

**NLWJC - KAGAN**

**STAFF & OFFICE - D.C. CIRCUIT**

**BOX 002 - FOLDER 003 DC**

**Elena Kagan Law Review 3 [2]**

# FOIA MARKER

**This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.**

---

**Collection/Record Group:** Clinton Presidential Records

**Subgroup/Office of Origin:** Counsels Office

**Series/Staff Member:** Sarah Wilson

**Subseries:**

---

**OA/ID Number:** 14685

**FolderID:**

---

**Folder Title:**

Elena Kagan Law Review 3 [2]

**Stack:**

**V**

**Row:**

**13**

**Section:**

**2**

**Shelf:**

**10**

**Position:**

**3**

position, but it is not relevant to my current claim, which is purely descriptive: laws that discriminate on the basis of viewpoint are indeed upheld in certain circumstances.

-Footnotes-

n14 See, for example, Strauss, 91 Colum L Rev at 334 (cited in note 5); T. M. Scanlon, A Theory of Free Expression, 1 Phil & Pub Aff 204 (1972). See also Ronald M. Dworkin, The Coming Battles Over Free Speech, NY Rev of Books 55 (June 11, 1992).

-End Footnotes-

It is here that the first proposition emerges as a half-truth. Viewpoint discrimination is indeed permitted, and the Court should not pretend that it is always banned. n15 We might conclude from the cases that viewpoint discrimination is not always prohibited and that the Court instead undertakes a more differentiated inquiry into the nature and strength of government justifications in particular cases. What is the nature of that more differentiated inquiry? I suggest that it begins with the view that viewpoint discrimination creates a strong presumption of invalidity. In certain narrow circumstances, the presumption is overcome because (a) there is at most a small risk of illegitimate motivation, (b) low [\*30] value or unprotected speech is at issue, (c) the skewing effect on the system of free expression is minimal, and (d) the government is able to make a powerful showing of harm. In the commercial speech cases, for example, we are dealing with low-value speech, and the risk of illegitimate motivation is small. In the case of securities regulation, there is no substantial skewing effect on free expression, and there is a highly plausible claim that government is protecting people against deception.

-Footnotes-

n15 R.A.V., 112 S Ct at 2547-48, seems to state this.

-End Footnotes-

For present purposes, it is not necessary to devote a good deal of attention to these various considerations. My point is only that current law does not embody a flat ban on viewpoint discrimination. Certain forms of discrimination are found fully acceptable. They are not seen in this way only because the presence of realworld harms obscures the existence of selectivity. The pretense embodied in our first half-truth has impaired the analysis of a number of free speech issues, including those raised by hate speech and pornography. Instead of relying on a per se rule, we should decide such cases by inquiring more particularly into the nature, legitimacy, and strength of government justifications. There may be sufficiently neutral justifications for apparent viewpoint discrimination in some such areas. I do not, however, suggest such justifications here. n16

-Footnotes-

n16 I do try to do this in Sunstein, Democracy and the Problem of Free Speech (cited in note 3); Cass R. Sunstein, Neutrality in Constitutional Law, 92 Colum L Rev 1, 13-29 (1992). See also Akhil Reed Amar, The Case of the Missing

Amendments: R.A.V. v. City of St. Paul, 106 Harv L Rev 124, 151-60 (1992).

- - - - -End Footnotes- - - - -

II. HALF-TRUTH NUMBER TWO: THE REAL THREAT TO THE SYSTEM OF FREE EXPRESSION COMES FROM CONTENT-BASED GOVERNMENT RESTRICTIONS ON SPEECH

The second half-truth is a generalization of the first. It derives from the same basic framework. I think that it is even more misleading; in any case, it is the most important.

