amendment was intended to ban from this country. Further, the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fervor of expression, or ownership of the technological means of dissemination...The evolution of traditional newspapers into modern corporate conglomerates in which the daily dissemination of news by print is no longer the major part of the whole enterprise suggests the need for caution in limiting the First Amendment rights of corporations as such...In short, the First Amendment does not 'belong' to any definable category of persons or entities: it belongs to all who exercise its freedoms. (34)

Chicago Joint Board

Stewart's 'special function' theory of the press is supported by a 1969 Illinois Court of Appeals decision in which a union attempted, unsuccessfully, to sue a newspaper for

³³ Ibid, Burger concurring.

³⁴ Ibid.

access to its advertising columns (35). The Amalgamated Clothing Workers wished to advertise in the Chicago Tribune its objections to the sale of imported clothing by a large Chicago department store, but publication of the ad was refused. In finding for the newspaper, the court interpreted the First Amendment free press clause as establishing permanent protection for the newspaper industry, including protection from any compulsion to publish. The speech rights of the union and the press freedoms of the publisher were separate matters; the union's freedom to speak required no access to the private property of the newspaper.

Chicago Joint Board aired another issue: the question of whether the press has a public function, exposing it to First Amendment litigation when its actions (or inactions) can be construed as quasi-public state actions. The court found that the press has a separate function, but not (at least not in its advertising activities) a public one -- that, despite the public interest rationale of Stewart's theory, the press had no obligation to function in its advertising pages as a public forum of debate:

We glean nothing from the constitutional guarantees, or from the decisions expository thereof, which suggest that the advertising pages of a privately published newspaper may so be pressed into service against the publisher's will either in the contest of a labour dispute to which the publisher is not a party or otherwise. (36)

The Court in Chicago Joint Board (U.S. Court of Appeals, 7th Circuit) was correct, even if the First Amendment grounds on which they chose to evaluate freedom of expression were discredited along with Stewart's thesis. The owners of newspapers have virtually absolute control over the selection and rejection of content, including paid

³⁶ Ibid, 1970.

advertising (37). This is fairly consistently expressed in the caselaw as an emanation of 5th and 14th Amendment property rights. While in theory the media firm has the same speech rights as any citizen, its greater accumulation of communicatively significant property gives it an actual power of speech which is amplified in at least the same proportion. The speech rights of journalists and editors are not merely their own ordinary speech rights, but the greater effective rights they wield as the agents of media property- owners.

A Florida appeals court, in another landmark decision on the press' right to reject paid ads, put the situation in plain language in 1965, and succeeding cases have only affirmed its judgement:

The law seems to be uniformly settled by the great weight of authority throughout the United States that the newspaper publishing business is a private enterprise and is neither a public utility nor affected with the public interest. The decisions appear to hold that even though a particular newspaper may enjoy a virtual monopoly in the area of its publication, this fact is neither unusual nor of important significance. (38)

There is a tension between Chief Justice Burger's First Amendment in Bellotti, with its co-extensive rights to expression and dissemination of speech which "belong to all who exercise its freedoms", and the private property rights discovered in the First Amendment in Chicago Joint Board. I would argue that this tension is present, implicitly or explicitly, throughout the mass media caselaw. It would be false, however, to suggest that the 'public interest' has never taken precedence in these disputes: it has in a few

³⁷ See e.g. Shuck v. Carroll Daily Herald, 247 N.W. 813 [Iowa 1933]; J.J. Gordon Inc. v. Worcester Telegram Publishing Co., 177 N.E.2d 586 [Mass. 1961]; Poughkeepsie Buying Service Inc. v. Poughkeepsie Newspapers, Inc., 131 N.Y.S.2d 515 [1954]; Wisconsin Association of Nursing Homes, Inc. v. The Journal Co., 285 N.W. 2d 891 [WISC 1979].

³⁸ Approved Personnel Inc. v. Tribune Co., 177 So. 2d 704 [Fla. 1965].

instances; and although these are scarce and have been largely ignored, distinguished or otherwise avoided in subsequent cases, they should be noted.

COMMUNICATION AND THE PUBLIC FUNCTION OF PRIVATE PROPERTY

There are only a few newspaper industry precedents which assert the priority of the public interest in privately-owned media operations. The 1945 Associated Press case (39) is exemplary. In finding against Associated Press, and thus enforcing competitor access to its wire services in a Sherman Act (anti-trust) case, Justice Black opined that

It would be strange indeed if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom...The First Amendment...rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public... [A] command that the government shall not itself impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. (40)

Sherman Act cases have perhaps affected the newspaper publishing industry more than pure First Amendment claims. In Citizen Publishing (41), a 1968 anti-trust case, the

³⁹ Associated Press v. United States, 326 U.S. 1 at 20 [1945]; see also United States v. Radio Corporation of America, 358 U.S. 334 [1959]; United States v. Greater Buffalo Press, Inc., 402 U.S. 549 [1971].

⁴⁰ Associated Press, *ibid.*

⁴¹ Citizen Publishing Co. v. United States, 394 U.S. 131 [1968].

Supreme Court ruled that the public's First Amendment interest in hearing from a variety of newspaper sources was subordinate to its interest in preventing monopolistic activities. In that case two separately owned dailies in the same city had formed a pooling arrangement for printing and distribution of their newspapers, and they claimed that this arrangement was the only way to prevent the business failure of one of them, and that such a result would be detrimental to the public's First Amendment interest in hearing from a variety of sources of published opinion (42).

These (short-lived) regulatory victories over the publishing industry in the anti-trust area never reached any implication of common-carrier or public access status for newspapers. At most, they implied that the organization and sale of commercial publishing services must demonstrably not be undertaken with monopolistic intent (43). The sole successful constitutionally-derived US newspaper access case was the 1919 Uhlman case (44), and this has been distinguished many times (ie in the Chicago Joint Board and Approved Personnel cases).

Broadcasting was also explicitly deemed not to be a common-carrier medium in the contentious post-World War One legislation which moved control of the radio system from the Navy to the private sector. Authority for communications legislation is founded on Congress' power to regulate interstate and foreign commerce. The public interest in the radio spectrum was codified under the 1934 Communications Act as the 'Fairness

⁴² Congress responded to the Supreme Court's denial of this argument by enacting the 1970 Newspaper Preservation Act, which sanctions such 'Joint Operating Agreements' when approved by the Justice Department. A JOA application for Chicago's two dailies is before Mr. Meese at the time of this writing.

⁴³ See especially Lorain Journal Co. v. United States, 342 U.S. 143 [1951]; Home Placement Service v. Providence Journal, 682 F. 2d 274 [1st Cir. 1982].

⁴⁴ Ibid, Chapter 2, Note 9.

Doctrine', and these regulations have been developed and administered by the Federal Communications Commission up to the present. These regulations (further considered in Chapter Six) relied on the public ownership and technical scarcity of useable radio frequencies to assert Federal regulatory powers in the broadcast media. All radio spectrum licensees are public trustees, granted use of a frequency in the public interest.

FCC v. Sanders Bros.

The public interest in broadcasting was given priority over private interests in the Sanders Bros. case on Sherman Act grounds (45). In this case (not a Fairness Doctrine case but illustrative of the public interest grounds of FCC licensing) an Iowa radio station sought to have a new competitor's license application denied on the grounds that economic injury to its own operations would result. The FCC denied the motion and granted the license. Explicitly recognizing that the absence of common-carrier status for broadcast undertakings under the Communications Act implied that "the field of broadcasting is one of free competition", the Supreme Court accordingly declined to overturn the FCC's (and the Appeal Court's) findings. "An important element of public interest...affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts" wrote Justice Roberts.

The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed... Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering

⁴⁵ FCC v. Sanders Bros. Radio Station, 309 U.S. 470 [1939].

electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public. (46)

Evans v. Newton

The potential for legally protecting a public function of private property emerges clearly in a 1966 Supreme Court case which is not concerned with communication rights, or at least not in any usual sense. In this decision (47) the concept of 'trusteeship' figures importantly (48).

In 1911 a U.S. Senator with the serendipitous moniker of Augustus O. Bacon bequeathed the use of a parcel of privately-owned parkland to the citizens of Macon, Georgia, with the proviso that its use was restricted in perpetuity to white people only. His will stipulated that the park should be managed by a city-appointed Board of Trustees made up of whites.

After some years a dispute arose. The city ceased to enforce the probated racial segregation, alleging its statutory impropriety. The then-existing Board of Trustees brought suit asking that the city be removed as trustee and title transferred to a new

⁴⁶ Ibid. See also FCC v. Allentown Broadcasting Corporation, 349 U.S. 358 [1954].

⁴⁷ Evans v. Newton, 382 U.S. 296 [1966].

⁴⁸ N.B. - Broadcast licensees are considered trustees of public property in their use of the radio spectrum, and judicial notice of the activity of newspaper editors and journalists is also often inflected by notions of trusteeship. See discussion of Fitzgerald, below; see also Chapter Six discussion of the Tornillo case.

trust prepared to carry out the will's provisions. Several black citizens (Evans et al) intervened in the suit, alleging that the original racial limitation was illegal and asking that the court refuse to appoint private trustees. The city resigned as trustee. Finally, some heirs of the Senator intervened, asking for reversion of the trust property to the Bacon estate.

The state court accepted the city's resignation and appointed new white trustees (Newton et al) to carry out the codicil. The Bacon heirs' claims, and also the black citizens' intervention, were denied. This latter group appealed to the Georgia Supreme Court, which affirmed the lower court's findings. They appealed that decision to the U.S. Supreme Court, which reversed the finding.

A clear majority on the court joined Justice Douglas' opinion, which required reinstatement of the city as trustee, regardless of its wishes, and non-segregated operation of the park. Despite the fact that title to the parkland was privately held, said the Supreme Court, "the public character of the park required that it be treated as a public institution" subject to constitutional provisions.

[W]here the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector. (49)

Justice White, in a separate concurrence, focused on the juridical character of charitable trusts. The general test of what is charitable, he wrote, is whether the "accomplishment of the trust purpose is of such social interest to the community as to justify permitting property to be devoted to it in perpetuity", and concluded that

⁴⁹ Ibid.

there is grave doubt concerning whether a charitable trust for a park could be limited to the use of less than the whole public. (50)

Justice Harlan (joined by Stewart) dissented. Harlan was disturbed by the argument that the privately-owned park's "public character" placed it in the "public domain". He noted that the only strong and similar case asserting the public function of a private institution was a 1946 Alabama case, Marsh v. Alabama, (51). In Marsh the Court found state action to prevent the suppression of free speech on the streets of a company town of 1500 residents by the town's corporate owner to be permissible and necessary on 'public function' grounds. Harlan pointed out that in subsequent New York state cases involving the suppression of free speech in two privately operated residential apartment complexes Marsh was overturned by a lower court and the Supreme Court had refused appeal in both cases (52).

The substance of Harlan's concern was the future implications of the decision. He gave as an example the school system, and suggested, rather prophetically, that by the logic of the decision racially and denominationally segregated schools would be impermissible. A great many other private activities might also be subjected to constitutional limitations:

While this process of analogy might be spun out to reach privately owned orphanages, libraries, garbage collection companies, detective agencies, and a host of other functions commonly regarded as nongovernmental though paralleling fields of

⁵⁰ Ibid, White concurring.

⁵¹ 326 U.S. 501.

⁵² Watchtower Bible and Tract Society v. Metropolitan Life Insurance Co., 297 N.Y. 339; certiorari denied, 335 U.S. 886; Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512; certiorari denied, 339 U.S. 981.

governmental activity, the example of schools is, I think, sufficient to indicate the pervasive potentialities of this "public function" theory of state action. (53)

Justice Harlan failed to note the further example of the privately-owned media, but First Amendment scholar Jerome Barron has rectified this oversight. Barron suggests that this case (and Marsh) might be used to constitutionally ground legislation to ensure public access to the mass media. Moreover, he says, "both decisions find that private property may become quasi-public without a statute in extreme cases" (54). Supporting legislation "may be justified on a theory that the nature of the communications process imposes quasi-public functions on these quasi-public instrumentalities" (55).

Echoing Frankfurter in the Associated Press case (supra), Barron suggests an affirmative and positive Supreme Court rereading of the First Amendment: "A provision preventing government from silencing or dominating opinion should not be confused with an absence of governmental power to require that opinion be voiced" (56). The state has an interest, according to Barron, in creating opportunities for expression and protecting the necessary conditions for the emergence of expression; and using the 'public function' argument it has the necessary constitutional powers to do so by its Fourteenth Amendment due process and Tenth Amendment police powers.

⁵³ Ibid; Harlan dissenting.

⁵⁴ Jerome A. Barron, "Access to the Press -- A New First Amendment Right", 80 Harvard Law Review 1641; reprinted in Donald M. Gillmor and Jerome A. Barron, Mass Communication Law, St. Paul: West Publishing, 1984, 559, at 568, Note 95, emph. added.

⁵⁵ Ibid, emph. added.

⁵⁶ Ibid.

Fitzgerald v. National Rifle Association

One of the few cases to affirm a compulsion on a newspaper to publish was also based partially on trusteeship doctrine (and partly on competition law). A man named Fitzgerald was a candidate for election to the Board of Directors of the National Rifle Association, and submitted to the official journal of the Association, 'The National Rifleman', an advertisement urging members to vote for him. The NRA, relying on its published statement that it "reserves the right to reject or discontinue any advertisement and to edit all copy", refused to publish the ad (57). Showing admirable restraint for a member of the NRA, Fitzgerald sued.

The Court found in favour of the plaintiff, Fitzgerald. The anti-trust decisions in the newspaper industry (see Associated Press, Lorain Journal and Home Placement Services, supra) were noted as follows: "[W]hen balanced against the Congressional policy of preventing monopoly, the right of publishers to refuse advertisements must yield" (58). More to the point, the Court said that in this case a publisher's near-absolute right to decide what advertisements to accept and reject (59) had to be balanced against "the fiduciary duty of corporate directors to ensure fair and open corporate elections" (60). The publication was deemed such a central part of the Association's democratic process

⁵⁷ Fitzgerald v. National Rifle Association, 383 F. Supp. 162 [D.N.J. 1974].

⁵⁸ Ibid.

⁵⁹ "The degree of judgemental discretion which a newspaper has with regard to refusing advertisements is not distinguishable, for purposes of First Amendment analysis, from the degree of discretion it has as to the content of any other editorial materials submitted for publication." Wisconsin Association of Nursing Homes, Inc. v. The Journal Co., 285 N.W. 2d 891 [WISC. 1979].

⁶⁰ Fitzgerald, *ibid.*

that members' opportunities for communicating about its business weighed more heavily in the balance of interests than the First Amendment prerogatives of editors and publishers.

The Court went on to analyze the legal relation between the editors and the member-advertiser in such a way as to reach the question of property rights. First, it found the corporation's executives' duty to publish "of course extends only to the association membership." Then it suggested that the plaintiff, as a member in good standing of the association, and whose dues contributed to the journal's printing costs, was one of its owners. Therefore the judgement was held not to be a clear precedent for compelling publication against the publisher's judgement: the Court had perhaps merely adjudicated a conflict among several owners of the 'Rifleman', all of whom had some claim to the traditional First Amendment protection of publishers.

THE STRUCTURAL MODEL OF THE FIRST AMENDMENT

The conservative tradition of First Amendment interpretation has been a literal and absolute reading, a kind of constitutional bible-thumping in which the mass media themselves have been the most eager, proselytizing part of the congregation. This judicial fundamentalism posits a prescient elect -- the 'framers of the Constitution' -- whose text is transparent and fixed in meaning. "Congress shall make no law abridging freedom of speech, or of the press" is what it says, and, as Justice Black liked to repeat, "no law means no law!" (61) For these gentlemen the scarcity doctrine is blasphemous. Contrary to Frankfurter's or Brennan's apparent perception that mass media speech rights

⁶¹ Bob Woodward and Scott Armstrong, The Brethren: Inside the Supreme Court, N.Y.: Avon, 1979, 148.

must be allocated where they best serve democratic purposes, and not simply where property interests dictate, the traditional view holds that government may neither prevent nor require the provision of speech opportunities in the mass media: both are distortions of the 'free marketplace of ideas' and as such, abridgements of freedom of speech.

I would argue that the extraordinary First Amendment privileges accorded to media owners by jurists in this tradition, even when they appear to reject Stewart's 'special function' doctrine, produce inevitable and very fundamental contradictions in the caselaw. It is clear that the constitution applies only to the actions (or, selectively, the inactions) of government and their effects on citizens; but given that, how are we to reconcile, for example, these statements?

Freedom of the press is not an end in itself but a means to the end of a free society. The purpose of the Constitution was not to erect the press into a privileged institution... The liberty of the press is no greater and no less than the liberty of every citizen. (62)

Nor does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by [the publisher], its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgement. (63)

The competing tradition -- Frankfurter's -- is the 'balancing' test, or what Brennan has called the 'structural' or 'affirmative' model of the First Amendment (64). The jurists of this tradition expect, perhaps naively, that their decisions should result in a

⁶² Pennekamp v. Florida, 328 U.S. 331 [1946].

⁶³ Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 391 [1973].

⁶⁴ The most influential modern U.S. political theorist in this tradition is Alexander Meiklejohn; see Free Speech and its Relation to Self-Government, 1948.

considered balance of speech rights among the various interests at play in the mass media, such that effective democratic processes may evolve in that context side by side with the obvious commercial opportunities. Supreme Court Justice Brennan has championed this model in a number of dissenting opinions:

[T]he First Amendment fosters the values of democratic self-government. Another way of saying this is that the First Amendment protects the structure of communications necessary for the existence of our democracy. This insight suggests the second model to describe the role of the press in our society. This second model is structural in nature. It focuses on the relationship of the press to the communicative functions required by our democratic beliefs. (65)

The structural model seemed in some cases to generate a greater latitude for discovery of a public interest with regulatory entailments, although the newspaper industry has always remained better insulated from these public interest requirements than either speech on the streets, or in the broadcasting medium. In the last section, though, I indicated that when the balancing test was deployed -- in Fitzgerald, in Newton, in Sanders Bros., in Lorain Journal and in Associated Press -- in these cases, although they usually applied only to narrow circumstances, a broadly conceived public interest also prevailed.

Two apparently disparate grounds -- competition law and trusteeship or fiduciary law -- were found to account for most of the successes of the structural model. (The Sherman antitrust momentum in fact contributes more tellingly to this object in the case of the publishing industry, than the First Amendment.) A more developed linkage between the concepts of competition and trusteeship and the free speech principle was noted by Justice Burger, though only as a preface to its rejection, in the Tornillo

⁶⁵ Justice William J. Brennan, quoted in Donald M. Gillmor and Jerome A. Barron, op. cit., at 149. See also William J. Brennan, "Freedom of the Press", 32 Rutgers Law Review 173 [1979].

newspaper access case (examined in detail in the next chapter). His summary of the appellant's argument gives the reasoning behind the structural model:

The same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be "surrogates for the public" carries with it a concomitant fiduciary obligation to account for that stewardship. From this premise it is reasoned that the only effective way to ensure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the marketplace of ideas is today a monopoly controlled by the owners of the market.

(66)

No elevation of pluralistic expectations is in order. The 'sixties were a period of expansion of civil rights, including speech rights, given force again by resurgent popular movements. But hopeful progressive sentiments come to grief in the subsequent years: first, in the irreversible failure of media access challenges such as Tornillo in the 'seventies; then with the subsequent assimilation of the 'balancing' model to the new 'hearer-centred' doctrine of 'commercial speech rights'.

Justice Holmes was once asked, at the end of his career, "What is 'law'?" "The study of what judges do", he replied. Similarly for mass communications this chapter has suggested that free speech can be defined as 'what the owners of the media do'.

⁶⁶ Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 [1974].