Our free-speech tradition, it is commonly said, is especially hostile to content-based restrictions on speech. n17 The principal recent exponents of this view see such restrictions as the most important obstacles to the system of free expression. n18 It is as if the other obstacles are invisible, or not worth attention at all. Indeed, the Court itself treats these restrictions as the defining illustration [\*31] of threats to democratic self-governance. n19 Although there is much to be said for this idea as a matter of principle, it is in large part an artifact of our particular history. The free speech tradition in America grows out of the clear-and-present-danger cases featuring the powerful dissenting opinions of Justices Brandeis and Holmes, n20 and culminating in the great case of Brandenburg v Ohio. n21 In all of these cases, the government attempted to censor political speech on the basis of its content.

- - - - -Footnotes- - - - -

n17 See Stone, 25 Wm & Mary L Rev at 196-97 (cited in note 6). See also Harry Kalven, Jr., A Worthy Tradition 6-19 (Harper & Row Publishers, 1988).

n18 I draw here upon Stone, 25 Wm & Mary L Rev at 194-233, 251-52 (cited in note 6); Kalven, A Worthy Tradition at 6-19 (cited in note 17).

n19 See, for example, New York Times Co. v Sullivan, 376 US 254 (1964).

n20 See Abrams v United States, 250 US 616, 628 (1919) (Holmes dissenting) ("It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country."); Whitney v California, 274 US 357, 373 (1927) (Brandeis concurring) (The state may not place restrictions on speech "unless such speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent . ").

n21 395 US 444, 447 (1969) (" The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

- - - - -End Footnotes- - - - -

The image bequeathed to the American legal tradition by these cases is exceptionally pervasive. It suggests that the real threats to free expression are indeed a result of content-based regulation of speech. Outside of the

arguably distinctive context of politics, government censorship of literature and the arts also attests to the dangers of content-based regulation. The symbolic power of the great Brandeis and Holmes dissents is unrivalled, but other defining cases involve content-based restrictions as well. Consider in this connection the famous Ulysses litigation n22 and the more recent, highly publicized case involving the work of Robert Mapplethorpe. n23

-Footnotes-

n22 See United States v One Book Entitled Ulysses, 72 F2d 705 (2d Cir 1934). See also Edward de Grazia, Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius (Vintage Books, 1993), which recounts the historical saga of the publication of Ulysses in the United States.

n23 See Contemporary Arts Center v Ney, 735 F Supp 743 (S D Ohio 1990).

-End Footnotes-

The antipathy to content-based regulation thus derives great support from history. Moreover, it is not hard to see the basis for the antipathy. If we are fearful of illegitimate reasons for government regulation, or if we are concerned about skewing effects from regulation, then content-based regulation is especially dangerous.

The basis for these judgments has been spelled out in great and often convincing detail. n24 Throughout the twentieth century, [\*32] major dangers have come from government regulations designed to impose on the polity a uniformity of opinion, to stifle artistic or literary diversity, and to entrench the government's own self-interest. In an era in which many countries are emerging from communist rule, it is especially salutary to focus on the risks posed by content-based regulation of speech.

-Footnotes-

n24 See Stone, 25 Wm & Mary L Rev at 217-27 (cited in note 6); Geoffrey R. Stone, Content-Neutral Restrictions, 54 U Chi L Rev 46, 54-57 (1987); Laurence H. Tribe, American Constitutional Law ch 12 (Foundation Press, 2d ed 1988); John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv L Rev 1482 (1975).

-End Footnotes-

But is it correct to say that the greatest threats to free expression stem from content-based regulation of speech? In contemporary America, I believe that an affirmative answer will divert attention from other important issues. Under current conditions, the second half-truth may even have become an anachronism. It renders other problems invisible. It sees the First Amendment through the wrong prism. It focuses attention on comparatively trivial problems--pornography prosecutions, commercial speech, private libel--and loses sight of the large picture.