CHAPTER FIVE:

THE STRUCTURE OF 'OPPORTUNITIES FOR EXPRESSION'

BALANCING RIGHTS

"Free, robust criticism of government...is the essence of the democratic dialectic" says First Amendment scholar Harry Kalven Jr. "The citizen may criticize the motives and performance of government. The government...may not criticize the performance and motives of its critics" (1). With this assurance of immunity in hand the present study extends in this chapter its critique of the U.S. Supreme Court's recent labours on the First Amendment to the explicit question of media access.

Justice Burger's remarks in Bellotti affirming the First Amendment protection of citizens' opportunities for expression echoed a long-standing doctrine in the caselaw that government has, not only a responsibility to refrain from abridgement of speech freedoms, but a more positive responsibility to maintain and enlarge the opportunities for their exercise. In many situations this responsibility becomes a question of whether access is available to (usually privately-owned) communications facilities. This section is concerned with the structure of the legal discourse on the 'right of access' in direct and mediated communication.

¹ Quoted by Justice Douglas, concurring, Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 [1973].

The question of access rights drags several other questions in its wake. For example, the access of others is 'compelled speech' for private owners of media facilities, who therefore claim a corresponding 'right to not speak'. There are also various conceivable kinds of access, each implying a different right -- a straightforward right of access to initiate discussion of an otherwise unreported topic; the 'right to reply' to previous editorial content, the right to reply to advertising content; the right to reply to advertising with, or without, paying advertising fees; the right to purchase advertising at all, and so on. Each of these also has its corresponding negative form of right. Editors and journalists have speech rights which are brought into question by 'rights of access'; so, too, apparently, do audiences, whose 'right to receive' may be affected (2). Certainly 'property rights' are affected by 'access'. The government's 'right to regulate' (for example, Federal regulatory powers over interstate commerce) arises, along with perhaps the most recondite issue in this area of law, the question of 'state action'. Without the identifiable participation of the government in any putative denial of rights the Constitution does not apply.

The following three sections examine landmark access cases in the contexts of daily newspaper publishing, broadcasting, and direct, literal public speech in a shopping center. The allocation of rights in these cases -- and the differences in their disposition -- provide a useful entry point for distinguishing the structure of mass media speech rights from that in direct interpersonal communication, and for comparing the forms of legal rights in mass communication with the forms of commodities produced by media firms.

² See chapter Six.

In 1913 the state of Florida enacted a statute compelling newspaper publication of certain kinds of materials. When this statute was overturned in the landmark 1974 Tornillo case (3) the question of access to the print media was clearly and finally settled, because the narrow form of access and clear legislative intent provided by the statute tested all the outstanding ambiguities in the constitutional doctrines on the subject. The statute provided a 'right of reply' only for registered election candidates who were attacked (on the basis of personal character, official record, or charges of malfeasance) in the columns of newspapers. In these circumstances the statute compelled free publication of a reply of equal length.

Pat Tornillo, a former official of the county teacher's association and the leader of a recent teacher's strike, ran in 1972 for a seat in the Florida legislature. During the election campaign the Miami Herald attacked Tornillo in an editorial, calling him a lawbreaker (the strike had continued after the issuance of an injunction) and suggesting that its readers were duty-bound to vote against him. Tornillo's reply to this attack was refused publication, and he brought a suit against the paper under the statute.

The lower court found the statute unconstitutional; the Florida Supreme Court reversed this decision, upholding the statute on First Amendment grounds and granting Tornillo's demand for an order against the Herald compelling publication of his reply. In 1974 the U.S. Supreme Court **unanimously** reversed the Florida Supreme Court and

³ 418 U.S. 241.

declared the statute unconstitutional. Tornillo was the first clear test of a statutory right of reply to the daily press.

Chief Justice Burger's opinion for the Federal Supreme Court refused this compelled access, despite the fact that (unlike Chicago Joint Board) it had the support of a carefully drafted statute which was limited to apply only to candidates' replies during elections. And yet, on the face of it, the situation appears as a clear target for Burger's hostility to the 'separate function' theory of press freedoms, and as an opportunity to enact his declared conviction that dissemination must be protected together with expression to fulfill the First Amendment's intent.

The Herald argued that the statute amounted to a form of theft: the publisher is deprived of property without compensation and without due process. The statute was unconstitutional, the publishing firm held, because it violated the Fifth and Fourteenth Amendment rights of a corporation, as a legal person, to the enjoyment of property, and the protection of its property rights by the law. The Herald did not specify the property of which it considered itself deprived by the Florida court's ruling.

Tornillo's lawyers (4) argued that the 'free marketplace of ideas' at the time the Constitution was drafted, in which the press as a whole had communicated the full range and diversity of public opinion, had evolved into a monopoly controlled by the owners of the media. Concentration in the publishing industry, they said, had driven the costs of entry into the 'marketplace of ideas' too high for most citizens to participate. The

⁴ among whom were Jerome Barron, a widely-read author on First Amendment issues (op. cit.), member of the Harvard law faculty and tireless activist for press access.

industry therefore was, because of its recognized and licensed monopoly character (5) and its frequent claims to be "surrogates for the public", in a stewardship role. Their brief petitioned the Court to enforce the fiduciary obligations of that role.

The Court noted these arguments, summarizing them in the proposition that "Government has an obligation to ensure that a wide variety of views reach the public" (6). Burger declined, however, to support this proposition, asserting that compelled speech -- a "command that the press publish what it prefers to withhold" -- was equivalent to and indistinguishable from prior restraint, or censorship. On the substance of *Tornillo's* arguments, Burger wrote:

A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.
(7)

Furthermore, according to Burger, statutes like the one in question were most likely to 'chill' free expression, since it gave editors an incentive to avoid controversy. "Government enforced right of access", he said, "inescapably 'dampens the vigour and limits the variety of public debate'" (8). Burger preferred to rely upon "journalistic integrity" and "editorial control and judgement": journalists, editors and publishers must be left to make the inevitable interpretive decisions, because these are the essence of a free press:

⁵ See Chapter Four, Note 42.

⁶ *Tornillo*, *ibid.*

⁷ *Ibid.*

⁸ *Ibid.*, quoting *Sullivan*, 1964, *ibid.*

A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper and decisions made as to...size...and content...and treatment of public issues and public officials -- whether fair or unfair -- constitutes the exercise of editorial control and judgement. (9)

Nothing in this case or any other First Amendment caselaw demands newspaper journalists, editors or publishers keep to any standard of 'objectivity', 'balance', 'fairness', or even 'accuracy'. 'No prior restraint' means that statements in the press can only be sanctioned after the fact, as in a libel suit. Burger's comments (supra) that "responsibility cannot be legislated", and that all interpretive judgement "-- whether fair or unfair --" is the prerogative of the newspaper, can be taken as characteristic. Burger quoted in *Tornillo* another landmark First Amendment case from the previous year, which suggests that publishers may 'interfere' as much as they wish in the editorial process -- if they judge it in their business interests:

The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers -- and hence advertisers -- to assure financial success; and second, the journalistic integrity of its editors and publishers. (10)

(Cynical readers may decide for themselves how limiting the second factor might be.

The other case quoted also considered (and rejected) compelled access -- in this case, access to paid broadcast advertising which was not a reply to previous content; it is considered in more detail below.)

The last chapter noted a tension between Chief Justice Burger's First Amendment, with its co-extensive rights to expression and dissemination of speech which "belong to all who exercise its freedoms", and the private property rights discovered in the First

⁹ Tornillo, *ibid.*

¹⁰ CBC v. DNC, 412 U.S. 94 [1973] at 117.

Amendment in Chicago Joint Board. In Tornillo we find that that 'tension' resides as much within the discourse of a particular jurist as among the competing interpretations of different jurists. Moving back and forth between the interests represented in the case, Burger eliminates ("responsibility cannot be legislated") all but two interests: that of government in preventing 'chilled' speech, and that of professional journalists and editors in exercising integrity and judgement. Both interests have the same object (undampened "vigour and...variety of public debate"); the latter achieves it more surely. Note that Burger's stirring rhetoric in Bellotti to the effect that the First Amendment belonged to all and to no-one came four years after his opinion in Tornillo. The two distinguishing characteristics of that decision were that the statute in question attempted to prevent publication of material acceptable to the media owners, and that the rights asserted against this governmental action were the rights of corporations to speak in the mass media.

Justice Byron White's concurrence in Tornillo is an elegant coda to Burger's first movement. In this text White collapses the same complex and conflicting array of private interests -- publishers, editors, readers, advertisers, voters and political candidates -- into one discursive public valiantly attempting, with the Court's help, to hold its ground against the state. This is his quintessentially laissez-faire answer to Pat Tornillo's charges of harmful monopoly:

Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer the power of reason as applied through public discussion and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press. (11)

¹¹ Tornillo, *ibid.*

DIRECT INTERACTION: Prunevard Shopping Center

Outside of cases involving the daily press -- in the broadcast media, for example, or in cases involving face-to-face communication, the precedents are more varied. A powerful rationale for an opposite decision in Tornillo is provided in Prunevard Shopping Center v. Robbins (12). Like Tornillo, Prunevard is also about 'compelled speech', though not set in a context of mass communication; it is precisely the different results obtained in mass media and non-mass media settings that are interesting here. The Supreme Court's concern in Prunevard, with the protection of states' rights to expand the opportunities for expression of individual citizens in direct interaction. This case contains some quite narrow distinctions; note especially the changing constitutional status of state law in Tornillo, Bellotti, and Prunevard.

Prunevard shopping center, in Campbell, California, rents business premises to about seventy-five retail stores and restaurants and to a movie theatre, and maintains, as part of its services to those tenants and their clientele, five acres of parking lot and a variety of walkways, sidewalks, courtyards and plazas. One weekend an "orderly and peaceful" group of high school students set up a card table in the central courtyard and began "distributing pamphlets and ask[ing] passersby to sign petitions...to be sent to the President and members of Congress" opposing the U.N. resolution against Zionism (13).

¹² 447 U.S. 74 [1980].

¹³ Prunevard, *ibid.*

None of the patrons objected to their activity, but a security guard told them they would have to leave, and suggested moving to the public sidewalk at the perimeter of the complex. He correctly informed them of the shopping center's explicit policy of disallowing "any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that was not directly related to [the shopping center's] commercial purposes". In the words of Justice Renquist in his opinion for the court, "Appellees immediately left the premises and filed this suit" in county court (14).

In their suit the students sought an injunction against the shopping center's denial of access for the exercise of their First Amendment rights. The lower court denied their injunction; on appeal the California Supreme Court reversed that decision, finding that the California State Constitution protected "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned" (15). The Pruneyard Shopping Center appealed to the Federal Supreme Court, which upheld the California Supreme Court.

Pruneyard's (appellants') arguments recall the Miami Herald's. The right to exclude others, said the shopping center, was implicit in the Fifth and Fourteenth Amendments' guarantees against the taking of property without, respectively, just compensation, and due process of law. Justice Renquist, for the Court, found neither infirmity, dismissing these arguments by observing that tolerance of the students' activity would not "unreasonably impair the value or use of their property as a shopping center" (16). The Herald, facing compelled access by the State of Florida, made a similar argument in

¹⁴ Ibid.

¹⁵ 23 Cal. 3d 899, [1979] at 910.

¹⁶ 447 U.S., *ibid.*

Tornillo as the California appellants here, and won, though without the Court directly addressing their argument. Here again the owner of the medium-as-property argues 'unjust taking', and the Court again skirts the issue but makes an opposite ruling on the access question. What is the property putatively 'taken' in each of these cases? Would there have been an impairment of property value in Tornillo under the Florida Supreme Court's decision?

Justice Marshall's concurrence in Pruneyard rejected the due process argument on more general grounds. Marshall referred to a "normative dimension" in constitutional law, derived from or shared with "core common-law rights". By identifying this "core", Marshall suggested, one could also identify permissible degrees of divergence between state and federal constitutional law, and thus ease the necessary process of historical change in the law. The appellants' due process arguments in Pruneyard, he felt, imposed an unnecessary rigidity on the Fourteenth Amendment's response to changing circumstances. He did not, however, distinguish this from Tornillo, where the changing circumstances of press ownership were arguably even more cogent than those of real estate ownership in this case.

The appellants in Pruneyard believed that they found support in Lloyd v. Tanner (17), wherein the Federal Supreme Court had denied the State of Oregon the ability to require access to shopping centers for the exercise of state constitutional rights of free speech and petition "when adequate alternative avenues of communication are available".

¹⁷ 407 U.S. 551 [1972].

In Lloyd a group of anti-Vietnam War protesters had sued over their eviction from a Portland shopping center (18).

Renquist refused the Lloyd precedent (without reference to Logan Valley), distinguishing it on the basis that there was in the case of Lloyd no explicit state constitutional or statutory provision for the "use of private property by strangers", and that there was such a provision in California law. He asserted the existence of a "well-established" power of the states to impose restrictions on private property, and to expand on the "individual liberties...conferred by the Federal Constitution" -- as long as there was no "taking without just compensation" (19). Thus, where in Tornillo the court declined to rule on the 'unjust taking' issue (or to enunciate what might or might not have been taken), in Pruneyard they ruled that the taking was not unjust (but still without saying what had been taken!).

The appellants also advanced First Amendment arguments based on Tornillo, and on Wooley v. Maynard (20). In Wooley, two Jehovah's Witnesses in New Hampshire had covered up the state motto 'Live Free or Die' on the license plate attached to their automobile because it offended their religious beliefs. Chief Justice Burger, invoking the protection of minority viewpoints by the First Amendment, (and offering lexical comfort

¹⁸ And Lloyd would appear itself to overturn without comment Justice Marshall's opinion for the Court in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 [1968], which affirmed a union's right to picket a store in a private shopping center on the argument that "property that is privately owned may, at least, for First Amendment purposes, be treated as though it were publicly held". First Amendment protection of union picketing in shopping centers was also denied in Hudgens v. NLRB, 424 U.S. 507 [1976].

¹⁹ 447 U.S., *ibid.*

²⁰ 430 U.S. 705 [1977].

to this study) held for the Court in Wooley that the state's attempt to enforce this display was unconstitutional:

[W]here the state's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message. (21)

The court in Pruneyard did affirm the right of individuals, discovered in Wooley, to avoid communicating a government -prescribed message. But Pruneyard was distinguished by the court on the grounds that no specific message was dictated by the state; that appellants were free to disclaim sponsorship or association with the students' message (e.g. by posting signs); and that the shopping center's standing invitation to the public to visit at will assured that the views of other members of the public would "not likely be identified with those of the owner" (22).

The 'state action' question seems only partly resolved by this justification of its action in Pruneyard, though. Because constitutional guarantees only apply to the relation between government and individual, where is the 'state action' that triggered constitutional protection from the California Supreme Court? Is it the County Court's initial affirmation of the shopping center owners' Fifth and Fourteenth Amendment interests? Consensual recognition of an array of private property interests and the very ability to observe the boundaries between them depend on an accumulation of such interest-adjudications. If these qualify as constitutionally regulated state actions, then all activity in the market must theoretically be subject to constitutional oversight. For a court to find constitutionally significant state action in the mere recognition of a

21 Ibid.

22 447 U.S. Ibid.

property right is for it to acknowledge property itself as the product of state action. Specifically in this case the relevance of identifying the property in question becomes even greater since the taking of that property was found to be neither tortious nor unconstitutional: what the state giveth, the state taketh away!

Renquist distinguished Tornillo on two grounds. First, the principle in that case, he said, was that a state cannot tell a newspaper what to print. The Florida statute contravened this principle in that it "exact[ed] a penalty on the basis of the content of a newspaper" (23). Although there is a great deal of caselaw that makes this point the 'principle' underlying most of it is that a newspaper owner may do as he wishes with his property. How this varies from the fact pattern in Pruneyard is unclear, unless Renquist is subscribing here to Stewart's 'separate function of the press' theory. Many other attempts to enforce press access -- on grounds of the function of the press rather than its specific content -- had failed precisely on their generality and overbreadth and their lack of supporting statutory authority (24), and it was the hope of the respondents in Tornillo that the Florida statute would save them from this defect. Jerome Barron's judgement is that access to the press

has been resisted by relentless invocation of the freedom of contract notion that a newspaper publisher is as free as any merchant to deal with whom he chooses. (25)

²³ 447 U.S., *ibid*, quoting Tornillo, *ibid*.

²⁴ See e.g. Mack v. Costello, 143 N.W. 950 [S.D.1913]; Friedenberg v. Times Publishing Co., 127 So. 345 [La.1930]; In re Louis Wohl, Inc., 50 F2d 254 [E.D.Mich. 1931]; Wall v. World Publishing Co., 263 P. 2d 1010 [Okla.1953]; see also Chapter Four, Notes 37 & 38.

²⁵ *Op. cit.*, Note 54, Chapter Four.

In regard to penalties, the Florida statute only provided for court-imposed penalties if the newspaper refused equal access to electoral candidates attacked in editorial copy in well-defined ways during elections. (Unless the penalty referred to is once again the ghostly property damage entailed in following these conditions, and if so, Renquist once again has not distinguished this from Pruneyard.)

Renquist's second distinction of Tornillo is even more suggestive. He identifies Burger's refusal to intrude on "the function of editors" as the key message in that case, and a condition absent from Pruneyard. He also reproduces Burger's quote from Sullivan (26) to the effect that government enforced right of access would "dampen the vigour and limit the variety of public debate", finding this inapplicable as well. Burger probably didn't realize he was creating a need for shopping malls to have editors.

Certainly it is true that the owners of the shopping center were not functioning as editors; they had not attempted to organize or publicly interpret the presentation of views in their plazas or courtyards as part of their business activities. If they had done so, would this have protected their exclusion of the students' speech? To speculate for a moment: imagine they organized and introduced weekend presentations of consumer product information in the central courtyard, and allowed product advertisers to display, for a fee, promotional material about their wares. Would they then suffer an 'unjust taking' of their property if the California court persisted in allowing the students to use the courtyard as a public forum? What would that property be? And is the communicative function of a public forum public property? If so, can it be transformed into private property merely by organizing the sale of its communicative use?

²⁶ Supra; see Sullivan, Chapter Four, Chapter Six.

Pruneyard articulates a concern for protection of states' rights to expand its citizens' access to expressive resources, regardless of the "existence of other appropriate avenues". Its reasoning confronts Tornillo's: is it really primarily the danger of insult to the editorial profession which stands in the way of realizing, in the mass media, the recognized responsibility of government to expand opportunities for public expression?

BROADCASTING: THE FAIRNESS DOCTRINE

The U.S. Communications Act of 1934 and subsequent judicial review have affirmed the constitutionality of a narrow degree of government regulation of broadcasting content (pursuant to S. 315 of the Act). These regulations have been continuously developed and refined by the FCC since the 1930's under its 'Fairness Doctrine' rules. The constitutional rationale for regulation is known as the 'Scarcity Doctrine': the radio spectrum is public property; it is a finite resource, inherently not available to all competing uses; its use is allocated by the government by granting limited-term, renewable licenses to preferred applicants; successful applicants are trustees of public property; and their use of it in the public interest is a condition of grant and renewal of licenses.

The Fairness Doctrine imposes two kinds of obligation on broadcasters: 1) they have an 'affirmative obligation' -- they must give "fair and adequate coverage to controversial issues of public importance"; and 2) they have a 'balancing obligation' -- they must provide coverage of other sides of controversial issues if one side is presented: a 'range of views'. The Commission,

on the **only** occasion on which it has enforced the **affirmative** obligation, did so by comparing the issues covered by different media outlets in the same region (27). The **balancing** obligation, which has been the subject of numerous proceedings and studies, is generally triggered by a complaint mechanism.