Consider, for example, a conventional view about freedom of expression. If we were to examine recent books on this topic, we would generally find a firm consensus that the system of free expression is at risk to the extent that government censors sexuallyexplicit speech, purportedly dangerous speech, or

commercial speech on the basis of its content. n25 The war against Ulysses is said to have found a modern parallel in the attack on violent pornography. The effort to deter a civil-rights advertisement through use of libel law in New York Times Co. v Sullivan n26 is said to be fundamentally the same as the continuing application of libel law to falsehoods about private people. n27 The restriction of the speech of political dissidents is said to have a modern analogue in the regulation of false and misleading commercial speech. n28

-Footnotes-

n25 See, for example, de Grazia, *Girls Lean Back Everywhere* (cited in note 22) (discussing government censorship of authors and publishers); Rodney A. Smolla, *Free Speech in an Open Society* 3-17 (Alfred A. Knopf, 1992); Anthony Lewis, *Make No Law* (Random House, 1991); Nat Hentoff, *Free Speech For Me--But Not For Thee* (Aaron Asher Books, 1992).

n26 376 US at 254.

n27 See Dworkin, *NY Rev of Books* at 62-64 (cited in note 14).

n28 See Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 *Va L Rev* 627, 644 (1990).

-End Footnotes-

Views of this sort are widespread. Moreover, it may even be right to say that the principal threats to free speech come from content-based restrictions; but the claim needs to be evaluated by reference to some sort of criteria. It should not be treated as an [\*33] axiom. Let me suggest provisionally that we should evaluate any system of free expression at least in part by attending to two matters: the amount of attention devoted to public issues and the expression of diverse views on those issues. Use of these criteria accords well with the original Madisonian vision of the First Amendment. n29 It also draws support from a range of important writings, most prominently those of Alexander Meiklejohn. n30 Many people are skeptical of the idea that the free speech principle should be understood wholly through the lens of democracy. n31 But one need not think that the First Amendment is exclusively or even primarily connected with democratic self-government in order to conclude that something is wrong if the system deals little with public issues and contains little diversity of views.

-Footnotes-

n29 See, generally, Sunstein, *Democracy and the Problem of Free Speech* (cited in note 3).

n30 Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* 27 (Harper & Brothers Publishers, 1948) ("The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."). See also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind L J* 1 (1971); Owen M. Fiss, *Free Speech and Social Structure*, 71 *Iowa L Rev* 1405, 1409-10 (1986).

n31 See, for example, Martin H. Redish, The Value of Free Speech, 130 U Pa L Rev 591 (1982).

- - - - -End Footnotes- - - - -

If these are our governing criteria, I suggest that the principal current problem is not content-based restrictions on speech but rather a speech "market" in which these values are poorly served. It is comparatively unimportant if the government is overzealous in its regulation of child pornography, or if government regulates commercial advertising that is not terribly deceptive. But it is far from unimportant if the system of free expression produces little substantive attention to public issues, or if people are not exposed to a wide diversity of views. If we are interested in ensuring such attention and such exposure, we may not be entirely pleased with the operation of the so-called free market in speech.

In large part, this claim is a factual one. To evaluate the claim, we need to have a very thorough empirical understanding of the free speech "status quo," and here there is a distressingly large gap in the free speech literature. There are few more important tasks for the study of free expression than to compile information on existing free speech fare. But a number of things do seem clear. n32 [\*34] In most of the broadcasting that people watch, there is exceedingly little attention to public issues. The "soundbite" phenomenon assures that during electoral campaigns, public attention will be focused on marginally relevant matters--the "Murphy Brown" controversy, escalating allegations of various kinds--rather than on the real issues at stake. Such attention as there is often centers on sensationalistic anecdotes, usually with an unwarranted whiff of scandal.

- - - - -Footnotes- - - - -

n32 I draw here on Phyllis C. Kaniss, Making Local News (University of Chicago Press, 1991); Sunstein, Democracy and the Problem of Free Speech (cited in note 3). An especially valuable empirical treatment is C. Edwin Baker, Advertising and a Democratic Press, 140 U Pa L Rev 2097 (1992).

- - - - -End Footnotes- - - - -

Coverage of public issues often involves misleading "human interest" anecdotes, in which people are asked how they "feel" about policies that appear to have harmed them. Frequently public issues are entirely absent. For example, the local news sometimes consists of discussion about the movie that immediately preceded it. Marketplace pressures, including the desires of advertisers, encourage the press to avoid substantive controversy. Often advertisers affect content, partly by discouraging serious discussion of public affairs, partly by avoiding sponsoring controversial programming, and partly by encouraging a favorable context for their products. n33 In the place of genuine diversity of view, offering perspectives from different positions, most of the broadcasting that people watch typically consists of a bland, watered down version of conventional morality. It would therefore be extremely surprising if commercial television were able to take a firm "pro-choice" or "pro-life" position in a news special or a prime-time movie, or a strong defense or critique of affirmative action.

- - - - -Footnotes- - - - -

n33 See Baker, 140 U Pa L Rev at 2139-68 (cited in note 32).

- - - - -End Footnotes- - - - -

In these circumstances, some major threats to a well-functioning system of free expression, defined in Madisonian terms, come not from content-based regulation, but from free markets in speech. Market pressures are compromising the two goals of a system of free expression. This is of course only a contingent fact. It is a product of a particular constellation of the current forces of supply and demand. If market forces were different, we might see a great deal of attention to public issues and a large amount of diversity of view. But under current conditions, this is hardly the case.

We might go further. The contemporary problem lies not merely in market forces, as if these were brute natural facts, but more precisely in the legal rules that underlie and constitute those markets. Broadcasters and newspapers are of course given property rights in their media. Without such government grants, the speech [\*35] market would be entirely different. It is these rights--generally of exclusive use--that make it possible for owners to exclude people who would like to speak and be heard. If a critic of a war, or of Roe v Wade, n34 cannot get onto network television, it is not because of nature or "private power," but because legal rules prevent him from doing so. Property laws at both the federal and state levels make any efforts to obtain access to television airwaves a civil or criminal trespass.

- - - - -Footnotes- - - - -

n34 410 US 113 (1973).

- - - - -End Footnotes- - - - -

Market forces are a product of law, including the law that allocates entitlements. That law, like all other, should be assessed for conformity to the First Amendment. The law of property, granting rights of exclusive use, is of course content-neutral rather than content-based. When CBS excludes someone from the airwaves, it is not because government has made a conscious decision to exclude a particular point of view. But it is also untrue to say (as current law perhaps does) n35 that government is not involved, that we have a problem of "private power," or that there is no state action for free speech purposes. There is a content-neutral restriction on speech. The question is whether that content-neutral restriction is helping or harming the system of free expression. To make this assessment, we should compare it with other possible systems. Alternatives might include a "fairness doctrine" that calls for attention to public issues and diversity of view; a point system creating incentives to license applicants who promise to cover important issues; a system of subsidies and penalties designed to increase coverage of important issues; or legal restrictions on the power of advertisers over programming content. n36

- - - - -Footnotes- - - - -

n35 CBS v Democratic Natl Committee, 412 US 94 (1973).

n36 For details, see Baker, 140 U Pa L Rev at 2178-2219 (cited in note 32); Sunstein, Democracy and the Problem of Free Speech (cited in note 3).

-End Footnotes-

If our current system of free expression is functioning poorly, it is because of the content-neutral law that underlies current markets. I believe that many important problems for the current system of free speech in America lie not in content-based regulation--which generally involves peripheral issues and almost never strikes at what I am taking to be the core of the free speech guarantee--but instead in the operation of the free market and in the legal rules that constitute it. In these circumstances, it is worse than ironic that people interested in the theory and practice of free speech focus on such comparatively trivial issues as commercial speech, disclosure of the names of rape victims, and controls on [\*36] obscenity. The principal questions for the system of free expression lie elsewhere. n37

-Footnotes-

n37 See Lee C. Bollinger, Images of a Free Press chs 2, 5 (University of Chicago Press, 1991); Commission on Freedom of the Press, A Free and Responsible Press 107-33 (University of Chicago Press, 1947) ("Hutchins Report").