In practice the Commission has usually considered the affirmative obligation moot if licensees have 'exercised reasonable editorial judgement' or if complainants have had an opportunity to receive coverage on the disputed issue via other media outlets. When licensees do choose to cover an issue the balancing obligation does not require equal time, nor does it require the broadcaster relinquish editorial control: it must simply represent a range of views, plausible to the Commission, on issues it chooses to cover. The Fairness Doctrine requires **personal** responses -- without editorial control -- only to attacks made on individuals during the presentation of 'controversial' issues (as from time to time identified by the Commission). There are also separate regulations (outside the Fairness Doctrine proper) requiring broadcasters to sell advertising spots to candidates for public office during elections, and to political parties for fundraising appeals.

This section's discussion of broadcast access caselaw examines three Fairness Doctrine cases: Red Lion, Retail Store Employees, and DNC (28). Access rights in the broadcasting sector were bracingly affirmed by the Supreme Court in Red Lion, and then ambiguously denied six years later in DNC. DNC has set the subsequent pattern. Retail Store Employees is an example of a lower court ruling after Red Lion and before DNC -- a ruling in which, clearly, the lower

²⁷ Mink, 59 FCC 2d 987 [1976]; see also Douglas H. Ginsburg, Regulation of Broadcasting, St. Paul: West Publishing Co., 1979, 509-10.

²⁸ Red Lion Broadcasting v. FCC, 395 U.S. 367 [1969]; Retail Store Employees Union, Local 880, Retail Clerks International Association, AFL-CIO v. FCC, 43b F. 2d 248 [D.C. Circuit 1970]; and Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 [1973].

court had understood, but perhaps too quickly applied, the meaning of the first decision. In these cases the Court makes explicit reference to the audience's role in mass communication.

Red Lion v. FCC

In Red Lion the Supreme Court unanimously upheld, for the first time, the constitutionality of the Fairness Doctrine against a broadcaster's claim that

the First Amendment protects any broadcaster's desire...to broadcast whatever they choose, to exclude whomever they choose... and to refuse to give equal weight to the views of opponents. (29).

These are the events which gave rise to the case. In November, 1964, as part of the "Christian Crusade" series carried by Red Lion Broadcasting Co. on its Pennsylvania radio station, the Reverend Billy James Hargis gave a critical review of a recently published book entitled Goldwater -- Extremist on the Right. Reverend Hargis' review consisted in large part of ad hominem attacks on the book's author, Fred J. Cook, who, he said, had been fired from a New York city daily for slandering a city official, had then worked for a "communist-affiliated newspaper" (The Nation), and had in that position defended the satanic Alger Hiss and attacked the saintly names of J. Edgar Hoover and the FBI.

Fred Cook decided that he had been personally attacked and demanded free reply time from the station, which was refused. He complained to the FCC. The Commission concluded that a personal attack had been made, that the station had failed to provide a transcript of the broadcast and an opportunity for reply (as required by the personal attack rules of the Fairness Doctrine), and that the station must provide a free opportunity for reply. Red Lion

²⁹ Red Lion, *ibid*, plaintiff's brief.

Broadcasting Co. appealed to the Circuit Court of Appeals, which found against them. They appealed that decision to the Supreme Court, and it also repudiated their claim, firmly upholding the FCC's and the Appeal Court's ruling.

Justice White's opinion for the Court (unanimous, with Justice Douglas absent) began by reviewing in some detail the powers of the FCC, previous Fairness Doctrine caselaw, and Congressional debate and committee hearings going back to the 1912 Radio Act and the National Radio Conferences of the early 1920's. He found that the FCC's personal attack rules implemented longstanding and well-documented Congressional policy and did not constitute a regulatory "frolic" on the part of the Commission:

Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation. Thirty years of consistent administrative construction... reinforce the natural conclusion that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations...

When a broadcaster grants time to a political candidate, Congress itself requires that equal time be offered to his opponents. It would exceed our competence to hold that the Commission is unauthorized by the statute to employ a similar device where personal attacks or political editorials are broadcast by a radio or television station. (30)

White went on to examine the First Amendment rationales underlying this finding. He first drew a parallel from the regulation of sound trucks to the regulation of broadcasting equipment:

The ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions are reasonable and applied without discrimination... Just as the Government may limit the use of sound-amplifying equipment so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or of any other individual does not embrace a right to snuff out the free speech of others. (31)

³⁰ 395 U.S., *ibid.*

³¹ *Ibid.* White also adverted in this passage to Kovacs v. Cooper, *ibid.*

White went on to examine the barriers to equal communication rights posed by broadcast technology, in terms which are remarkably sensitive to the dialogical potential of mass media discourse:

[T]here could be meaningful communications if half the people in the United States were talking and the other half listening... But only a tiny fraction of those... can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology... Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish...

As far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused... There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves...

The people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. (32)

Two related issues with great significance for the later DNC case arose in Red Lion.

These were the questions of editorial privilege, and of the status of the scarcity doctrine. On the first question, White's opinion asserted that without the right of reply license holders would have far too much power to ensure their own views monopolized public discourse. This, he said, was no better than government encroachment on the freedom of the press: "the First Amendment does not sanction repression of that freedom by private interests."

Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. (33)

32 Ibid.

33 Ibid.

The appellant also argued that the scarcity doctrine no longer reflected prevailing conditions because there were in existence unallocated frequencies, and because new frequencies were being opened to use by technical advances. White, reviewing the FCC's allocation data, did not find an unreasonable gap between available and allocated frequencies. He also pointed out that the mere existence of unutilized parts of the spectrum was not enough to "render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest", especially in face of the fact that

Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants... (34)

Why did these considerations in the Red Lion decision -- the narrowing effects of private censorship on public discourse, the high entry barriers to the industry, and the legitimate power of legislators to counter both of these problems with right of reply rules -- not bleed over into the Tornillo decision in the newspaper industry?

Retail Store Employees v. FCC

The 1970 Retail Store Employees (35) case is typical of the new view the courts held in broadcast access disputes for a few years after Red Lion. Note especially the different outcome from the Chicago Joint Board case in the same year, despite their similar fact-patterns.

³⁴ Ibid.

³⁵ 43 F. 2d 248 [1970], *ibid.*

The union had a labour dispute with a chain department store's Ashtabula, Ohio operation. A strike was organized, and the union took out a large number of advertising spots on a local radio station to request public support for its picket line. After a few months the union was denied further opportunities to purchase advertising despite the fact that the station continued to air the employer's ads. The union complained to the FCC.

The Commission responded by noting that radio licensees were not common carriers and were not required to sell advertising opportunities on demand, and further noted that in its opinion there was no controversial issue of public importance involved in the dispute. The union intervened at the radio station's next license hearing, alleging a violation of the Fairness Doctrine, and the FCC again dismissed the complaint. The union appealed, and the court, finding that "controversial issues of substantial public importance" were indeed involved, remanded the decision back to the FCC for rehearing. The court record does not indicate whether the union's expensive moral victory was translated into success on the picket line. In this case the union received, however, an unusually clear affirmation of its broadcast access rights from a court following the Red Lion precedent.

CBS v. Democratic National Committee

A more recent precedent in broadcast access is the case of CBS v Democratic National Committee, which put an end to the liberal interpretation of the Fairness Doctrine briefly sanctioned by Red Lion. DNC (the fact pattern is described below) recapitulates the 'opportunities for expression', 'compelled speech', 'editorial function', 'state action' and private property rights issues in the context of the broadcast media. The access and 'compelled speech'

issues are inflected in a new way, not only by the different configuration of the 'state action' question, but also by the fact that this case invoked a structure of access midway between that denied in Tornillo and that affirmed in Pruneyard. (This new form of access is also denied).

The jurists' concern for editorial prerogatives mirrors that in Tornillo, and all of the egalitarian doctrine so fervently enunciated in Red Lion appears to evaporate, except from Brennan's dissent (joined by Marshall).

This case is rendered quite complex in two ways which deserve introductory comment. The first is the court voting pattern and its results: the majority opinion (written by Burger) denied the 'opportunity for expression' sought by the Democratic National Committee, upholding CBS's appeal and reversing the previous Appeals Court decision in favour of the DNC. But there was no majority opinion on the reasons for reversing the Court of Appeals: Burger's substantive argument was joined only by Stewart and Renquist, while White and Blackmun, joined by Powell, wrote separate concurrences giving quite incompatible reasons. Douglas concurred on yet other grounds. Furthermore, Stewart wrote a separate concurrence diverging on some points from Burger's opinion, joined, on some points, by Blackmun and Powell; and Brennan wrote a dissent in which he was joined by Marshall. The Court was not unanimous.

Second, the case was one of four considered simultaneously by the Supreme Court, all arising from a broadcaster's exclusionary policy. These cases began with a complaint to the FCC, in 1970, from the 'Business Executives' Move for Vietnam Peace' (BEM); but by the time the Federal Supreme Court heard the dispute in 1973, it was faced with a loud rhubarb of texts and voices, including BEM, the FCC, the DNC, CBS, ABC, Post-Newsweek, and the Court of Appeals, as well as an unusually dense welter of legislative, regulatory and caselaw history and precedents.

The following discussion omits most of these voices, reviewing, as far as possible, only the case of CBS v. DNC (36) and the FCC's part in it. Similarly the dialogue between the justices is pared down to Burger's opinion, Brennan's dissent, and some instructive comments from the others. The relevant facts and doctrines are attentively preserved; but for the justices' analyses of, for example, the regulatory issues or the statutory history, the reader should consult the court record.

BEM's complaint to the FCC in January 1970 unsuccessfully asserted its right to buy radio advertising spots from WTOP, a station in Washington D.C., to air its views on the Vietnam war. The station "followed a policy of refusing to sell time for spot announcements to individuals and groups who wished to expound their views on controversial issues" (37). DNC's case to the FCC four months later made a wider claim. It sought a declaratory ruling that broadcasters could not "as a general policy, refuse to sell time to responsible entities...for comment on public issues" (38). DNC did not object to the policies of any particular broadcaster, nor did it specify a particular issue on which it wished to speak. It offered evidence that its efforts to air ads would be frustrated by some broadcasters, and asked the Commission to declare such refusal a breach of the FCC's regulations and the limited constitutional right of access to the airwaves established by the Supreme Court in Red Lion.

It was really only the personal attack rules of the Fairness Doctrine which were tested and vindicated in Red Lion. DNC proposed a much broader reading of the FCC's regulatory powers. In effect, if it agreed to find a government-protected right to purchase the broadcast of ads, the FCC would have thereby required broadcasters to carry (paid) messages over which they

³⁶ 412 U.S., 94 [1973], *ibid*.

³⁷ *Ibid*.

³⁸ *Ibid*

exercised no editorial control ('personal' messages that did not have to be responses to attacks); would have taken away editorial definition of what constituted a "controversial issue" (by allowing advertisers to raise issues ignored by broadcasters); and would have imposed new conditions for 'balanced' coverage, all at once. If the FCC accepted this interpretation of Red Lion, and continued to enforce its existing provisions, it would have to require broadcasters to present the other sides of issues raised by advertisers like DNC, at their own expense.

Evidently, the Commission did not want these powers; it rejected both BEM's and DNC's complaint, finding that citizens and citizen groups had no First Amendment right to purchase broadcast advertising to comment on public issues.

The Court of Appeal reversed the Commission on both cases, finding a limited right to present "editorial advertisements" on stations which presented other paid announcements, such as product advertisements. In its view, broadcasters were "instrumentalities of the government" because of the scarcity doctrine -- because they were granted a (regulated) use of a part of the public domain. It reasoned that acceptance of one kind of ad, and not the other, was unconstitutional discrimination by the state, and counter to the purposes of the First Amendment. The Court of Appeal therefore instructed the Commission to develop appropriate regulations for determining how much editorial advertising must be accepted, and how it was to be selected.

The Supreme Court reversed the Court of Appeal (in the equivocal manner of voting noted above), denying the constitutionality of the DNC's proposed form of access. The net impression of the ruling is that speech in the mass media on issues of public importance is not only unavailable as a right (even to citizens willing to pay advertising rates), but, by default, commands less constitutional protection than product advertising.

Burger's opinion for the Court (the position of three of the nine justices -- Burger, Stewart, and Renquist) said that this was not a First Amendment case. Broadcasters' editorial policies and judgements were not actions of the state, and were therefore not governed by the First Amendment. DNC's rights were not breached by CBS's refusal to air their ads, or by the FCC's refusal to require them to, because CBS was not acting as the government. Moreover, government action by the FCC would have unconstitutionally infringed on CBS's First Amendment rights. There simply was -- and could be -- no 'state action' implicated here.

This was consistent with Burger's later majority opinion in Tornillo, where the narrow Florida state statute requiring less of newspapers than the Fairness Doctrine required of broadcasters (only a personal right of reply for candidates attacked during elections) was held to be an unconstitutional infringement on the First Amendment rights of the press. Nor does it contradict his opinion in Bellotti: the Massachusetts statute overturned in that case would have permitted the state to deny non-media corporations the right to buy political advertising. In DNC the government is restrained from either requiring media firms to sell such opportunities, or from requiring them not to do so: the decisions -- and the selections -- rest entirely with the owners of the media.

White and Blackmun, joined by Powell, denied the Democratic National Committee's sought-for access by upholding CBS's policy as consistent with the "substance" of the First Amendment: it was a First Amendment case; the broadcaster's policy was a government action; the outcome is not affected because it is a constitutionally permissible state action. Douglas' concurrence varied from Burger's opinion only in going further: he found the Fairness Doctrine unconstitutional as well.

Burger gives extensive and deferential acknowledgement to the "delicate balancing" performed by Congress and the FCC:

Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned...the broadcast industry is dynamic in terms of technological change...Thus, in evaluating the First Amendment claims of respondents, we must afford great weight to the decisions of Congress and the experience of the Commission...This is not to say...we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. (39)

Having established the varying jurisdiction and unified intent of the orchestra of government, he waltzes deftly around with his chosen partner, editorial judgement: (1) he affirms the scarcity doctrine, finding in it more evidence of 'balancing' -- "between private and public control"; (2) he notes approvingly Congress' rejection of common carrier regulation of broadcasting, in 1934; (3) he happily discovers, in the Fairness Doctrine, a permissible balancing of the government's, and broadcasters', rights...

Broadcasters are responsible for providing the... public with access to a balanced presentation of information on issues of public importance. Consistent with that philosophy... no private individual or group has a right to command the use of broadcast facilities. (40)

Burger's argument in fact rests a great deal on the Fairness Doctrine. He rejects the Appeal Court's confidence in a number of Supreme Court cases prohibiting states from discriminating in the kinds of speech protected in the press or in public areas (41) because, he says, the Fairness Doctrine "gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs". Finally, against the Appeal Court's holding in favour of the DNC, he raises the spectre of ruling class control of the media:

³⁹ 412 U.S., *ibid.*

⁴⁰ *Ibid*, *emph. added.*

⁴¹ e.g. Cox v. Louisiana, 379 U.S. 536 [1965]; Fowler v. Rhode Island, 345 U.S. 67 [1953]; Niemotko v. Maryland, 340 U.S. 268 [1951].

[T]he public interest in providing access to the marketplace of ideas would scarcely be served by a system so heavily weighted in favour of...those with access to wealth... Moreover, there is the substantial danger that ...editorial advertising could be monopolized by those of one political persuasion. (42)

The solution is, again, editors; we must repudiate the view, he writes,

that every potential speaker is the best judge of what the listening public ought to hear or indeed the best judge of the merits of his or her views... editing is what editors are for; and editing is selection and choice of material... The question here is not whether there is to be discussion of controversial issues of public importance on the broadcast media, but rather who shall determine what issues are to be discussed by whom, and when. (43)

But this argument is different than Tornillo's: the concern there over the 'chilling' of speech in the case of a limited 'right of reply' to the press should be absent in the case of a right to initiate debate in the broadcast media. Burger's sanguinary view is that "in a very real sense listeners and viewers constitute a 'captive audience'"; the government, he says, has known this since the Fourth National Radio Conference in 1924, and as the broadcast media have become more "pervasive" since then, "the problem has become more acute". But --

it is no answer to say that because we tolerate pervasive commercial advertisements we can also live with its political counterparts. (44)

Justice Stewart, anticipating the recent disposition of the Fairness Doctrine, notes that there are now (due to concentration in the newspaper industry) "many more broadcasting stations than there are daily newspapers" (45). This he seems to intend as a buttress for the

⁴² 412 U.S., *ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*; nota bene that this is the same bencher who wrote the Court opinion in Bellotti (Chapter Four) upholding corporate rights to advertise on public issues.

⁴⁵ *Ibid.*; Stewart, concurring.

argument that no more regulation of the editorial control of broadcasters is needed: the broadcast environment is already unusually diverse!

This was a prescient subversion of the scarcity doctrine. Note that the Fairness Doctrine was unanimously abdicated by the FCC in August 1987, on two grounds: 1) that the continuing reduction of the number of daily newspapers made the scarcity doctrine -- the logical basis of the FCC's regulatory powers under the Fairness Doctrine -- discriminatory towards broadcasters; 2) that the Fairness Doctrine was counter-productive in a First Amendment sense because, by granting a basis for 'counter-speech' claims, it gave editorial staff an incentive to avoid controversy, thus 'chilling' free speech (NY Times, Aug. 5, 1987, p.20). No explanation was given for the Commission's failure to enforce the 'affirmative obligation' under the Fairness Doctrine, which by itself would cure this perceived defect. The U.S. Congress continues to push for statutory enactment of the Doctrine, but its bills have been continually vetoed by President Reagan. In the face of the Commission's and the Administration's hostility, and in light of the even greater conservative composition of the Supreme Court, the Fairness Doctrine may now be taken as deceased, or at least comatose, even without the diagnostic aid of litigation. Who would bother? The biggest remaining question is whether this recent FCC action is intended as a preliminary step away from the public trusteeship concept of broadcast licensing.

The 'chilled speech' argument might have had some force in relation to the already existing policies of the FCC under the Fairness Doctrine, since broadcasters already had an incentive to avoid, as far as possible, raising issues or making accusations that would trigger its application (though it is hard to understand how such a perception comports with a reliance on 'editorial responsibility'). But the FCC had not applied the provisions of the Fairness Doctrine energetically: at the time of the DNC case, when they had been in place for some forty years,

the provision requiring that controversial issues be covered -- the affirmative obligation -- had never been enforced (46).

The DNC case is different. The form of access sought by the Democratic Party logically precludes the 'chilling' argument on which Tornillo was based, and it also suggests how that concern might be addressed in relation to newspaper access. DNC sought a right to purchase editorial advertising on the airwaves **without regard** to whether the issues to be raised had been addressed, or whether their prospective ads completed the coverage of all sides of the issue, and as **initiation of, rather than reply to, specific coverage**. If the Democratic Party's case had been upheld by the Supreme Court, new responsibilities would have been added to editors' existing responsibilities under the Fairness Doctrine. This could not be described as 'chilling' to nearly the extent that Burger's preference for "pervasive commercial advertisements" was.

In Tornillo the question of access also raised the question of the 'costs' associated with it. The Court viewed this issue in terms of whether the newspaper firm would be exposed, by granting Florida's statutory access, to unreasonable increases in the cost of producing the newspaper itself, as a commodity. In Tornillo the press medium's provision of 'space' was held to be intrinsically elastic, to some degree, though the disputed access was nonetheless held to be a potentially unreasonable cost burden. In DNC this issue was not squarely addressed, though the practice of all justices was to refer to the broadcasters' 'sale of time'. In neither case did the Court raise the issue of what the media firm's final product was, what the cost components of producing it were, or what the effect of access on revenues or expenses might be. No consideration was given in Tornillo to the possibility that since production of editorial content was an expense, compelled access could be construed as at least potentially a replacement of other editorial content and thus a reduction in costs; similarly, in DNC, no

⁴⁶ It was enforced once since then, in Minks, 1976, *ibid.*

attention was paid to the effects on advertising revenue of increasing demand in the ad market and thus, potentially, the rates. What seems to lie unstated beneath these silences is explicit recognition that audiences, prepared in particular ways to receive advertising messages, were the revenue-producing commodities of both media (and not of shopping centers); and the concomitant judgement that the sought-for forms of access would in some way damage the market value of those commodities.