-End Footnotes-

III. HALF-TRUTH NUMBER THREE: GOVERNMENT "PENALTIES" ON SPEECH ARE FUNDAMENTALLY DIFFERENT FROM SELECTIVE FUNDING OF SPEECH

In the next generation, some of the most important free speech issues will arise from selective funding of speech. What if government funds some artists but not others, imposes conditions on what libraries may obtain, or regulates political expression by refusing to pay for the literature of certain causes? On the constitutional question, the Supreme Court's cases are exceptionally hard to unpack. We might distinguish five different propositions, which in concert seem to reflect the current law. n38 Once we have them in place, we will be able to see the key role of the third halftruth.

-Footnotes-

n38 Rust v Sullivan, 111 S Ct 1759 (1991) (allowing selective subsidy); Harris v McRae, 448 US 297 (1980) (same); FCC v League of Women Voters, 468 US 364 (1984) (banning penalty).

-End Footnotes-

(A) Government is under no obligation to subsidize speech. Government can refuse to fund any and all speech-related activities. In this sense, it can remain out of the speech market altogether.

(B) Government may speak however it wishes. Public officials can say what they want. There is no free speech issue if officials speak. Speech of this kind "abridges" the speech of no one else.

(C) Government may not use its power over funds or other benefits so as to pressure people to relinquish rights that they "otherwise" have. This is an obscure idea in the abstract, but it can be clarified through some examples. Government could not say that as a condition for receiving welfare, people must vote for a certain political party. Government could not tell people that if

they are to have drivers' licenses, they must agree not to criticize the President. In both cases, government makes funding decisions so as to deprive people of rights of expressive liberty that they would otherwise have.

But--and this is an important qualification--government may indeed "condition" the receipt of funds, or other benefits, on some limitation on rights, if the condition is reasonably related to a neutral, noncensorial interest. For example, the government could forbid you from working for the CIA unless you agree not to write about your CIA-related activities, or could prevent you from political campaigning if you work for the federal government. n39 In both cases, the government has legitimate justifications that do not involve censorship. Its limitation on CIA employees is designed to ensure the successful operation of the CIA, which entails a measure of secrecy. Its limitation on government employees is designed to ensure that political campaigning does not compromise basic government functions. Of course this principle will create some difficult line-drawing problems.

-Footnotes-

n39 *Snepp v United States*, 444 US 507 (1980).

-End Footnotes-

(D) Government may not "coerce" people by fining or imprisoning them if they exercise their First Amendment rights. Fines and imprisonment are the most conventional examples of free speech violations. They do not raise "unconstitutional conditions" issues at all, and may be approached far more straightforwardly. n40

-Footnotes-

n40 I will question this view below.

-End Footnotes-

(E) The government may apparently be selective in its funding choices. In other words, government may direct its resources as it chooses, so long as it does not run afoul of principles (C) and (D) above. Government may give funding only to those projects, including those speaking projects, of which it approves. Thus government may fund art, literature, or legal and medical care and impose limits on the grantees, even on their speech, if the limits regard what may be done with government money.

*Rust v Sullivan*, a highly controversial Supreme Court decision, is the source of this last proposition. n41 In *Rust*, the Court suggested that so long as government is using its own money, and not affecting "private" expression, it can channel its funds however it wishes. The problem arose when the Department of Health and Human Services issued regulations banning federally-funded family-planning services from engaging in (a) counseling concerning, (b) referrals for, and (c) activities advocating abortion as a method of family planning. The plaintiffs claimed, among other things, that these restrictions on abortion-related speech violated the First Amendment. In particular, they argued that the restrictions discriminated on the basis of point of view. The Court disagreed, [\*38] holding:

-Footnotes-

n41 111 S Ct at 1759.

-End Footnotes-

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. n42

-Footnotes-

n42 Id at 1772. The Court added:

To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternate goals, would render numerous government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 USC 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism and Fascism.

Id at 1773.

-End Footnotes-

In response to the claim that the regulations conditioned the receipt of a benefit on the relinquishment of a right, the Court held that "here the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." n43

-Footnotes-

n43 Id at 1774.