Justice Brennan's dissent in DNC (which was joined by Marshall) directly opposed Burger's opinion, focusing on three issues: 'state action', editorial prerogatives, and the relation between broadcasters and their audiences. Brennan was vehement that state action was indicated more than sufficiently to invoke the First Amendment:

[G]iven the... public nature of the airwaves, the governmentally created preferred status of broadcasters, the extensive Government regulation of broadcast programming, and the specific governmental approval of the challenged policy... the absolute refusal of broadcast licensees to sell air time to groups or individuals wishing to speak out on controversial issues of public importance must be subjected to the restraints of the First Amendment. (47)

Examining the nature of the editorial power granted by the Court's decision in this case he observes that the Fairness Doctrine fails to require broadcasters to allow speakers to present their own views, and that this is a constitutional defect:

Broadcasters may meet their fairness responsibilities through presentation of carefully edited news programs, panel discussions, interviews, and documentaries. As a result, broadcasters retain almost exclusive control over the selection of issues and viewpoints to be covered, the manner of presentation, and, perhaps most important, who shall speak... The Fairness Doctrine, standing alone, is insufficient -- in theory as well as in practice -- to provide the kind of uninhibited, robust, and wide-open exchange of views to which the public is constitutionally entitled. (48)

⁴⁷ 412 U.S., *ibid.*

⁴⁸ *Ibid.*

Brennan points out that a regime encouraging "uninhibited" debate requires, not only the presentation of issues generally recognized as "newsworthy", but also "exposure of the public to those views and voices that are novel, unorthodox, or unrepresentative of prevailing opinion", and that the Fairness Doctrine goes only far enough to ensure a range of views from among majority currents of opinion. Indeed, in a footnote to this passage (49) he suggests that "sit-ins and demonstrations testify" to the inability of minority viewpoints to establish access to the mass media by other means.

Putting together the question of whose view is represented in the media with the question of who presents it, Brennan next recalled the Court to one of the constitutional sourcebooks it relied on in the Red Lion case. In Red Lion the majority opinion quoted J.S. Mill to support government regulation under the Fairness Doctrine:

The expression of views opposing those which broadcasters permit to be aired in the first place need not be confined solely to the broadcasters themselves as proxies. "Nor is it enough that he should hear the arguments of his own adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. This is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them." (50)

Brennan recapitulated this argument to critique the absolute necessity of "journalistic middlemen" implied by sanctioning an absolute ban on editorial advertising:

The public is compelled to rely exclusively on the "journalistic discretion" (Burger) of broadcasters... This separation of the advocate from the expression of his views can serve only to diminish the effectiveness of that expression. (51)

⁴⁹ Ibid, Note 27.

⁵⁰ Red Lion, 395 U.S. [1967], *ibid*; quoting J.S. Mill, 1971, *ibid*.

⁵¹ 412 U.S., *ibid*; Brennan, dissenting; *emph.* in original.

Brennan locates the underlying dynamic of broadcasters' content selection in the processes of market exchange. He finds, in this case, some First Amendment problems with this:

[I]n light of the strong interest of broadcasters in maximizing their audience, and therefore their profits, it seems almost naive to expect the majority... to produce the variety and controversiality of material necessary to reflect a full spectrum of viewpoints... it is simply 'bad business' to espouse -- or even to allow others to espouse -- the heterodox or the controversial. (52)

The case before the Court, however, is not so wide-ranging as to require a complete rejection of editorial control; it calls rather for "a balance of competing First Amendment interests". Only the allocation of "advertising time -- air time that broadcasters regularly relinquish to others without the retention of significant editorial control" is implicated.

Thus, we are concerned here, not with the speech of broadcasters themselves, but, rather, with their "right" to decide which other individuals will be given an opportunity to speak in a forum that has already been opened to the public. (53)

So for Brennan, the broadcaster policy attacked by the Democratic National Committee is an absolute ban on non-product advertising, inconsistent with the public interest requirements of the Communications Act, involving the government (the FCC) in its enforcement, and thus unconstitutional under the First Amendment. The majority decision of the Court was a strong repudiation of Brennan's 'structural model' of the First Amendment; according to the Court's ruling, as he sees it,

any person wishing to market a particular brand of beer, soap, toothpaste or deodorant has direct, personal, and instantaneous access to the electronic media. He can present his own message, in his own words, in any format he selects, and at a time of his own choosing. Yet a similar individual seeking to discuss war, peace, pollution, or the suffering of the poor is denied this right to speak. Instead, he is compelled to rely on the beneficence of a corporate trustee appointed by the Government to argue his case for him. (54)

52 Ibid.

53 Ibid.

54 Ibid.

CHAPTER SIX:

THE RIGHT TO RECEIVE CORPORATE AND COMMERCIAL SPEECH

The 'free marketplace of ideas' has acquired new rhetorical force in the First Amendment decisions of the past decade. By the mid-'70's the drive for citizen opportunities for expression in the mass media had been nullified by publishers' and broadcasters' successful litigation. Together with their corporate clients they then set about acquiring for their audiences the kind of speech rights they deemed appropriate for citizens to exercise in the mass media: the 'right to receive' commercial messages. Government regulation to further media access had been stalled. Now was the time to dismantle the juridical basis of advertising regulation as well.

This chapter offers a perspective on the innovative and far-reaching litigation of the past dozen years regarding corporate and commercial speech rights. The Court has affirmed the audience's right to receive such communication as the most compelling element in these conflicts. The following discussion examines, first the definitional strategies of the Court, then the key cases in which it articulated its earlier and opposite doctrine, and finally the decisions in which this new doctrine emerged.

A PROBLEM OF DEFINITION

Since the 1975 Bigelow case (1) a long-standing distinction in legal doctrine between the First Amendment protection properly due to 'political' and 'commercial' speech has been progressively erased (2). Prior to Bigelow government had fairly generous discretionary powers in the regulation of advertising. The courts distinguished between the expression of speakers having predominantly financial interests in its distribution, and that of speakers whose motives were explicitly political. They protected political speech from governmental interference far more assiduously, viewing it as the core object of the First Amendment's guarantee. Government regulation of the more tangential category of commercial speech, on the other hand, was widely permitted.

The distinction had obvious definitional problems, and these became salient in the 'sixties and 'seventies. As late as 1974 the FCC stated that pure product advertising did not "inform the public on any side of a controversial issue [or make] a meaningful contribution to public debate" (3). But it was by then also a commonplace market

¹ Bigelow v. Virginia, 421 U.S. 809.

² See generally Thomas H. Jackson and John C. Jeffries Jr., "Commercial Speech: Economic Due Process and the First Amendment", 65 Virginia Law Review 1 [1979]; and Thomas W. Merrill, "First Amendment Protection for Commercial Speech", 44 University of Chicago Law Review 205 [1976].

³ Fairness Report, 48 FCC 2d 1 (1974). It should be noted, though, that the FCC made this statement in order to repudiate its own decision in Banzhaf, 8 FCC 2d 381 [1967], in which it had extended the Fairness Doctrine to apply to product advertising. Banzhaf created, for a few years, an obligation on broadcasters to carry 'counter-advertising' against cigarette commercials when they aired these. The new (1974) policy exempted product advertising (but not advocacy advertising) from the Fairness Doctrine.

positioning strategy for a large firm to attempt to propagate a desirable corporate 'image' as well as advertising the products it produced. 'Image' advertising doesn't concentrate on the attributes of products (or their users) but on the attributes of the company: for example, the patriotic motives guiding its business decisions. Additionally, corporate policy on a wide array of issues with commercial and political implications (such as oil-pricing, napalm manufacturing, strip-mining, effluent-dumping, and nuclear power generation) came under broad and vociferous attack in this period. The 'advocacy' advertisement, which presented the firm's view on a public policy issue, was one response to this kind of criticism (4). Were patriotic image advertising and public advocacy advertising instances of commercial or of political speech?

In many rulings the courts have attempted to uphold a definition of commercial speech based primarily on the content of the communication, even as they revised their view of the degree of constitutional protection it enjoyed (5). Eventually they realized how semantically slippery -- not to mention unenforceable -- this route was. If some kinds of government regulation of advertising are still to be admissible a content-based definition of commercial speech is inadequate, as the Supreme Court noted in a case contesting state regulation of pharmaceutical advertising:

Not all commercial messages contain... a very great public interest element [but] there are few to which such an element could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug

⁴ See for example Peter Dreier, "Capitalists v. the media: an analysis of an ideological mobilization among business leaders", Media, Culture and Society 4, #2, 1982, 111.

⁵ See for example Bates v. State Bar of Arizona, 433 U.S. 350 [1977] at 363; Virginia Board of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748 [1976] at 761; Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 [1980] at 632; Ohralik v. Ohio State Bar Association, 436 U.S. 447 [1978] at 455.

prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not. (6)

The Supreme Court has also used a combination of defining variables when distinguishing between commercial and political speech. The content of the communication, the methods of its diffusion, and the motivation of the speaker were considered together to extend First Amendment protection to an advertisement prohibited under state law in the Bigelow case (7). Pecuniary motivation and commercial content were the factors weighed by the court in denying protection to an advertisement in Chrestensen (8), the controlling precedent until Bigelow. In Sullivan (9) the Court found the fact that a communication took the form of a paid advertisement which solicited money for the civil rights movement did not render it commercial speech because the motive was not profit. An advertised offer of free legal services by the ACLU was protected on the same grounds of exempt motivation (10).

Other factors were added to the definition. In at least two decisions the interests of the distributor of the message, that is, of the publisher or other media owner, were considered (11). The nature of the product was also found relevant in several cases involving paid, profit-motivated speech about a constitutionally-protected activity: reading

⁶ Virginia Board of Pharmacy, *ibid.*, at 764.

⁷ *Ibid.*

⁸ Chrestensen v. Valentine, 316 U.S. 52 [1942].

⁹ New York Times v. Sullivan, *ibid.*

¹⁰ In Re Primus, 436 U.S. 412 [1978] at 422.

¹¹ Metromedia v. City of San Diego, 453 U.S. 490 [1981]; Bolger v. Youngs Drugs Products Co., 463 U.S. 60 [1983].

books (12). Finally, the interests of the audience in receiving the speech, and the question of whether those interests were purely economic or not, emerged as the decisive factor in three key cases (13).

No precise definition or test for commercial speech has yet been formulated by the Supreme Court, despite the fact that it has fashioned in this area a significant departure in First Amendment theory, and made, in its name, a large number of very innovative and far-reaching decisions. The most significant element of the new commercial speech doctrine is that where decisions have resulted in a greater extension of First Amendment protection to commercial expression -- and since Bigelow most have done so -- the rationale has been the audience's right to receive it. Curiously, it has seldom been audiences, and more often advertisers and media firms, who have sought the protection of the audience's speech rights in this manner.

In the following sections of this chapter I argue that this discovery of new First Amendment rights for the audience was grounded in the Court's view of the connection between markets and democracy. The Court reasoned that

if the free flow of commercial information is indispensable to the proper allocation of resources in a free-enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal. (14)

¹² Murdock v. Pennsylvania, 319 U.S. 105 [1943], cited in Dun & Bradstreet Inc. v. Greenmoss Builders, Inc., 53 U.S.L.W. 4866 (June 26, 1985); Breard v. City of Alexandria, 341 U.S. 622 [1951].

¹³ Virginia Board of Pharmacy, *ibid*; Metromedia, *ibid*; Central Hudson Gas & Electric Corporation v. N.Y. Public Service Commission, 447 U.S. 557 [1980].

¹⁴ Virginia Board of Pharmacy, *ibid*, at 756.

There is no possibility of interpreting the now greatly increased latitude for commercial speech as a 'right to advertise': that notion was soundly laid to rest in the access caselaw as an unwarranted infringement of the expressive rights of media owners. There is no First Amendment 'right to advertise'. The rights granted in the commercial speech decisions are the right of audiences to receive what media owners choose to offer -- and the right of media firms and their clients to control those offerings with very little regard to the government's pursuit of other public interests.

Certainly governments have often used the licensing of speech opportunities as an occasion simply for the suppression of dissent; and, at least in principle, most citizens of liberal democracies agree that such prior restraint by government is inimical to the public interest. But regulation may have more positive goals than the suppression of dissent (15). 'Commercial free speech' is a justly controversial notion when advertising is targeted at 'vulnerable' groups (such as children), or represents parts of the population in ways they consider unfair (such as women), or promotes products which may endanger public health or safety (such as alcohol and tobacco), or undermines the protection of collective rights (such as language rights). When no right of reply to such advertising exists, it is hard to accept such commercial liberties at face value as an augmentation of the audience's rights.

Considered in isolation the 'right to receive' does not endanger the public's interest in communication as an instrument of self-government; it is even a useful addition. But taken together with public exclusion from speaking roles in the media, and considering the private economic power and motives of media firms and their clients, the freedom

¹⁵ And access regulations would seem to fall in this category -- see Red Lion, Chapter Five.

from public regulation embodied in the new commercial speech rights doctrine can be understood as a further concentration of control over public discourse into private hands.

It is, however, interesting that in extending new commercial speech rights the Court has begun to use a model which analyzes the distribution of rights among actors and interests. In the instant case this has been characterized as a "hearer-centred" model of the First Amendment (16). In the commercial speech caselaw the Court completes its codification of the rights of the various actors: to the 'speaking' rights of the media firm and its designated agents (editors and journalists) and contracted proxies (advertisers) are added the 'hearing' rights of the audience. This ultimately takes place as if the conflicts which reached the courts' adjudication were really conflicts between the audience -- demanding the 'right to receive' -- and those tyrannical governments determined to deny this right. By 'balancing' in this way the interests at play the Court has assimilated Brennan's morally authoritative 'structural' model of the First Amendment to the economic strategy of the leading sectors of U.S. capital.

The 'right to receive' has its origins, prior to the 'new-look' commercial speech decisions, in the mass media caselaw of the 'sixties. There was a faint trace of it in the extension of editorial privilege in Sullivan (17); and it was made explicit in Red Lion, where the function of compelled access was, not the speaker's interest in self-expression via the mass media, but the audience's right to receive his suppressed viewpoint. (This potential of the 'right to receive' to furnish a rationale for access rights is now apparently extinguished: the right extends only as far as the media firm's desire to accommodate it.) Here is how the Court in Red Lion saw it:

¹⁶ Neubourne, 1987, *ibid.*

¹⁷ 1964, *ibid.*

It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It 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 by a private licensee. It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. (18)

The development of the 'right to receive' has important implications for our attempt to interpret the Court's representation of the audience's rights and interests, and to assess the political and economic value-premises and underlying theory of communication employed by the courts in mass media cases. The 'right to receive' has become an 'obvious' and common-sense notion in the short period since its invention and routinely appears, without any explanation necessary, in the ordinary discourse of the mass media and the advertising industry themselves on speech rights topics, (19). A resolution passed at the 1985 General Assembly of the World Federation of Advertisers, for example, states quite baldly that

the freedom to publicize and to receive information of a commercial nature is as necessary for the social and economic development of every individual human being and of society as a whole as the freedom to impart and receive information of a cultural and political nature. (20)

¹⁸ 1967, *ibid.*

¹⁹ In the controversy surrounding the Canadian Government's recent passage of legislation to prohibit tobacco advertising reference is routinely made to the 'right to receive' as a commonsense formulation of citizens' speech rights in the mass media - see e.g. "Newspapers defend tobacco ads", A4 Globe & Mail 10 July 1987; and the full-page ad from the Canadian Tobacco Manufacturer's Council on page A3 Globe & Mail, 17 July 1987. The same notion appears in reports on other consumer protection disputes. A judge of the Quebec Court of Appeal was quoted regarding the "right to send and receive commercial messages" in "Consumer groups promise to fight...", Globe & Mail 24 September 1986.

²⁰ quoted in "Flow of information", B4 Globe & Mail 12 June 1985.

The rest of this chapter describes the various case contexts in which commercial speech rights have been contested, and in which the 'right to receive' has broadly prevailed over attempted public interest regulation. One instructive instance of its use in a context of **non-commercial** political speech is also reviewed. Here, in the context of a public lecture (21), a curious reversal of the pattern in the access caselaw emerges. Whereas it was demonstrated in the last chapter that opportunities for expression denied in the mass media were generally upheld in the context of direct interaction, here the 'right to receive', upheld in the mass media context, is denied in the context of direct interpersonal communication.

CHALLENGES TO THE DOGMA

Chrestensen, Jones et. al. and Breard

The Supreme Court first addressed the issue of constitutional protection for commercial speech in the 1942 Chrestensen (22) case. This unanimous decision, which firmly repudiated an advertiser's claim to First Amendment protection from government regulation, remained the controlling precedent until the mid-1970's.

²¹ Kleindienst v. Mandel, 408 U.S. 396 [1974].

²² 316 U.S. [1942], *ibid.*

In 1940 Mr. Chrestensen bought a surplus submarine from the U.S. Navy, drove it from Florida, where he purchased it, to New York City, and moored it at a state-operated pier in the East River. Planning to profit from his investment by selling guided tours of the interior of his vessel to members of the public, he printed and began to distribute on the streets an advertising handbill. He was interrupted in this attempt to convert military equipment to peaceful use by the police, who informed him that his distribution of handbills violated Section 318 of the Sanitary Code of New York.

Mr. Chrestensen did some research and discovered that while distribution of commercial and business advertising matter in the streets was prohibited, the distribution of handbills "devoted to information or public protest" (23) was exempt from this Section of the Sanitary Code. He thereupon went back to the printer with his handbills, which carried his advertisement on one side and were blank on the other, and had a protest against the wharfage rates of the City Dock Department printed on the blank side. He then resumed his leafleting activity.

The Court affirmed that "the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion"; and it further acknowledged "the difficulty of apportioning... the contents of the communication as between what is of public interest and what is for private profit". But it nevertheless found that "the Constitution imposes no restraint on government as regards purely commercial advertising" (24).

The affixing of the protest... to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance. If that evasion were

²³ Ibid at 52.

²⁴ Ibid, 55, emph. added.

successful, every merchant who desires... need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command. (25)

Although the Court had not previously had opportunity to articulate its view on this question, the position it took in Chrestensen was a traditional one, and by no means departed from then-current doctrine. The central function of freedom of speech was to safeguard democracy, and the strength of any claim to the protection of speech against government regulation was measured by its relation to that purpose. As an Ontario High Court Justice nicely put it more recently:

Pure commercial speech says nothing about how people are governed, or how they should govern themselves. Indeed, it stands outside of public discourse: it could be said in a tyranny or a democracy, a monarchy or a society without a government at all. (26)

The lower court decision in Chrestensen had focused on the content of the handbill, and had carefully avoided reliance on the motive of the speaker. On the basis of its content (the protest added to the reverse side) constitutional protection of the handbill was affirmed. Despite the apparent clarity and simplicity of the Supreme Court's reversal of the lower court judgement, it actually opened, by its reliance on motive, a complex and difficult question which ultimately had to be re-thought many times over the next several decades. As two recent authors observe, the distinction between commercial and non-commercial speech asserted in this decision failed to distinguish usefully "the many different senses in which expression may be said to be commercial; the ways in which its commercial nature is totally irrelevant to its protected status, and the senses in which its commercial nature may possibly be of some constitutional relevance".

²⁵ Ibid, 56.

²⁶ Re Klein and Law Society of Upper Canada, 16 D.L.R. (4th) 489 [1985] at 534, Callaghan, J., for the Court.