-End Footnotes-

Rust seems to establish the important principle that government can allocate funds to private people to establish "a program" that accords with government's preferred point of view. In this area, even viewpoint discrimination is permitted. In fact, the Court seems to make a sharp distinction between government "coercion"--entry into the private realm of markets and private interactions--on the one hand and funding decisions on the other. Hence we arrive at our third half-truth: Government may not "penalize" speech (propositions (C) and (D)), but it may fund speech selectively however it chooses, by allocating its funds to preferred causes (propositions (A) and (E)).

This view captures an enduring principle, one that will inevitably play a role in the constitutional law of freedom of expression. Often government has legitimate justifications for treating funding decisions differently from criminal punishments. As noted, it may conclude that people who work for the

CIA must refrain from speaking on certain matters, on the ground that the speech could compromise national security. Hence government could conclude [\*39] that if it is to provide people with the benefit of CIA employment, it may condition their speech. So too, the President could conclude that Cabinet-level employees must speak in ways of which the President approves. Without imposing this kind of condition on speech, the President's power to execute the laws would be severely compromised. The condition is therefore acceptable. It can be justified by reference to sufficiently neutral justifications.

But the sharp distinction between penalties and subsidies is inadequate. It is far too simple. It sets out the wrong sets of categories. Most generally, there are no such fundamental distinctions among the law that underlies markets, the law that represents disruption of markets, and the law that calls for funding decisions. All are law, and the First Amendment directs us to assess each in terms of its purposes and effects.

To make the point a bit more dramatically: All constitutional speech cases are in an important sense unconstitutional conditions cases. When the government says that someone will be fined for speaking--our category (D) above--it in effect imposes an unconstitutional condition. It is generally saying that your property--which is, as a matter of fact, governmentally conferred n44 --may be held only on condition that you refrain from speaking. To be sure, a case of this sort is not seen as one of unconstitutional conditions at all. But this is only because existing holdings of property are seen, wrongly, as pre-political and pre-legal. To support the outcome in category (D), it would be more precise to say that a condition is usually unconstitutional when government is using its power over property that it has created through law to deprive you of something to which you are otherwise entitled--and you are always otherwise entitled to property that you now own. But to put things in this way would be to place funding cases and other cases on the same analytic ground. The sharp split drawn in Rust is therefore misconceived. It is here that the distinction between penalties and subsidies is merely a half-truth.

- - - - -Footnotes- - - - -

n44 This has no normative implications. By saying that property rights are a creation of law, I do not mean in any way to disparage the institution of private property, which is crucially important to, among other things, individual liberty, economic prosperity, and democratic self-government. I mean only to suggest that to have a system of private property, government controls are necessary, as people in Eastern Europe have recently learned very well.

- - - - -End Footnotes- - - - -

We may go further. The First Amendment question is not whether there is a subsidy or a penalty. For two reasons, it is wrong to ask that question. First, the question is exceedingly hard [\*40] to answer; it forces us to chase ghosts. Second, it is essentially irrelevant. n45 We might have a perfectly acceptable "penalty," and we might have an impermissible refusal to subsidize.

- - - - -Footnotes- - - - -

n45 See Kagan, 1992 S Ct Rev at 30 (cited in note 3); Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv L Rev 1413 (1989); Cass R. Sunstein, The Partial Constitution ch 11 (Harvard University Press, 1993).

- - - - -End Footnotes- - - - -

The first problem is that in order to decide whether there is a subsidy or a penalty, we need a baseline to establish the ordinary or normatively-privileged state of affairs. When government denies Medicaid benefits to artists, has it penalized speech, or has it refused to subsidize it? We cannot answer that question without saying what it is that artists are "ordinarily" or "otherwise" entitled to have. n46 The Constitution does not really answer that question, and without a textual resolution it is very difficult for courts to resolve it on their own.

- - - - -Footnotes- - - - -

n46 See Robert Nozick, Coercion, in Sidney Morgenbesser, ed, Philosophy, Science and Method: Essays in Honor of Ernest Nagel 440 (St. Martin's Press, 1969).