[S]peech may be 1) commercial in content and commercial in its motivation, or 2) commercial because of the nature of the speaker's motivation, but political or non-commercial in its content, e.g., critical of government action, but occasioned by government action that impinges on the private, economic interests of the speaker, or 3) non-commercial in its motivation and non-commercial in its content, e.g., classical political comment concerning abstract ideological issues, or 4) non-commercial in its motivation but commercial in its content, e.g., the handbill... giving notice of [a political meeting] but containing a schedule of admission charges. (27)

Within months of the Chrestensen decision the Supreme Court was obliged to begin its reconsideration of the commercial speech doctrine. A flurry of cases appeared as a result of conflicts which emerged at this time between the Jehovah's Witnesses and municipal governments all across the country (28). These were, moreover, not ordinary civil disputes, but contests between the moral and justiciary authority of the Court's constitutional texts and the Divine Power of God's Word as revealed in Holy Scripture.

A central religious practice of the Jehovah's Witnesses, then as now, is the demonstration of their "conformity to the teachings of St. Matthew 10: 11-14 and 24: 14, by going from city to city, from village to village, and house to house, to proclaim them" (29). Perhaps recognizing the formal similarity between the Court's temporal discourse and the other spiritual one, Jehovah's Witnesses came before the Supreme Court in large numbers to argue that sanitary codes and ordinances governing door-to-door solicitation

²⁷ Edwin P. Rome and William H. Roberts, Corporate and Commercial Free Speech, Westport, Connecticut: Quorum Books, 1985, 18-19. Rome and Roberts also corroborate my analysis of the emergence of the right to receive.

²⁸ Murdoch v. Pennsylvania, *ibid*; Jones v. City of Opelika, Sanders v. City of Fort Smith, Bowden v. City of Fort Smith, Jobin v. Arizona, all 316 U.S. 584 [1942], all vacated 319 U.S. 103 [1943]; Jamison v. Texas, 318 U.S. 413 [1943]; Douglas et. al. v. City of Jeannette, 319 U.S. 157 [1943]; Martin v. City of Struthers, 319 U.S. 141 [1943].

²⁹ Jones et. al., 1942, *ibid*, at 606-7.

could not legitimately be applied to "the exercise of their beliefs concerning their duty to preach the gospel" (30).

The initial problem was that while preaching the gospel the Jehovah's Witnesses distributed printed learning aids in the form of handbills and magazines, and solicited donations for this material from respondents. The charitable, non-profit organization which printed the material and collected the receipts used these donations solely to extend its activity in witnessing Jehovah's works; but it remained a fact, in the eyes of municipal and state authorities, that the Witnesses were engaged in commercial solicitation on the street and from door to door in contravention of the relevant by-laws and without obtaining and paying for the necessary licenses.

In its first decisions, in the immediate aftermath of Chrestensen, the Court denied the Witnesses the protection of the First Amendment (which of course also protects freedom of religion along with speech, press and association). The reasoning in Jones, Bowden, Sanders and Jobin (31), while accepting the sincerity of the religious motive involved, found that the pecuniary element of the contested speech acts did strip them of their constitutional protection and make them subject to the commercial speech exception articulated a few months before. It was also stated, however, that these were simply "time, place and manner" restrictions (32). The Court pointed out that the mixture of non-commercial with commercial content was not enough to exempt the commercial conduct from regulation: the fact that money was earned brought these cases within the ambit of Chrestensen.

³⁰ Ibid, at 589.

³¹ Ibid.

³² Ibid, at 594.

The justices considered the possible similarity of this instance of government licensing of published material with other famous instances, such as the Star Chamber censorship that moved Milton to write the Areopagitica in 1640, or the contribution of King George's Stamp Tax to revolt in the Colonies. In this case, though, the Court equated the sought-after exemption from the license requirements with a government subsidy to the Witnesses, and found this wholly repugnant (33).

The Supreme Court found against the Jehovah's Witnesses in the 1942 cases. But although a majority opinion was produced the Court remained sharply divided on these cases and took the unusual step of vacating its own decision shortly after the judgement was handed down. The dissenting views in the original judgement focused on the overall intent or motive of the Witnesses, which was clearly non commercial, and thus found their activity constitutionally protected because there was no conspiracy to shield illegal motives (i.e. the avoidance of legitimate license expenses) behind lawful acts. On rehearing the arguments the following year the Court reversed its judgement in all cases.

The new judgement in the Witnesses' favour in Jones et. al., as also the favourable judgements in Murdock and Jamison in 1943 (34) rested, in the last analysis, on the sincerity of their religious motive and the ancillary evidence thereof in the charitable character of the enterprise, the devotion of its revenues to expand its religiously-motivated activities, and the willingness of the organization to distribute its publications without charge to those who could not pay and to enter cheerfully into the occasional financial losses thereby incurred. This meant, however, that in some important sense the

³³ Ibid, at 599.

³⁴ Ibid.

reasoning in Chrestensen was either in sharp contradiction with, or was broadly augmented by the reasoning in these cases. Jamison (35) is a good example. Unlike all the cases decided in 1942, there was no issue in this case of refusal to pay a license fee for street solicitation: the violated ordinance quite simply prohibited the distribution of handbills. The handbill distributed by the offending Witness was, like Mr. Chrestensen's, printed on both sides, with an invitation to a religious gathering on one side and a solicitation for the purchase of two religious books on the other. On the basis of Jamison's religious motive his conviction was overturned and his First Amendment claim for exemption from the by-law upheld. Thus Chrestensen and Jamison, taken together, illustrate that communication which is "commercial because of the nature of the speaker's motivation, but political or non-commercial in its content", must indeed be distinguished carefully from communication which is "non-commercial in its motivation but commercial in its content" (36).

In Martin (37) another issue was raised. The contested by-law in this case (somewhat like that in Jamison) simply prohibited the disturbance of householders for the purpose of distributing handbills, whether by ringing the doorbell, knocking on the door, or other means. Neither the Witness herself nor her literature in this instance solicited funds: the purpose of the door-to-door visits was simply to invite the city's residents to a free religious service. The by-law, and Ms. Martin's conviction, were overturned, but not simply on the basis that this was an instance of non-commercial speech. Canvassing door-to-door could not be prohibited outright because the potential annoyance of commercial solicitation could not effectively be prevented without a greater harm to all

³⁵ 318 U.S. [1943], *ibid.*

³⁶ See Note 26, *supra*.

³⁷ 319 U.S. [1943], *ibid.*

varieties of political and religious expression which might rely on a direct canvass for their dissemination. The Court weighed "the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens, whether particular citizens want that protection or not" (38). The priority interests they chose to protect in this case were the interests of potential receivers of information who might wish to be exposed to it.

The last of these early commercial speech cases, the 1951 Breard case (39), was quite similar to the others in that it involved municipal prohibition of direct (door-to-door) communication involving a commercial element. The primary new inflection was the combination of press freedoms with the issue of public solicitation. The Louisiana municipality of Alexandria had an ordinance forbidding uninvited sales visits to residences, and the constitutionality of this ordinance was affirmed. But the convicted canvasser, who was soliciting magazine subscriptions as a business agent of the publisher, based his defense on the First Amendment's protection of the press. The Court was obliged to specify that it was the profit motive of the canvassing activity which exposed it to regulation. The decision affirmed the constitutional protection of publishers with respect to the content of their publications, but found their interest in disseminating those publications as they saw fit weaker than the privacy interests of residents. Three members of the Court dissented, asserting the necessity of protecting publishers' freedom to disseminate their communication. In this case (and in Murdock) the last two elements of the Supreme Court's definition struggle with 'commercial speech' make their first

³⁸ Ibid, at 143.

³⁹ Breard v. City of Alexandria, 341 U.S. [1951], *ibid*.

appearance: the nature of the product which is the subject of the communication, and the method of diffusion of the speech.

Another question which arises here is how the profit motive which made publishers' sales agents subject to government regulation of their verbal communication is to be distinguished for constitutional purposes from the profit motive of publishers themselves in printing and distributing their products. Would the sales agent have been protected by offering residents a free leaflet containing some non-commercial information of general public interest along with his sales pitch? How would this be different from the publisher's activity? What would be the essential defect of a theory which proposed that all of the communicative activity of a commercial media corporation and its agents, including journalists, is 'commercial speech', and thus subject -- because of its commercial character -- to some degree of governmental regulation?

In Chrestensen, Breard, and the Jehovah's Witness cases the Supreme Court maintained a consistent position: commercial speech does not enjoy constitutional protection -- when it can be clearly identified as such. It remained adamant that government may regulate purely commercial advertising, and that such regulation is in fact an exception from the First Amendment's protection against government restraint of speech. In a sense the core of this doctrine has not changed in recent years, even though a very significant degree of constitutional protection has been extended to commercial advertising. The distinct category of expression discovered in Chrestensen -- 'commercial speech' -- is still a distinct category. Whether the Court finds that commercial speech is completely unprotected, partially protected or even fully protected, it continues to "recognize a difference between commercial price and product advertising

and ideological communication" (40). The lines may blur in some instances, but the assumption is that there remains a region of 'pure' market information disseminated for 'pure' motives of profit, and this content and this motive are by definition non-ideological.

Sullivan, Pittsburgh Press and Bigelow

Every journalist is familiar with the New York Times Co. v. Sullivan case (41); it was a momentous decision, simultaneously establishing a new and very liberal standard for libel in the criticism of government officials, new powers of journalistic privilege and editorial discretion, a further interpretation of the commercial speech doctrine, and a ringing declaration of citizens' rights to receive controversial and governmentally-proscribed opinion in the commercial mass media. As well, the persuasive force of this decision helped confer a constitutional mandate on the civil rights movement of the 1960's.

On March 29, 1960 the New York Times ran a full-page advertisement sponsored by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. The advertisement contained, under a large banner headline reading 'Heed Their Rising Voices', a 1000-word description of King's student-based protest movement and its reception in several southern communities, about one hundred prominent supporters'

⁴⁰ Claire Bernstein, "Courts to examine advertisers' free speech rights", Toronto Globe & Mail, 2 December 1985, B8.

⁴¹ 1964, Ibid.

names, and a financial pledge coupon. One of the protest demonstrations was described in the ad as follows:

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

One of the three elected Commissioners of the City of Montgomery -- the Commissioner responsible, among other things, for supervising the Police Department (Sullivan) -- sued the N.Y. Times and four of the ad's sponsors for libel. He won, and was awarded damages of \$500,000 in Montgomery County Court; and he won the subsequent appeal of this decision to the Supreme Court of Alabama. Ralph Abernathy and the New York Times both appealed again to the U.S. Supreme Court, which overturned the lower courts' decision.

On the question of the existence of a libel, the Supreme Court found that the advertisement was factually erroneous -- but that in the case of comment on public officials in the performance of their duties, the First Amendment protected newspapers from punitive libel damages on the basis of error alone. "Actual malice" had to be proven, because otherwise the vital public function of the press in eliciting uninhibited debate on matters of public interest and controversy would be impaired. "The constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered" said the Court (42).

⁴² Ibid, quoting NAACP v. Button, 371 U.S. 415, at 445.

'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press'. (43)

This new standard for establishing libel against government officials (written by Justice Brennan) was greeted with jubilation by journalists, for it meant that self-censorship and the spectre of crippling costs arising from honest error or misleading sources had been exorcised from the coverage of government affairs, and their professional privilege significantly extended.

But there was another aspect to the decision. The plaintiff had argued in part, citing Chrestensen, that the First Amendment was inapplicable to this case because the libel was contained in a paid advertisement, and was therefore commercial speech, exempt from constitutional protection. Brennan distinguished Chrestensen by motive and thus found that the advertisement in Sullivan was not commercial speech (despite the fact that it was paid for, and also contained a solicitation for donations):

Any other conclusion would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities -- who wish to exercise their freedom of speech even though they are not members of the press... To avoid placing such a handicap upon the freedoms of expression, we hold that if the allegedly libellous statements would otherwise be constitutionally protected from the present judgement, they do not forfeit that protection because they were published in the form of a paid advertisement. (44)

This rationale for constitutional protection of "editorial advertisements" was based on the interests of citizens as speakers and the concomitant result that "government may

⁴³ Sullivan, *ibid*, quoting James Madison, in Elliot's Debates on the Federal Constitution, (1876), at 571.

⁴⁴ *Ibid*, at 266, *emph. added*.

be responsive to the will of the people and... changes obtained by lawful means" (45).

But a related rationale for protection, one which was prefigured in the context of direct interaction in Martin and emerges later as an important element within commercial speech doctrine, is also articulated in Sullivan: the advertisement became something other than unprotected commercial speech because of the audience's interest in receiving it:

The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. (46)

In the early 'seventies two additional commercial speech rulings were handed down by the Supreme Court. Both of these decisions retreated from the complete exclusion of commercial speech from First Amendment protection, and thus paved the way for the new doctrine which emerged soon after. The first of these, Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations (47), concerned a newspaper's practice of dividing its classified 'help wanted' columns by gender. Pursuant to an ordinance of the Pittsburgh Human Relations Commission the newspaper was issued with a cease and desist order, which withstood appeal to the Pennsylvania Commonwealth Court. The Supreme Court also upheld the order.

The newspaper, of course, claimed First Amendment immunity from this regulation, relying on the broad findings of editorial discretion throughout the press caselaw (48), including Sullivan. The Human Relations Commission relied almost entirely on

⁴⁵ Ibid, at 269, quoting Stromberg, *ibid*.

⁴⁶ Ibid, at 271.

⁴⁷ 413 U.S. 376 [1973].

⁴⁸ See Chapter Four, *passim*.

Chrestensen. The Court took its task to be deciding whether the advertisements in questions more closely resembled the submarine tour solicitation or the civil rights appeal, and found them to be "classic" instances of commercial speech, and thus subject to regulation. The Court did not, however, extend Chrestensen (or even defend it very vigorously), preferring to withhold press protection in this case mainly on the argument that the gender classification of employment advertising was part of a broader category of illegal activity: employment discrimination. This foray into the regulation of commercial speech in the mass media forum is significant for later decisions because it identified in advance a relation between commercial speech and unlawful conduct which triggers, far more sensitively than for political speech, the outer boundary of constitutional protection:

Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal. (49)

This principle was soon tested. Bigelow v. Commonwealth of Virginia (50) considered the conviction of the editor of the Virginia Weekly (an 'underground' newspaper circulated largely on and around a university campus) for publishing the advertisement of an abortion referral agency located in New York City. Although Roe v. Wade and Doe v. Bolton (51) had recently affirmed a constitutional right to seek an abortion, the performance of abortions was still illegal in Virginia, and a criminal statute was also on the books prohibiting the advertisement of abortion services. The decision

⁴⁹ Ibid, at 389.

⁵⁰ 421 U.S. 809 [1975] (ibid).

⁵¹ 410 U.S. 113 [1973]; 410 U.S. 179 [1973].

in Bigelow overturned this statute along with Jeffrey Bigelow's two convictions by the Virginia courts.

Bigelow also overturned the Supreme Court's own 33-year-old commercial speech doctrine. Justice Blackmun's opinion for the Court was that while the advertisement "did more than simply propose a commercial transaction... [i]t contained factual material of clear public interest" (52), the State of Virginia had demonstrated no clear interest to weigh against its publication. (This was more than slightly disingenuous, given the recent constitutional side-taking by the same panel of the Supreme Court in the enormous conflict over abortion rights.) He stated that neither the possible pecuniary motive of the publisher in printing the ad nor the commercial transaction it proposed stripped it of First Amendment protection (53), and found that it shared with the Sullivan ad "the exercise of the freedom of communicating information and disseminating opinion" (54). Blackmun even took the step of firmly distancing the Court from Chrestensen in a footnote (55), although nothing else in this decision explicitly repudiated the earlier doctrine. But he did not attempt to say that this was anything other than commercial speech; its protection in this instance was grounded in its substantive content, and not in any finding that it was differently motivated:

⁵² Bigelow, *ibid*, at 822.

⁵³ *Ibid*, at 818.

⁵⁴ *Ibid*, at 822.

⁵⁵ *Ibid*, at 314, Note 6.

To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

(1)

The Court found this an auspicious occasion to recognize the interests of publishers and editors, advertizing at the end of its decision to the "proper functioning" of the press as defined in Tornillo (2). It also referred to the rights of the audience to receive the advertisement:

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience... Thus, in this case, appellant's First Amendment interests coincided with the constitutional interests of the general public. (3)

THE NEW TESTAMENT

Virginia Board of Pharmacy

Bigelow, if only by its silences, held out at least some reason to expect that purely commercial advertising would continue to be excluded from the protection of the First Amendment unless the private commercial interests it advanced coincided to some sufficient degree with public interests outside the sphere of the market. The very next

¹ Ibid, at 825-6, emph. added.

² Ibid, at 829; see Chapter Five.

³ Ibid, at 822.

session of the Supreme Court destroyed this expectation. In its landmark decision in Virginia Board of Pharmacy v. Virginia Citizens' Consumer Council (59) an explicit rationale for constitutional protection of pure commercial speech was finally recognized by the Court.

The facts of the case are straightforward: like most jurisdictions, Virginia regulates the licensing of professionals such as lawyers, engineers, optometrists, and pharmacists. The advertising of prescription drugs by pharmacists was defined under the relevant statute as 'unprofessional conduct' (60) and accordingly disallowed. The statute was challenged on First Amendment grounds and invalidated by the decisions of both the District Court and the U.S. Supreme Court. It was not, however, pharmacists themselves who brought the challenge forward, but a consumer advocacy group. The Virginia Citizen's Consumer Council claimed that prescription drug consumers had a right to receive drug price information in order to locate the lowest-priced suppliers, and the Supreme Court's decision in their favour was premised explicitly on this argument.

The Court squarely faced the question of the continuing validity of its commercial speech doctrine under Chrestensen and concluded that even pure commercial speech commanded, after all, some protection from the First Amendment.

⁵⁹ 425 U.S. 748 [1976].

⁶⁰ Many subsequent commercial speech cases contested the constitutionality of such limitations on client solicitation by professionals. The usual rationale for such forms of governance is that since licensing and regulation of the professions restrict market entry in pursuit of such public interests as health, safety and accountability, their accredited members are insulated from competition. They may therefore legitimately be required to compensate for this privileged position in the market by conforming to professional codes designed to maintain the integrity of their profession's service to the public. See e.g. Monroe Freedman, "Advertising and Solicitation by Lawyers: Legal Ethics, 'Commercial' Speech, and Free Speech", Allen Hyman and M. Bruce Johnson (Eds.), Advertising and Free Speech, Lexington, Mass.: Lexington Books, 1977, 67.

Our question is whether speech which does no more than propose a commercial transaction is so removed from any exposition of ideas, and from truth, science, morality and arts... that it lacks all protection. Our answer is that it is not. (61)

Reviewing the history of the Chrestensen doctrine the justices admitted that it had not "survived reflection" (62); and therefore, having found that commercial speech was entitled to protection they attempted to formulate rules for determining how much constitutional protection it enjoyed. They were careful to identify four continuing grounds for state regulation: 1) 'time, place and manner' regulations; 2) prohibition of 'false and misleading' advertising (as regulated by the FTC); 3) prohibition of advertising which proposes illegal transactions (as in Pittsburgh Press); and 4) regulation of advertising in the inherently exclusionary and publicly-owned airwaves. (None of these grounds were found to save Virginia's statute.) In general the new approach laid down in this case was that although commercial speech now enjoyed First Amendment protection,

commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation. (63)

But the Court's recognition of a different and less protected status for commercial than political speech was still a profound reinterpretation of the First Amendment. Rather than focusing on the specific relation of free speech to self-government the Court was content to assume that by protecting communication in the service of 'free enterprise' it would also serve the ends of democracy:

⁶¹ 425 U.S., *ibid*, at 762 (citations omitted).

⁶² 425 U.S., *ibid*, Note 16.

⁶³ *Ibid*, Note 24.

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal. (64)

In the following year (1977) the new doctrine enunciated in Virginia Board of Pharmacy was reaffirmed in two cases: one concerning Arizona's prohibition on advertising by lawyers (65); and the other considering a New Jersey municipality's regulation of real estate signage (66). Both decisions, like Virginia Board of Pharmacy, asserted the priority of the audience's First Amendment right to receive the contested commercial communication over the regulatory interests of government, even though these latter interests were acknowledged by the Court as valid and substantial.