- - - - -End Footnotes- - - - -

More important, the First Amendment does not say that "penalties" on speech are always prohibited and that "subsidies" are always allowed. Even if we could tell the difference between the two, we would not have accomplished very much. Perhaps government can "penalize" speech when it has legitimate justifications for doing so. Perhaps government must sometimes subsidize speech when its failure to do so is grounded on an impermissible reason. The notions of penalty and subsidy seem to truncate analysis at a too early stage.

I do not claim that funding decisions affecting speech should be treated "the same" as other sorts of government decisions that affect speech--whatever this ambiguous claim might mean. The development of constitutional limits on funding that interferes with expression raises exceedingly complex issues. But for now, we have reason to doubt whether our third half-truth, and Rust, would be taken to their logical extreme. Can it seriously be argued that government could fund the Democratic Convention but refuse to fund the Republican Convention? Is it even possible that government could give grants only to academic projects reflecting governmentally-preferred viewpoints? More likely, Rust will come to be understood as a case involving private counselling rather than public advocacy, in the distinctive context in which a ban on abortion counselling is ancillary to a ban on the performance of abortions. It will not be taken to authorize government selectively to subsidize one point of view in a controversy over some public issue. [\*41]

In short: Adherence to the First Amendment requires an analysis of the effects of selective funding on the system of free expression, and of the legitimacy of the government justifications for selectivity. A sharp split between penalties and subsidies will not do the job; some penalties are acceptable and some selective subsidies are not. The third half-truth is thus rooted in anachronistic ideas about the relationship between the citizen and the state. It poses a genuine threat to free speech under modern conditions.

IV. HALF-TRUTH NUMBER FOUR: CONTENT-BASED RESTRICTIONS ON SPEECH ARE WORSE THAN CONTENT-NEUTRAL RESTRICTIONS ON SPEECH

We arrive finally at the last and most general half-truth. From what has been said thus far, it should be clear that the Supreme Court is especially skeptical of content-based restrictions and especially hospitable toward content-neutral restrictions. n47 Contentbased restrictions are presumed invalid. Outside the relatively narrow categories of unprotected or less protected speech--libel, commercial speech, fighting words, and so on--the Court rarely upholds content-based restrictions. By contrast, content-neutral restrictions are upheld so long as they can survive a form of balancing. In undertaking that balancing, the Court is often highly deferential to government judgments about the need for contentneutral restrictions. One of the most striking developments in recent law is the Court's increased hostility to content-based restrictions and its increased deference to content-neutral ones. Indeed, the distinction between the two kinds of restrictions seems to become sharper every term. Thus it is striking to compare the recent invalidation of a relatively narrow content-based restriction--the ban on cross-burning--with the recent validation of a broad content-neutral restriction--the ban on solicitation in airports. n48

-Footnotes-

n47 See generally Stone, 54 U Chi L Rev at 54-117 (cited in note 24).

n48 See R.A.V., 112 S Ct at 2547-49, discussed in text accompanying notes 2 and 3; Intl Society for Krishna Consciousness, Inc. v Lee, 112 S Ct 2701, 2705-09 (1992) (holding that an airport terminal is not a public forum and that the port authority's ban on solicitation was a reasonable means of minimizing inconvenience and disruption of travelers).

-End Footnotes-

There is much to be said in favor of this fourth half-truth. n49 As noted, it does tend to capture current law. Moreover, it makes considerable sense as a matter of principle. Generalizing only slightly from the previous discussion of viewpoint-based restrictions, we might conclude that content-based restrictions are peculiarly likely to stem from an illegitimate government reason, and peculiarly likely to have intolerable skewing effects on the system of free expression. A law that forbids AIDS-related advertising on subways, for example, is more objectionable than a law that forbids all advertising on subways. Content-neutral restrictions are far more trustworthy, for the reasons for regulation are apt to be more legitimate and the skewing effects less worrisome. On this basis, a legal system could do far worse than to set out a presumption against content-based restrictions and a presumption in favor of content-neutral ones.