The 'right to receive' undergoes further development as an element of First Amendment analysis in these cases. Whereas in Bigelow, in Red Lion and in Sullivan the respective audience's non-commercial interest in receiving the information was a significant part of the Court's determination that the contested communications were protected categories of speech, in Virginia Board of Pharmacy and the many cases which follow it the audience's right to receive commercial information becomes the central rationale for extending constitutional protection to it. The right to receive thus moves from the outside to the inside of the commercial speech doctrine. By positing an

⁶⁴ Ibid, at 765.

⁶⁵ Bates v. State Bar of Arizona, 433 U.S. 350 [1977].

overriding First Amendment right of audiences as their instrument for the protection of commercial communication the Court shielded private corporate speakers against public interest regulation by government -- in the name of "the people as a whole".

Bellotti revisited; Buckley v. Valeo

Two examples of the corporate utility of the right to receive were given in cases decided in this period. Buckley v. Valeo (67), handed down the same year as Virginia Board of Pharmacy, arose as a corporate challenge to the amendments to the Federal Election Campaign Act (FECA) which Congress enacted in the aftermath of the Watergate scandals. These amendments were designed to curb electoral campaign financing irregularities and prevent wealthy interest groups from 'buying' electoral success for their preferred candidates or otherwise dominating political discourse during elections. The amendments to FECA limited individual and corporate contributions to candidates; placed ceilings on candidates' and parties' campaign expenditures; limited independent expenditures which attacked or supported particular candidates; established a system of public funding of some campaign activities; instituted public disclosure requirements for campaign funding; and set up a Federal Election Commission to administer these provisions. On the basis of the right of citizens to receive electoral information the Supreme Court overturned a key provision in the amended FECA.

The most significant constitutional defect discovered by the Court in Buckley v. Valeo concerned the Act's limits on independent, third-party campaign expenditures.

⁶⁷ 424 U.S. 1 [1976]; see Chapter One.

Limits on individual contributions to candidates' campaigns were found to be constitutionally permissible, but the First Amendment, in the Court's view, prevented the Government from controlling independent advertising expenditures by interest groups who sought to place their views about candidates and their records before the public.

Of course, there was no implication in this judgment that newspaper publishers, billboard companies or other advertising media were required to carry such campaign advertising: the government was enjoined from either preventing any election-related expenditures of private third parties, or from requiring private media firms to sell them advertising opportunities. Private interests could raise as much money as they pleased for election publicity, and the media could choose which electoral clients they wished to service. The effect on the political process of unequal access to economic and communicative resources was dismissed as irrelevant by the Court. "Virtually every means of communicating ideas in today's society" reasoned the Court "requires the expenditure of money."

The distribution of the humblest handbill or leaflet entails printing, paper and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech. The [third-party] expenditure limitations... would appear to exclude all citizens and groups except candidates, political parties and the institutional press from any significant use of the most effective modes of communication. (68)

The Court concluded that the FECA's restrictions on third-party expenditures, while content-neutral, did not fulfill their aim of providing reasonable 'time, place and manner'

⁶⁸ 424 U.S., *ibid.*, at 19. See also J. Skelly Wright, "Politics and the Constitution: Is Money Speech?", 85 Yale Law Journal 1001 [1976]; Wright, "Money and the Pollution of Politics", 82 Columbia Law Review 609 [1982]; Mark Tushnet, "Corporations and Free Speech" in The Politics of Law, David Kairys (ed.), N.Y.: Pantheon, 1982, 253.

guidelines for equalizing the volume of the political utterances of third parties. Rather, in the Court's view, they illegitimately restricted the right of citizens to receive the range of viewpoints made available by other citizens through a lawful allocation of private economic resources.

In Chapter Four the case of First National Bank of Boston v. Bellotti (69) was discussed in the context of whether the First Amendment's separate reference to 'freedom of the press' conferred greater speech privileges on media firms than on other corporations. Another important aspect of this 1978 case is that it also turned upon the notion of the audience's right to receive corporate speech. In this case the Massachusetts Supreme Court had upheld a state statute preventing corporations from using the media to influence the vote on state tax referenda. The Massachusetts Court agreed with the legislature that corporations had only those rights granted to them by government, and that their property and due process rights only protected their freedom of speech on matters directly affecting their business or assets.

The U.S. Supreme Court overturned this decision, finding the speech rights of non-media corporations to be equivalent to those of media corporations or of natural persons. Since the contested speech related directly to the actions of government it was a category of speech protected fully by the First Amendment. The interest of the state in preserving the political process from the distorting influence of corporate expenditures was of lesser import, said the Court, than the interest of citizens in receiving the views of corporations on the referendum issues.

⁶⁹ 435 U.S. 765 [1978].

Neither Bellotti nor Buckley v. Valeo were argued to be instances of commercial speech -- their connection with state action and political discourse was too salient for any such argument to prevail. But both cases arose in the same period as the reformulation of the commercial speech doctrine, were concerned with the closely related area of corporate speech, made frequent reference to the recent commercial speech caselaw, and were decided fundamentally on grounds of the audience's right to receive the corporate speech. In Bellotti, for example, the Supreme Court noted:

Nor do our recent commercial speech cases lend support to [the Massachusetts legislature's] theory. They illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the free flow of commercial information. (70)

It is apparent then that on the grounds of the audience's interest in receiving it, both the political and the commercial speech of corporations began to attract significantly more constitutional protection just at the time when citizen rights of access to the mass media had been most firmly ruled out. The difference, of course, is that the commercial media wished to grant corporate access for both commercial and political speech but were prevented in some instances from doing so by government regulation. The Court quickly obliged by finding much of this regulation unconstitutional. The state's role as a regulator was significantly reduced in this period: the full exercise of professional judgement by editors and journalists superseded the state's interest in requiring citizen opportunities for access to the media, and the audience's right to receive the communications of the media's chosen clients equally precluded the state from

⁷⁰ 435 U.S., *ibid.*, at 783.

preventing their dissemination. The regulatory role exercised by the state was thus largely handed over by the Court to the media firm.

Consolidated Edison and Central Hudson

Three significant decisions concerning commercial and corporate speech -- all of which grappled with the problem of distinguishing clearly between the commercial and political utterances of corporations -- were handed down in 1980. Two of them -- Consolidated Edison Co. of New York v. Public Service Commission and Central Hudson Gas and Electric Corp. v. Public Service Commission (71) -- were companion cases, handed down on the same day.

In January, 1976 the billing envelopes mailed by the Consolidated Edison Company of New York to its electrical utility subscribers contained a printed insert entitled "Independence Is Still a Goal, and Nuclear Power Is Needed To Win The Battle"; this material, authored by the company, focused on the safety, economy and cleanliness of nuclear plants, asserted that "the benefits of nuclear power... far outweigh any potential risk", and stressed especially the role of nuclear power in helping the U.S. become independent of "foreign energy sources" (72). A citizen group, the Natural Resources Defense Council (NRDC), responded by sending Con Ed a rebuttal to this insert, and a request that it be printed and collated into the utility's next billing. Con Ed refused this request.

⁷¹ 447 U.S. 530; 447 U.S. 557.

⁷² 447 U.S., *ibid.*

The NRDC then asked the state utility regulator, the Public Service Commission of New York, to "open Consolidated Edison's billing envelopes to contrasting views on controversial issues of public importance". The Commission also refused the NRDC's request, but issued a Statement of Policy on Advertising and Promotion Practices of Public Utilities which barred utility companies entirely from distributing billing inserts which expressed their viewpoints on controversial issues. The Commission reasoned that "customers who receive bills containing inserts are a captive audience of diverse views who should not be subjected to the utility's beliefs" (73).

Con Ed appealed on First Amendment grounds and the New York Court of Appeals upheld the Public Service Commission's policy as a "valid time, place and manner regulation designed to protect the privacy" of customers. The U.S. Supreme Court reversed this finding. In Bellotti, said the Court (referring obliquely to the audience's right to receive the insert) "we rejected the contention that a state may confine corporate speech to specified issues".

The Commission has limited the means by which Consolidated Edison may participate in the public debate on this question and other controversial issues of national interest and importance. Thus, the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak. (74)

On the question of permissible time, place and manner restrictions Justice Powell (who wrote the opinion) said that they must be content-neutral:

[T]ime, place and manner regulations must be applicable to all speech regardless of content... The First Amendment's hostility to content-based regulation extends not

⁷³ 447 U.S., *ibid.*

⁷⁴ 447 U.S., *ibid.*

only restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth. (75)

What is curious about this argument is its apparent contradiction with the reasoning by which the Court itself defined the contested insert as an instance of political rather than commercial speech. This is nothing if not content-based. The utility used commercial revenues to pay the expenses of advancing a viewpoint which accorded with its own commercial interests, included it in the envelopes containing its customers' statements of account, and declined to provide opportunity for rebuttal by opponents who clearly considered it a political comment. But the Court determined -- on the basis of the insert's content -- that this was **not** commercial speech: it did **not** propose a commercial transaction and it **did** address an issue which in the view of the Commission and the Court was 'political'. Is the question of whether a communication is commercial or political speech a commercial or political question?

What, we may also wonder, would the outcome have been if the New York Public Service Commission had complied with the NRDC's request and **required** the mailing of their insert rebuttal? We may speculate that since **media** firms (e.g. broadcasters) are immune from just such demands for the provision of rebuttal opportunities in circumstances where they also are regulated by a government commission (76), and since the Court had already asserted in Bellotti the equal speech rights of media and non-media corporations, it would have found that such a requirement was unconstitutional

⁷⁵ 447 U.S., *ibid.*

⁷⁶ See the companion case to DNC: CBS v. Business Executives' Move For Vietnam Peace, 412 U.S. 94 [1973]; and review Tornillo, Chapter Five.

(77). Government may not control "the search for political truth", but, apparently, corporations may.

Powell dealt quite summarily with the other major argument advanced by the Commission -- the argument that the privacy interests of the utility's 'captive audience' of customers were "being invaded in an essentially intolerable manner":

[T]he First Amendment does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech... The customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket. (78)

Consolidated Edison, as well as illustrating the development of the Court's view of corporate speech rights, is also a particularly clear exposition -- precisely because it considers here a particularly tangled array of property interests -- of the role of state and law in their determination. This was the burden of Justice Blackmun's dissent from the majority opinion:

States might use their power to define property rights so that the billing envelope is the property of the ratepayers and not of the utility's shareholders. If, under state law, the envelope belongs to the customers, I do not see how restricting the utility from using it could possibly be held to deprive the utility of its rights. (79)

The 1980 Central Hudson case was also the product of a dispute between a regulated utility and the New York Public Service Commission, dating from the 'oil crisis'

⁷⁷ An opposite view of the implications of Consolidated Edison, on the basis of the utility's monopoly power and consequent involvement with state action, is advanced by Thomas Emerson, "The Affirmative Side of the First Amendment", 15 Georgia Law Review 795 [1981] at 827.

⁷⁸ 447 U.S., *ibid.*

⁷⁹ 447 U.S., *ibid.*

of 1973-4. The Commission, distinguishing between the "promotional" and the "institutional and informational" advertising of utility companies, completely banned the former on the basis that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-4 winter" (80). The Commission's rule explicitly permitted "informational" advertising with the intent that utilities "encourage shifts of consumption from peak demand times to periods of low electricity demand" (81).

The Supreme Court struck down the restriction on what it agreed was purely commercial speech, despite the compelling public interests in regulation claimed by the Commission. In doing so, the Court gave its fullest statement on the rationales behind the protection of commercial speech, and articulated a four-part test which has remained the basis of its decisions in this area. Its rationales were given as follows (82):

- 1) Commercial speech not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information;
- 2) People will perceive their own best interests only if they are well-enough informed, and... the best means to that end is to open the channels of communication, rather than close them;
- 3) Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

The Court also re-affirmed that commercial speech enjoys a lesser degree of constitutional protection than other kinds of expression:

⁸⁰ 447 U.S., *ibid.*, at 559.

⁸¹ *Ibid.*, *emph.* in original.

⁸² *Ibid.*, at 562.

Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well-situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overboard regulation. (83)

In striking down the Public Service Commission's rule the following standard of review for constitutionally permissible regulation of commercial speech was articulated (84). "At the outset we must determine", wrote Justice Powell,

- 1) whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must... concern lawful activity and... not be misleading. Next, we ask
- 2) whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine
- 3) whether the regulation directly advances the governmental interest asserted, and
- 4) whether it is not more extensive than is necessary to serve that interest.

While the Court recognized the validity of the governmental interests asserted by the Commission, it failed the Commission's regulation on the basis of points 3) and 4) in its test. As Justice Blackmun wrote in his concurring opinion,

Permissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques. Those designed to deprive consumers of information about products or services that are legally offered for sale consistently have been invalidated... If the First Amendment means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect a message is likely to have on the public. (85)

⁸³ Ibid, at 564, Note Six.

⁸⁴ Ibid, at 566.

⁸⁵ Ibid, at 574.

Justice Renquist dissented from the Court's opinion. Renquist asserted that the First Amendment embodied a principle of remedial counter-speech which was inapplicable to the realm of commercial advertising. Since the Court found regulation and lawsuits -- and not access opportunities -- to be the appropriate remedies for fraudulent commercial propositions, commercial speech was removed entirely, in his view, from the ambit of the First Amendment:

[I]n the world of political advocacy and its market place of ideas, there is no such thing as a 'fraudulent' idea... The free flow of information is important in this context not because it will lead to the discovery of any objective 'truth', but because it is essential to our system of self-government... [F]raudulent commercial speech is... separated by a world of difference from the realm of politics and government... For in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to learn many years hence. (86)

* * *

Some three dozen additional commercial and corporate speech cases have been heard by the Supreme Court in the past fifteen years. These have considered municipal regulation of publicity and signage of porn theatres, bus and billboard advertising, real estate and political campaign lawn signs, storefront drug paraphernalia signage, and, again, door-to-door solicitation (87); state regulation of advertising by lawyers,

⁸⁶ 447 U.S., *ibid.*, at 598-9.

⁸⁷ Coleman Young v. American Mini-Theatres Inc., 427 U.S. 50 [1976]; Splawn v. State of California, 431 U.S. 595 [1977]; State of New York v. P.I. Ferber, 458 U.S. 747 [1982]; Metromedia Inc. v. City of San Diego, 453 U.S. 490 [1981]; Lehman v. City of Shaker Heights, 418 U.S. 298 [1974]; Linmark Associates Inc. v. Township of

optometrists, utilities, casinos, and cable re-transmitters of out-of-state programming (88); and federal regulation of union boycotts and publications, contraceptive manufacturers' mail solicitations, investment circulars, fund-raising drives and credit agency reports (89). The formula stated by the Court in *Central Hudson* has been quite serviceable in these decisions, and a broad momentum for deregulation of advertising consolidated by them.

Note that in the context of in-person solicitation the outcome has reversed the access caselaw (90). Home visits (or in *Ohralik*, bedside visits by ambulance-chasing attorneys) for commercial purposes are considered so intrusive and difficult for the 'captive audience' to avoid that they lose their constitutional protection. As in the early commercial speech doctrine, in-person solicitation may be regulated quite stringently. This means, however, that the forum of communication requiring the least capital to enter is the one most hedged about with regulations. Urgent as the protection of

Willingboro, 431 U.S. 85 [1977]; Members of City Council of Los Angeles v. Taxpayers for Vincent, et. al., 466 U.S. 789 [1984]; Village of Hoffman Estates v. Flipside, 455 U.S. 489 [1982]; Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 [1980].

⁸⁸ Bates v. State Bar of Arizona, 433 U.S. 350 [1977]; Ohralik v. Ohio State Bar Association, 436 U.S. 447 [1978]; In Re R.M.J., 455 U.S. 191 [1982]; Zauderer v. Office of District Counsel of Supreme Court of Ohio, 85 U.S. 652 [1985]; Texas Optometric Association v. Rogers, 440 U.S. 1 [1979]; Pacific Gas and Electric Co. v. Public Utilities Commission of California, 106 S. Ct. 903 [1986]; Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 106 S. Ct. 2968 [1986]; Capital Cities Cable Inc. v. Oklahoma Alcoholic Beverage Control Board, 467 U.S. 691 [1984].

⁸⁹ Eastex Inc. v. National Labour Relations Board, 437 U.S. 556 [1978]; NAACP v. Claiborne Hardware Co., 458 U.S. 886 [1982]; Carey v. Population Services International, 431 U.S. 678 [1977]; Bolger v. Youngs Drug Products, 463 U.S. 60 [1983]; Lowe v. Securities and Exchange Commission, 105 S. Ct. 2557 [1985]; Dun & Bradstreet Inc. v. Greenmoss Builders Inc., 105 S. Ct. 2939 [1985]; Cornelius v. NAACP Legal and Educational Defense Fund, 105 S. Ct. 3439 [1985]; Bose Corp. v. Consumers Union of U.S. Inc., 466 U.S. 485 [1984].

⁹⁰ See e.g. *Ohralik*, 436 U.S., *ibid.*

privacy may be, it is curious that this rationale for regulation does not extend far enough, for example, to permit tighter control of telephone solicitation or the sale of mailing lists. These -- especially computerized telephone marketing -- are arguably just as intrusive and disruptive of privacy.

Note also that nothing in these decisions challenges the power of media owners themselves to restrict expression, whether "because of the effect a message is likely to have on the public" (91 - for example, sowing public doubt about the quality or safety of the products of their primary advertising clients), or for other reasons:

In spite of First Amendment victories for commercial speech, the media have compromised none of their rights of control over access and display of advertising. They may refuse advertising and dictate the conditions of its sale. (92)

The 'less-protected' status of commercial speech, then, serves to contain potential conflicts between media and non-media corporations, and establishes a tacit First Amendment hierarchy: media corporations; other 'corporate citizens' (their clients); other citizens, in the audience.

WNCN: Mandel

This is illustrated in the two last decisions which will be considered here. In WNCN (93), a 1981 case from Minnesota, a citizens' group took the FCC to the Supreme

⁹¹ Central Hudson, Blackmun concurring, *ibid.*

⁹² Gillmor and Barron, 1984, *ibid.*, at 610.

⁹³ WNCN Listeners' Guild v. Federal Communications Commission, 450 U.S. 582 [1981].

Court in an attempt to force it to regulate a local radio station in line with the expressed interests of its audience. The "WNCN Listeners' Guild" was formed when a local commercial station overhauled its format, replacing the classical music it had aired for numerous years with a new emphasis on 'soft rock'.

The Listeners' Guild argued that by catering to its advertisers' interests in the content of the station's broadcasts, the station was evicting one audience from its established enjoyment of a public resource and replacing it with another which was already well-served by other locally-available frequencies. The Guild pointed out that the motive of the exercise was purely private and commercial, and not pursuant to the station's responsibilities as a public trustee of the airwaves. The Guild directly asserted that the original audience's First Amendment rights were being trampled: it specifically claimed that the audience had a right to receive the classical music programming that it had supported for so long. It claimed that no alternative broadcast source for enjoyment of this material was locally available; and indeed, that the change in the radio station's format would significantly diminish the general availability of and level of support for classical music in the community.

The story has a straightforward ending, and no long exegesis is needed. As Mark Freiman summarizes,

the Court held that the public's ownership of the airwaves does not give the broadcasting audience any specific rights with regard to the material being broadcast -- there is no right to hear any specific messages or class of messages.
(94)

⁹⁴ Mark J. Freiman, "Consumer Sovereignty and National Sovereignty in Domestic and International Broadcasting Regulation", in Cultures in Collision: A Canadian-U.S. Conference on Communications Policy, N.Y.: Praeger, 1984, 112.

The other case, Kleindienst v. Mandel (95), also can be quickly summarized. Mandel arises in the statutory and caselaw context of "alien exclusions" from the U.S. Under the 1952 Immigration and Nationality Act (the Walter-McCarran Act) the U.S. Government has denied entry to hundreds of writers, academics, artists and political figures. Visas may be denied under the Act because of insanity, drug addiction, polygamy, or evidence that they are "affiliated with any organization that advocates or teaches", or have

"possession for the purposes of circulation... or display, any written or printed matter advocating or teaching... opposition to organized government, or... the economic, international and governmental doctrines of world communism" (96).

Exclusion under the Walter-McCarran Act is of course a valuable status symbol in some political circles. The Act was drafted during the height of the Cold War, but it has yet to be significantly amended. Although the Mandel decision predates the current commercial speech doctrine, it set a deferential standard for judicial review of "security"-related speech-and-association law which has prevailed up to the present (97). The significance of the case is the further illumination it casts upon the audience's 'right to receive'.

Ernest Mandel, a socialist journalist and academic from Belgium, was invited in 1969 to give a U.S. lecture tour on a number of university campuses including Stanford, Princeton and Columbia. Mandel was not a member of any left-wing party, nor was he shown to be insane, addicted to drugs, or polygamous. His visa was denied under the

⁹⁵ 408 U.S. 753 [1972].

⁹⁶ 8 U.S.C. Section 1182 (a) (28).

⁹⁷ For example, the Mandel precedent was recently upheld without judicial comment in Abourezk v. Reagan, 56 U.S.L.W. 4001 [1987].

Act, largely on the basis of evidence that he had given a speech at a fund-raising event for the legal defense of students involved in the 1968 mobilization in France.

Subsequently, a number of the faculty and student associations who were sponsoring the tour sued Attorney General Kleindienst on First Amendment grounds. Their specific claim was that their rights to receive information and ideas were unconstitutionally violated by the visa denial. They also brought evidence of Fifth Amendment violation of equal protection and due process, in that right-wing advocates of the overthrow of government were not similarly excluded.

The lower court issued the injunction sought by the plaintiffs. The Supreme Court reversed this finding. Although it recognized that First Amendment rights were indeed implicated, it found no power of judicial review of state action in this area sufficient to allow it to

look behind the exercise of [Executive] discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant. (98)

In these communicative circumstances, any rationale offered by the state for constraint of political speech is, apparently, adequate. The audience's right to receive, domestically protected with such enormous vigilance from state action (but subordinated to the claims of property, as in WNCN), is selectively subject, in the sphere of international communication, to the clear and absolute prior restraint of the state.

⁹⁸ 408 U.S., *ibid*, at 770.

This completes our survey of the development of the paradigm body of legal discourse on the audience's speech rights in the mass media (99). It is quite doubtful, in light of Mandel, whether U.S. citizens have a right to hear these present arguments from their author. And yet, under the doctrines explored in these chapters, the world's commercial media and advertising firms, and many of their national regulators, now claim to foresee an emerging global regime of free speech and press, and the attendant political and cultural liberation of those national populations whose freedom of expression has been so unconscionably repressed by government. These are the cases which make up the policy platform for the proclaimed arrival of the "international free flow of information".

⁹⁹ Though further interesting comparative materials in the context of direct interaction arise from litigation in the area of commercial telephone solicitation (and its apparently compulsory reception by listed telephone service subscribers).

CHAPTER SEVEN: CONCLUSIONS: FOR A RADICAL PLURALISM

The false claim that democracy has been achieved, in the liberal-capitalist world, now presents the most formidable obstacle to advances towards realities of democracy in our part of the world.(1)

The United States of America, which is the heartland of the world's commercial communications media, understands itself as also the home of individual liberty, especially the liberty of expression. Its citizens tend to believe they enact, personally and collectively, the living presence-in-the-world of free speech and the reach and power of their media -- the very impenetrability of their media to the influence of other cultures and value-systems -- are the best proof to them of that fact.

In the American polity, as in other highly developed market polities, commercial communications media play a central role in both the economic and the political spheres: they are leading sectors of profit and growth, linking production to consumption through marketing and advertising. They also set public agenda, influence political actors, inform citizens and generally link electorate to government. In fact it requires a concerted effort to disaggregate these roles. The ways in which the great liberal revolutions in seventeenth- and eighteenth-century European political thought were applied to statecraft in America, though highly pragmatic, also idealized from the outset the liberatory potential of laissez-faire market relations to such an extent (in the absence of the European pre-capitalist traditions) that the political and economic inflections of 'freedom'

¹ Christian Bay, "Access to Political Knowledge as a Human Right", in Government Secrecy in Democracies, Itzhak Galnoor, ed., N.Y.: Harper, 1977, 22.

were largely indistinguishable. The economic successes which followed in the next two centuries stamped America's claims of Liberty with an unimpeachable warrant.

While Publius and Paine had, on the surface, a profound sympathy with their revolutionary counterparts in France, their doctrines and those of succeeding American political philosophers are best understood within the English-language tradition of political theory which stretches from Milton, through Locke, Hobbes, Mill and Bentham, to James and to Holmes and the Brandeis Court. Within this tradition the identity of democracy with freedom of speech is a salient theme. The Enlightenment faith in the corrective of reasoned debate; the necessity of an informed populace to the functioning of democracy; pluralism's requirements for toleration of dissent and difference; the rise, with the Industrial Revolution, of the political and economic value of literacy -- all these interlocking conceptions of the public sphere in classical liberalism continue to resonate throughout the institutions of contemporary American culture. They remain the staple of political rhetoric at all levels of government, from the contributions of citizens in the town halls of New England to the quotidian pronouncements of incumbent presidents. They inform the design strategies of school curricula, the ritual bases of civil organizations like the Boy Scouts or the Chamber of Commerce, the invocations that unite sportsfans and concertgoers. Above all, they are the symbolic trump suit of commodity advertisers in the mass media, where representations of these other cultural practices, gathered under the sign of Liberty, inflect consumption itself with patriotic significance.

The constitutional caselaw we have examined in the foregoing chapters is the main authority for U.S. citizens' fervent and patriotic claims to freedom of speech and, by logical extension of its doctrinal underpinnings, the foundation also of much of their

belief in the legitimacy of their democratic institutions. In historical perspective it is clear that the significant developments in First Amendment doctrine correspond to periods of widespread political challenge by popular movements, and to the counter-initiatives with which political and economic elites have responded.

MASS COMMUNICATION AND INDUSTRIAL LABOUR

The first of these periods of challenge and response originates in the speech rights struggles of popular movements before World War Two. The results of these successful struggles were encoded in decisions having, in retrospect, two common doctrinal characteristics: they were predominantly cases of controversial and explicit political speech; and they are usually cases of direct, face-to-face communication. The typical fact-pattern of these cases involved a rally, meeting, picket line, or pamphleting drive. When we begin to consider the juridical history of mediated communication, largely determined in the post-World War Two period, the picture is very different. In the mass media we find a striking failure in the efforts of popular movements to assert citizen rights to opportunities for expression. The successes of the speech- and association-rights struggles waged from the 1890's to the 1940's sensitized socialists and labour activists to the possibility of using the bourgeois media to organize against the capitalist status quo. Their failure to enforce their First Amendment rights in the mass media is not only a result of events inside courtrooms, of course. This could easily be the topic of another thesis; here I wish only to note a few of the historical factors influencing these outcomes.

In the first place the ascendancy of popular movements such as the socialist and labour movements, not only in the U.S. but also in Europe, coincided in the 1930's with an extremely severe contraction in the industrial economy. Retaining control over political institutions and keeping the general direction of policy in the hands of the capitalist class clearly required some level of accommodation of working class aspirations within the framework of industrial capitalism. Despite their high-flown rhetoric of 'natural rights', Holmes and his colleagues were sharply aware of the practical role of the courts in organizing and carrying out these accommodations. This is clear from, for example, published papers of Holmes' after his retirement (2). The higher courts' liberal judgements in this period must be seen in relation to this changing balance of social forces in the other institutions of U.S. society.

Secondly, progressive organizations had a well-founded distrust of the private press, and had also a lively, thriving network of newspapers of their own. Before WW2 the left was winning a good many of its political battles; its energies were focused on immediate, street-level struggles and the future dominant role of the mass media in the political process was not then apparent. As the level of popular literacy, the advertising-supported mode of media financing, and the scale of media audiences developed and grew, the partisan labour and left press was left with a very small relative share of readership, and virtually no institutional presence in the radio spectrum. The need for legal protection for organizing efforts conducted through the media only became apparent after WW2, and by this time social conditions were no longer conducive to victory in the courts.

² See Richard Hodder-Williams, The Politics of the U.S. Supreme Court, London: George Allen and Unwin, 1980.

Thirdly, by the end of the nineteen-fifties there were no broad-based progressive movements in the U.S. Labour's strategy of entering partnership with capital and sharing the burgeoning industrial wealth of the post-WW2 U.S. was paying off handsomely in its members' pay packets, and thus in their support of an accommodationist leadership. The price of success for labour was renunciation of its radical goals and expulsion of its radical members. Although these elements numbered in the millions (900,000 members were expelled from the CIO in 1949 alone) the anti-communist hysteria of the Cold War period quite effectively silenced them. Ties with the civil rights movement were broken. Even in the late 'sixties and early 'seventies labour was still divorced from radical constituencies, and its support of the Vietnam War was a telling sign. Only very recently, and only in face of its own serious decline, has the labour movement in the U.S. made any motions towards re-entering progressive coalitions.

In the heyday of U.S. industrial dominance in the '50's and '60's the present situation would have been very difficult to imagine. Just as a symptomatic indicator, at the end of WW2 the U.S. produced 40% of the world's industrial output; by 1984 this had declined to 8%. A global economic 're-structuring' in pursuit of the higher profits needed for effective international sectoral competition has resulted in huge U.S. trade deficits in the older and more marginal 'smokestack' industrial sectors. This has eviscerated the blue-collar ranks of the labour constituency, probably forever. The restructuring has also been accompanied by a determined attack on social spending, with accompanying degradation and exploitation of (and political resistance from) women, the elderly, the disabled, youth and minorities. But organizing the five-sixths of the workforce who are now non-union, mobilizing those who are 'structurally' or otherwise

excluded from the work-force, or mounting any kinds of new progressive political initiatives depend as never before on effective communication in the mass media. In my view, initiatives to establish the necessary speech rights in that setting would have been far more likely to succeed forty or fifty years ago.

This is especially so because the industrial strategy of the U.S. in the coming decades appears to rely on the extension into other economies of its established model of mass communication. One of the primary means the U.S. has to reverse the trend of declining productive investment and to balance its trade flows is its export of cultural commodities and information services and technology. In these sectors it still maintains a distinct competitive edge in the global economy, largely due to explosive growth in and aggressive protection of its information and cultural sectors. This strategy is evident in U.S. policies in international political fora such as the UN, the ITU and UNESCO in regards to the so-called 'free flow' of information; in its open hostility to public forms of media ownership, domestically and abroad; and in its arm-twisting representations (for example to Canada) in such trade-related areas as copyright law, access to information services markets, postal subsidies to publishers and broadcast advertising substitution.

This strategy is simultaneously an economic and a political strategy. The same measures which ensure favourable terms of trade for U.S. communications industries also maximize the reach of its political ideology. Transformation of the structure of social communication in developing countries to give pride of place to private media owners and their corporate clients and to recast the electoral process as a specialized branch of marketing (as in the U.S. and, to a lesser extent, the other industrialized polities) marginalizes the formal and informal political campaigns of popular movements in other countries as reliably as it has done so at home. The close association of the notion of

'free speech rights' with the concepts of representative democracy and an unfettered market economy makes it a key conceptual apparatus for the extension of political and economic hegemony.

MEDIATED POLITICAL DISCOURSE IN THE POST-INDUSTRIAL STATE

These foregoing remarks bring us to the second period of challenge and response, from the early 1960's to the present, in which the specific conditions of communicative interaction in the commercial mass media have been tested and codified. The mature development of commercial mass communications institutions has occasioned large-scale change in the structure of public discourse. The pluralist notion of a multiplicity of organized interests competing on more or less equal terms in an open and accessible 'marketplace of ideas' was perhaps most nearly realized in the 1930's, when interpersonal speech rights were broadly affirmed and before the communicative marketplace had yet been so fully rationalized in economic terms as it is today. But the organization of mass audiences as a tool for reducing the unit cost of message distribution and the high degree of control of message context which commercial firms were able to offer preferred clients radically changed the relative communicative power of competing interests.

In addition, the distributive efficiency of the burgeoning communications sector subtly altered the popular conceptual apparatus of liberal democracy. The concept of a

'citizen' for whom "public discussion is a political duty" (3) no longer matched the actual structure of public discourse, with its new emphasis on the passive role of the audience. The new conception was that the majority of citizens entered the 'marketplace of ideas' only as 'buyers' and not as 'sellers'. Since the media performed a dual role in distributing both economic and political utilities it was intellectually satisfying to the pragmatic liberal theorists on the bench to consider the citizen in the mass media forum as a political as well as an economic consumer.

The challenge, when it came, was in the form of a demand for citizen access to the mediated forum of public discourse. The rights deliberated in Tornillo, Pruneyard and DNC demonstrate the range of possible forms of access to speech opportunities, and also say something about the imperatives that shape their allocation. At one end of the spectrum lies the very narrowly-constructed 'right of reply' for candidates attacked by newspapers during elections; in Tornillo even this constricted form of access was denied. At the other end are the rights affirmed in Pruneyard: the wide-open rights of members of the public to initiate communication in privately-owned public places, without cost or license requirements, in their own words, and on virtually any subject. Between these two forms is the right to buy broadcast advertising, upheld in Retail Store Employees as a logical extension of Red Lion -- but denied in DNC. This form of communication right would grant the speaker the choice of subject and format, but would impose high financial barriers and leave the broadcast-property owner in possession of final editorial power over that speech and the context of its reception.

³ "...and that this should be a fundamental principle of the American government", Whitney v. California, 274 U.S. 357 [1927], Justice Louis Brandeis for the Court.

We can distinguish two kinds of communications access rights here: the 'right to reply', and the 'right to initiate': both are denied in the mass media by a great deal of Supreme Court First Amendment jurisprudence. We should also distinguish paid and unpaid access as different forms (4). With the FCC's recent abdication of the Fairness Doctrine, constitutional rights of either reply or initiation for audience-members of the mass media in the U.S. (paid or unpaid) have become vestigial. Red Lion seems unlikely to be re-affirmed by the Court, even if Congress ever does pass the Fairness Doctrine into statutory law, and it's also unclear whether any state-enacted right-of-reply provisions would hold up.

In situations of direct interaction like Pruneyard, on the other hand, citizens retain very broad rights to take up both 'speaking' and 'listening' roles, and both in reply to, and for initiation of discussion of chosen issues. Even highly structured contexts of direct interaction, such as 'town hall' meetings run under elaborate procedural rules, or public addresses with pre-arranged speakers, generally make provisions for questions from the floor, and are conducted with important degrees of interaction between speakers and audiences. As a matter of right, dissenting voices may, for example, mount information pickets at the site of public meetings. It is hard to avoid the conclusion that the denial of equivalent opportunities in mass-mediated public discourse -- opportunities energetically sought by dissenting speakers and ostensibly ruled by identical constitutional doctrines -- is a consequence of the pecuniary interests of media owners.

⁴ The 'right to reply' could be even more narrowly drawn than in Tornillo, as, for example, a right to reply to defamatory falsehoods, and not to matters of opinion; but even this form of access as a remedy for a tort has been denied by the Court in favour of libel litigation: Sullivan, also Gertz v. Robert Welch Inc., 418 U.S. 323 [1974]; but see also Rosenbloom v. Metromedia, 403 U.S. 29 [1971].

The interactional structure of the commercial mass media is characterized by privately-controlled choice of speakers, topics and formats, and by a rigid separation of roles in which the vast bulk of the public is permitted to participate in public discourse only to the extent of regularly indicating whether they are still attending (i.e. through audience surveys). There are many models for organizing a more balanced and 'dialogic' structure of communication in the mass media which would form a better analog of the structure of speech rights in direct interaction: local and state initiatives such as Florida's rejected statute; liberal interpretation of the rules of the Fairness Doctrine, including DNC's proposed right to buy advertising; or even the democratic editorial decision-structure of some community-licensed radio and TV stations are all known measures that hold a degree of this potential. Existing access fora now controlled by media owners, such as letters columns or open-line radio shows, could also be extended and formalized as opportunities for the exercise of speech rights; these might be able to make fruitful use of voluntary regulatory structures such as community press and media councils. And of course the priorities of the broadcast licensing process itself could be reshaped in favour of citizen access.

It seems apparent from these cases that the 'monologic' structure of the commercial media is not a necessary or intrinsic characteristic of large-scale communications facilities. This is, rather, a failure in law and policy to balance the new speech rights claims which have emerged in the newly dominant contexts of commercial mass communication. This failure to ensure a healthy degree of 'dialogic' interaction in the public fora of the mass media ignores (while pretending to follow) the affirmative free speech doctrines of the 'architects' of the First Amendment.

The radical difference between the structure of speech rights found in Prunevard or in the early landmark cases, and that found in Tornillo and DNC, illustrates this imbalance. Despite the rhetoric of support for public 'opportunities for expression' the economic development of the mass communications industries has been accompanied by reduced opportunities for expression in relation to the means available (5). The new communications technologies (e.g. CATV, VCR, 'desktop' publishing) are widely touted as remedies for this situation, and in conjunction with the continuing phenomenon of audience fragmentation, seem, at first glance, to hold out the promise of vastly increased citizen access opportunities and diversity of media content. I believe, however, that such speculations are naive, considering how little is yet known about the eventual market structure of these developments. They may for the moment offer lower entry barriers at the production end of the communications process, but they do nothing to alleviate the continuing high entry barriers to effective distribution. In fact, the role of such new technologies in producing media competition, and thus driving advertising costs down, may be just as likely in the long-term to help larger firms consolidate market share and thus generate even higher levels of concentration and conglomeration in media and

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media-dependent sectors. For example, although most of the regulation of the CATV industry in the U.S. is performed at the municipal level -- and is therefore the occasion of frequent grassroots campaigns for community access and content standards -- ownership of the U.S. CATV industry itself is rapidly concentrating into a small number of large corporate portfolios. In any case the structure of rights examined here applies equally at the innovative margin and the maturing center of the communications sector.). As long as communication is not itself the basis of profitable exchange (as it was not in Pruneyard), the citizen's speech rights are interpreted in a generous manner. As soon as a price and a profit are attached to the communicative activity, however, those rights quite dramatically shrink (to the dimensions of Tornillo and DNC).

The most frequent rationale for this distortion in the balance of rights in mass media contexts is the presence of responsible editors and journalists, and especially their First Amendment rights to be free from prior restraint. But the rights they deploy are proxy rights: in legal terms the extraordinary speech privileges of editors and journalists are derived from their actions as the agents of media firms and their owners, because it is those firms, as corporate legal persons, who actually own the rights of selection, rejection, interpretation and definition which are invoked by the courts to preclude audiences' rights to speak. Editors and journalists have no rights to publish what the owners of the communicative apparatus they employ say shall not be published (6). But there is no reason to believe that the editorial function is intrinsically incapable of being

⁶ An example illustrating this assertion is conveniently at hand from the Canadian federal election campaign as I write. According to the Vancouver Sun, Clark Davey, publisher (for Southam) of the Montreal Gazette "caused a rift with the paper's editorial board and uproar in the newsroom" because he directed the paper to run an editorial favouring free trade "although his editorial board has for weeks been denouncing the treaty. Davey said he doesn't usually interfere with editorial-board decisions, 'but in this case my opinion is going to be the official position of the paper'". Vancouver Sun, 19 Nov 1988, A17.

organized to facilitate citizen speech. We have to look elsewhere than the purely literary function of editors to understand the deployment of editorial discretion in this way by the courts.

The editor (or broadcast producer) has also an economic role, shaping and managing the production of a product which is competitively priced, attractively packaged and effective as a factory tool. The product they produce is the newspaper or programme, and the 'buyer' is the broadcast or print media firm which produces it as a 'producer's commodity', and consumes it itself (for the price of its production) (7). The media firm produces its media content as a factor in the production of the commodity it sells to its clients, mainly governments and other large firms. The function of the editorial content of the newspaper or programme is to attract an audience which can be sold to these advertiser-clients.

Even closely limited protection of the public's use of mass media speech forums in the U.S. has yielded to commercial firms' desire to buy and sell access to audiences of consumers. Editors direct this work of producing audiences as the salaried staff of internal departments of the media firm, rather than as sub-contractors of the finished product; journalists may produce their sub-components as wage-labourers' or as 'freelance' contractors. The particular concern of both is the establishment of a compelling relationship between themselves and the audience: it is they who speak to the audience. If they have done their research on the intended audience and spoken effectively to it, the audience, and the advertiser, will both 'stay tuned'.

7. See the discussion of the 'Blindspot' debate, Chapter Three.

Were systematic access opportunities to be upheld by the courts as a matter of citizen rights, this could have a serious effect on the value of the commodity offered to advertisers. If citizens had access rights editors might have great difficulty in shaping non-contradictory contexts for advertising materials which maximize their persuasive force. How valuable would an automobile manufacturer's TV spot during a major sports event be if a well-financed third-world solidarity group had the right to buy an opportunity in the same context to criticize the company's labour practices in developing countries?

In the courts the notion that communication is an interactional exchange is substituted by the metaphor of communication as economic exchange -- the 'free marketplace of ideas'. This has been politically justified by an idealized account of the expressive activities of journalists and editors in their self-styled role as the 'watchdogs' of the public interest. Certainly the perceived autonomy of the media is vital to its ability to mobilize consent to market relations in general, and certainly this requires vigorous attack on the 'excesses' and normative deviations of both corporate and government actors (especially as defined by law). But however autonomous they may be with respect to the other institutions of a market polity, the commercial media are directly reliant on the continued growth of the market per se, and this confers an identifiable structure on the public discourse they are willing to permit.

AFFIRMATIVE RIGHTS: THE CONSUMER'S RIGHT TO RECEIVE CORPORATE AND COMMERCIAL SPEECH

For a time -- in the late 'sixties and early 'seventies -- the citizen access challenges mounted by the civil rights and anti-war movements began to gain ascendancy through successful constitutional initiatives. Already, however, their partial successes (for example, Sullivan and Red Lion) were being cast in the language of consumerism rather than of citizenship -- the audience's right to receive rather than the citizen's duty of public discussion. The media and their clients, by now accustomed to control and management of the 'marketplace of ideas', mounted a sharp and focused response from the mid-'seventies onward. This response was successful, leading first to the reversal of the citizen access gains and then to the appropriation of the audience's right to receive as a very effective shield against most kinds of government activity in their marketplace. The core of this successful initiative is the new commercial speech doctrine of the Supreme Court.

It is difficult to see in what sense commercial advertising in the mass media really shares the interactive characteristics or public interest objectives of the speech liberties championed by Mill (and the courts). In Mill and derivative arguments it is the opportunity for the clash of views -- for debate, disagreement and interested advocacy - - which leads to the discovery of truth, to a democratic political culture and to peaceful social change. The structure of the communicative event in commercial advertising is not freely interactive in this way. Rather, it is rigid, formalized, and hierarchical:

- speaking and listening are rigidly divided roles. Listeners remain in the audience role and seldom (never by right) alternate into the speaking role;
- all communicative activity of parties occupying the speaking role is multiple and public; all communicative activity of listeners is singular and private;
- control of the topic rests with the party occupying the speaking role, and listeners have no opportunity for reply or redefinition of the topic or any of its constituent elements;
- the goals and outcomes of the communicative event are set by the speaker and oriented to the speaker's interests.

A structure of expression that could be characterized as 'free' would arguably require opportunities to alternate between both roles (speaker and listener) and both conditions (public and private) and include a degree of symmetry for all participants with regard to agenda-setting, rules of standing and evidence, and opportunities for rebuttal and reply. 'Free' speech would have multiple goals and potential outcomes reflective of the different interests of participants. It is questionable, then, whether commercial advertising is predominantly an instance of other-regarding speech at all: given its pecuniary motives and objectives it might more usefully be categorized as self-regarding conduct and thus exempt from constitutional protection, as indeed the early commercial speech caselaw held (8). Certainly the audience's receipt of advertising messages is a

⁸ Ezra Mishan makes more or less this point in his essay "Commercial Advertising: A Skeptical View", Advertising and Free Speech, Allen Hyman and M. Bruce Johnson, Eds., Lexington, Mass.: Lexington Books, 1977, 59.

self-regarding activity, and not an other-regarding one, and should therefore find its constitutional protection somewhere other than the First Amendment.

The extension of constitutional protection to commercial speech of course simply ratified the already existing structure of the mass media speech forum. But this is only to say that advertising itself had already transformed the structure of public discourse in such a way that other communicative events in the same forum (political, artistic, religious discourse) acquired a similar hierarchical and monologic division of communicative roles. The burden of the argument in these pages has been to show that, while this interactional structure serves well the communicative purposes of commercial advertisers, it is damaging -- and should be subordinated -- to the political interests of citizens.

The very definition of 'commercial speech' within the public discourse of a capitalist social formation is problematic. Is all communication in the commercial media 'commercial speech'? What distinguishes political speech from commercial speech in this forum? Consider the example of Retail Store Clerks (Chapter Five). In that case, from the perspective of the commercial radio station, a department store's paid broadcasts urging the audience to buy its merchandise were not political speech, were uncontroversial, and were acceptable for airing without other comment needed. Paid broadcasts from the store's employees' union in the same time period urging the audience not to buy the store's merchandise until it had concluded a labour contract were instances of controversial political speech and were not acceptable; only the broadcasting firm's journalists were allowed to speak on this issue. What made the difference?

In the mass media context the property rights of owners are paramount over the citizen's communicative rights. The corporate initiative in the First Amendment field in the 'seventies and 'eighties has resulted in a cumulative denial of citizen rights to access or reply to the commercial press, including paid access, that is nearly absolute. The public's interest in the use of the broadcasting spectrum fared marginally better under the FCC's Fairness Doctrine, but this was eventually blocked in the courts, and has now been repudiated by the FCC. In the mass media -- the central public forum of contemporary political culture -- 'freedom of speech' is, for citizens, only the freedom to receive messages.

There is nothing sinister about the Court's affirmation of the audience's right to receive corporate and commercial speech -- at least not until this is placed in perspective beside the Court's prior rejection of the audience's right to reply to what it hears. It is this conjunction of citizen access denial and corporate access protection which seems to me to confirm Smythe's analysis of the audience as a commodity.

The protection of commercial speech was necessarily partial because full constitutional protection would have been uncondusive to a mutual accommodation of the interests of media corporations and their clients: if corporations had a right of access, so would citizens, and the value of citizen exclusion from speaking roles would have been lost to media and non-media corporations alike. But the denial of citizen access left the field open to the media to operationalize their accommodation with corporate clients in the name of the audience. In reality the audience's interests have in all respects been subordinated to the property rights of the media firm and of its private clients in the 'marketplace of ideas'. The combined effect of the Court's prohibition of government regulation in regards either to compulsion or restraint of private media firms has been to

confirm these utterly undemocratic institutions as the legitimate regulators of public discourse.

It is unremarkable that the legal discourse should ratify the valorization of the audience in this secretive manner. Straightforward and outright assertion that property rights in the audience-as-commodity take precedence over the audience's speech rights in the mass media context would not only produce a doctrinal (and perhaps popular) crisis in regards to democratic theory, but would also open up serious Fifth and Fourteenth Amendment grounds for challenging the fiscal basis of commercial communication. The citizen could in effect claim that, since it had a demonstrable market value, her constitutionally-protected interest in her own communicative activity had been stolen by organized criminal enterprises and fenced to knowledgeable accomplices! (9)

I believe my analysis has shown that the Supreme Court's representation of the constitutional speech interests of citizens, legislatures, media firms and other corporations has systematically and erroneously conflated the processes of social communication with those of commodity production and market exchange, especially through the metaphor of the 'free marketplace of ideas'. This representation of fundamental social relationships in the discourse of constitutional law has generated a corresponding allocation of legitimating rights and effective power which represses the communicative interests of citizens and 'overdetermines' their communicative domination by large-scale property interests. As Christian Bay notes in discussing the concept of the 'free marketplace of ideas':

⁹ A good example of the displacement in legal discourse of conflicts between property rights and speech rights into putative conflicts between other social values occurs in a recent Canadian Charter decision, which in this case pitted speech rights against privacy rights: Hunter v. Southam Inc., 2 S.C.R. 145 [1984].

Equality in any marketplace perishes quickly. Each victory tends to strengthen one competitor and weaken others for future contests; growing trends towards lopsidedness and unfair advantage are inescapable, and monopoly or oligopoly is the normal end state as decades and generations go by, for ideas as well as commodities. (10)

I do not claim that the Court has explicitly recognized the audience as a commodity produced, owned and exchanged by media firms. But I do claim to have shown that the First Amendment discourse is carefully structured to permit precisely this outcome. It is also apparent from the analysis that this body of law disguises a distinct prejudice in favour of property owners by clothing it in the ideological form of rights bestowed equally on all citizens (e.g. the 'right to receive' commercial advertising). This production of forms of legal right which correspond to the forms of commodity production illustrates the function of law as an ideological condition of development of the capitalist economy. The discourse on rights does not merely articulate the coercive intentions of the capitalist state. It is not only because it "sustains relations of domination", but because it invests these relations with different and reverse meanings -- such as justice, equality, obligation and consent -- that legal discourse must be described as ideological.

This effect in the area of speech rights is highlighted by a legal scholar's argument for the creation of radio spectrum property rights. William Meckling's discussion (11) of the frequency allocation regime in the U.S. notes that it has the apparently contradictory goals of maximizing frequency utilization, and minimizing frequency interference:

¹⁰ Bay, 1977, *ibid*, 31.

¹¹ Meckling, "Management of the Frequency Spectrum", 1 Washington University Law Quarterly 26 [1968].

The way to minimize interference is to prohibit all but one individual from radiating. The way to maximize utilization is to let everyone radiate. (12)

Meckling, in the course of advancing his laissez-faire argument for spectrum property rights, goes on to describe, and critique, the FCC's actual method of regulation:

The FCC now generally specifies the rights of individual users in terms of production inputs, like the size and shape of the antenna, power level at the transmitter, etc. This... has two disadvantages: first, it makes it difficult for the user to make input substitutions, e.g., of transmitter power for antenna size; secondly, it results in different levels of interference as a function of time of day, day of the year, sun spot cycle, etc. (13)

The solution to these and many other inefficiencies attendant on public ownership of the resource, according to Meckling, is spectrum property rights:

Instead of specifying the physical inputs users can employ... it would be desirable to specify energy levels they are permitted to impose at various geographic points. From an interference standpoint there is no reason why we should be concerned about how those energy levels are created. (14)

Meckling wants government to create a new form of property, consisting of the right to be received at a given frequency, location and radiated power. He indicates that he wants government to allocate this form of property by selling permanent, privately transferable licenses in the open market.

The problem here is the precisely matching inverse of that in the commercial speech doctrine. The right to be received is defined (by Meckling) as a form of self-regarding property right, properly available to those possessing the necessary financial qualifications -- when it is really a strongly other-regarding speech right. The right to

¹² Ibid, 28.

¹³ Ibid, 30.

¹⁴ Ibid, 30.

receive is defined (by the Court) as a fundamental speech right, available freely to all, when it is not really a speech right at all.

SPEECH, PROPERTY AND THE STATE REVISITED

The critique of speech rights in the mass media is an illuminating case for the broader critique of bourgeois law and legal institutions and the study of political power in general. To Canadian constitutional scholar Allan Hutchinson, the entry point for the critique of liberal rights is the legal system's enforcement of a distinction between public and private spheres of action:

The liberal theory of rights and political justice is premised on the belief that individuals possess a pre-political sphere of pure autonomy and freedom that does not depend for its existence upon the state: individuals are independent and complete entities who interact with others out of a grudging necessity to better satisfy their self-regarding wants and preferences. Accordingly, the major function of a liberal charter is to police the boundary that separates the political and the collective from the pre-political and the individual -- to contain the state so as to prevent it from intruding, in its utilitarian zeal, upon the 'natural' realm of individual liberty. The major difficulty confronting adherents of liberalism lies in identifying the line that separates the domain of individual liberty from the domain of state action. (15)

Hutchinson distinguishes between 'natural law' theorists -- the "line-finders" who seek to show that "the boundary is a product of the natural order of social life" -- and legal positivists -- the "line-drawers" who, recognizing the arbitrariness of the

¹⁵ Allan C. Hutchinson, "Private Rights/Public Wrongs: The Liberal Lie of the Charter", unpublished paper, Toronto: Osgoode Hall Law School, 1988.

distinction, depend on the identification of a prevailing social consensus. But both schools of liberal jurisprudence "assume that the bounds of private action [are] drawn by the invisible hand of the market" and therefore tend to draw (or find) the line between public and private just where the market encounters the state. The root ideological premise of liberal law is this pretense that the market can and does function independently of state power:

The state is implicated in the market in the same way that it is implicated in any other political choice made within its territorial jurisdiction. Its claim to sovereignty implies that a decision not to intervene and regulate, or mere inaction, is as much a governmental responsibility as a decision to do so. Thus the attempt to limit state activity [and its constitutional oversight - MAR] to efforts directed at changing the status quo is misconceived; the state is equally implicated in the retention of the status quo... The entitlements of private property-owners exist only insofar as the state is prepared to recognize and lend support to those entitlements in the face of competing claims. What is referred to as 'private power' is in reality public power that has been delegated to certain individuals and that can be wielded in a largely unchecked and democratically unaccountable way. (16)

In the speech rights caselaw, then, we can discern the operation of all three forms of political power described by Lukes (17). The power to cause an event to take place is illustrated, for example, by Pruneyard, in which a property owner was compelled by the Court to make its premises available to public speakers without charge. The power to prevent an action taking place is illustrated throughout the caselaw in the disposition of the 'state action' question. For example, the decision in Tornillo prevented the State of Florida from compelling a political candidate's access to a newspaper, and most of the commercial speech caselaw likewise enforced government inaction with respect to

¹⁶ Hutchinson, *ibid.*, 12-13; see also note in text: Horowitz, "The History of the Public/Private Distinction", 130 University of Pennsylvania Law Review 1423 [1982]. The most extended discussion of this issue *supra* occurs in Chapter Five's comment on the Pruneyard decision.

¹⁷ See Chapter One.

advertising. This negative form of state power -- the interdiction of government intervention -- figures as a central theme in First Amendment doctrine all the way back to its origins in the text of 1791: "Congress shall make no law abridging freedom of speech... or of the press". The result of the enforced inaction of the state is of course simply a further imbalanced weighting of the already vastly inequitable relation between the political power of property owners and other citizens:

Property is the foundation upon which [constitutional] rights are conferred, protected and enhanced. The less property one has, the less one can exercise and enjoy one's rights. There is a strong correlation between finance and franchise. In our technological society, wealth is a pre-condition of being able to speak broadly and effectively. Although anyone can stand on the street corner, only the rich can have direct access to our homes through the costly channels of the media. When the rights of property owners and speakers collide, speakers stand dumb before the claims of property. (18)

Freedom of expression is conceived in the liberal tradition as a purely individual right, pertaining only to the sphere of private action. And yet if what the First Amendment protects -- as liberal political philosophy so eloquently asserts -- is the 'other-regarding' character of communication, then communication itself is in a fundamental sense an ineluctably public activity. 'Speech', in constitutional discourse, refers to an activity which is protected from regulation because it provides such a basic service to the public interest: it constitutes the public sphere.

The Court's treatment of this interactive character of speech illustrates the workings of Lukes' third form of power, the power to define the issue. The subject is complicated by the fact that the media themselves clearly employ their constitutional privileges to exercise 'definitional' power in respect to the full range of social and political issues, including issues before the courts. But these privileges are at least

¹⁸ Hutchinson, *ibid*, 25.

partly rooted in the form in which communication is defined in the discourse on justice and communication. This is the area which calls most clearly, I believe, for further study; I have only noted in passing in the thesis (19) some of the evidence that a 'transmission' model of social communication, largely counter-indicated in the social science literatures, is a predominant theme in the Supreme Court's own utterances.

A transmission model of communication is a problematic apparatus for analysis of the interactive dimensions of communication, but a highly effective tool for defining and controlling claims of authorial property and contractual obligation. If the thematization of communication as the transmission of information -- along with its conceptual inventory of self-evident 'messages', 'codes', 'channels', and 'sending' and 'receiving' functions -- performs the central role in the organization of the constitutional discourse on speech rights which I believe it does, then it must be recognized that the very definitions of social processes employed in that discourse have vast entailments with respect to the allocation of economic resources and social power. Legal and policy discourses furnish an excellent datum for exploring this relationship between political-economic modes of social explanation and those of discourse and narrative theory.

I have contended, in effect, that in the name of free speech and democracy the Supreme Court has commanded the silence of the 'sovereign people'. Given that one of the functions of the 'marketplace of ideas' is the organization and legitimation of the institutions of the state itself, as well as the definition and debate of their policy options and public obligations, I believe it is not an excessive claim that the recent developments in First Amendment theory constitute an influential model for consolidating

¹⁹ See especially Chapter Four.

local, regional and national political processes as literally factor commodities available for purchase in transnational markets.

The Court's negation of the state's regulatory powers in communication is perhaps an instance of the "negation of the negation" of industrial capitalism, a point of mediation and transition between the mixed economy of a liberal industrial democracy and the fuller privatization of the public sphere in a global 'information economy'. The emerging shape of First Amendment doctrine is an image, not of the preservation of the status quo, but of its supercession by an altered mode of production in which human subjects, rather than humanly-produced objects, are the prime material upon which labour is expended, and in which economic values inhere. If this is an accurate image, the 'Other' totalized in the Court's determinations is really the audience, and not, as it pretends, the state.

I wish to conclude by pointing beyond the critique of liberal rights to a cautiously affirmative historical vista. The notion of freedom of expression has not only the repressive meanings we have explored but also a transformative potential, transcending liberal ideology (20). Market allocation of resources is an outcome of public policy choices, not the 'natural' order of society. Citizens are not identical with consumers. The interests of corporations and state institutions are not the only interests at play in the public forum. The very centrality and force of 'free speech rights' as an ideological condition of development of contemporary market forces may in the end contribute to breaking down these assumptions. The area of communications law and policy is therefore a strategic front in the struggle between capital and human development.

²⁰ See especially Paulo Freire, Pedagogy of the Oppressed, N.Y.: Herder and Herder, 1970; Education for Critical Consciousness, N.Y.: Continuum, 1982.

The Supreme Court of the United States has on several occasions avowed that the purpose of the constitutional guarantee of free speech was to ensure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people". The prospective achievement anywhere of effective means for popular discussion and implementation of political change is highly threatening to important sectors of capital. On the other hand the failure to achieve a widespread 'radical pluralism' may imply an even more threatening attenuation of our capacity for reasoned popular response to the many looming threats of social, economic, geopolitical and environmental immiseration. I believe that 'free speech' as understood in liberal theory, is a necessary element of fundamental justice and authentic democracy, even while it is in fact incompatible with the stability and growth of the market system. Collective self-determination -- perhaps even collective survival -- now requires the audience's appropriation of the media. We have urgent need of their full and free public use so that we may reason together, and respond to the extremely perilous state we are in.

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