-Footnotes-

n49 See Stone, 54 U Chi L Rev at 54-57 (cited in note 24).

-End Footnotes-

These presumptions should not, however, be pressed too hard. There are cases in which content-neutral restrictions are especially damaging, and cases in which content-based restrictions are not so bad. Suppose, for example, that government forbids all speech in airports, train stations, and bus terminals. Here we will have a fundamental intrusion on processes of public deliberation.

Indeed, one of the most effective strategies of tyrants is to limit the arenas in which public deliberation can take place. Surely this sort of intrusion is more severe than what arises when, for example, small public universities ban a narrow category of racial hate speech. The content-neutral restriction may seriously restrict the number of expressive outlets and thus impair the system of democratic deliberation. It may also have content differential effects: when people are prevented from engaging in door-to-door canvassing, or from using public parks, there are severe adverse effects on poorly financed causes. Moreover, some content-based regulation--consider a limited ban on racial hate speech or narrow classes of violent pornography--is at least plausibly a modestly intrusive corrective to an already content-based status quo. Whether or not such contentbased regulations should be upheld, it seems wrong to think that regulations of this sort are automatically more objectionable than regulations that are content-neutral.

I do not suggest that the distinction between content-based and content-neutral regulations is a failure, or that it should be abandoned. The danger arises if the doctrine becomes too rigid and mechanical. There is a risk, for example, that the current Court will become exceptionally receptive to content-neutral restrictions on speech, giving them the strongest presumption of validity. It is possible that something of this kind has already occurred. There is also a risk that outside of a few narrow categories, the Court will invalidate all content-based restrictions without looking seriously at the reasons for regulation in the particular case. But many content-neutral restrictions have extremely harm [\*43] ful consequences and some content-based restrictions are founded on adequate justifications. The fourth half-truth is dangerous above all because in its rigidity, it operates as a substitute for close analysis of particular problems. n50

- - - - -Footnotes- - - - -

n50 Of course, it may sometimes be worthwhile to insist on rules that are crude but that reduce the costs of individualized inquiry. Some of the oversimplification in free speech law might be justified on this ground.

- - - - -End Footnotes- - - - -

CONCLUSION

With any well-elaborated body of legal doctrine, there is a pervasive danger that the doctrinal lines and distinctions will take on a life of their own. The purposes and goals that gave rise to those lines and distinctions sometimes become increasingly remote. This is, I believe, the source of the problem with all four half-truths. The larger goals of free speech doctrine have often been abandoned in favor of continued attention to particular doctrines that serve those goals in only partial and indirect ways.

It is of course possible to debate the content of those larger goals. Much ink has been spilled on that highly-contested question. n51 But we need not enter into especially controversial territory in order to assert that at least a part of the justification for a strong free speech principle is its contribution to the American conception of self-government. This conception--associated with the Madisonian view of free speech--helps explain the persistence of each of our half-truths. All of them can be seen at least in part as efforts to protect against skewing effects on democratic deliberation and illegitimate government

efforts at self-insulation. It is for this reason that the propositions I have discussed can fairly be described as half-truths, rather than as simple illusions.

- - - - -Footnotes- - - - -

n51 See, for example, Scanlon, 1 Phil & Pub Aff at 204 (cited in note 14) (autonomy theory); T. M. Scanlon, Freedom of Expression and Categories of Expression, 40 U Pitt L Rev 519 (1979) (partial retraction of that theory); Strauss, 91 Colum L Rev at 334 (cited in note 5) (autonomy theory); Kent Greenawalt, Free Speech Justifications, 89 Colum L Rev 119 (1989) (overview of theory of free speech value); Frederick Schauer, Free Speech: A Philosophical Inquiry chs 2-5 (Cambridge University Press, 1982) (same); Redish, 130 U Pa L Rev at 591 (cited in note 31) (autonomy theory).

- - - - -End Footnotes- - - - -

But the four half-truths have indeed taken on a life of their own, and in important ways they disserve the system of free expression. In their generality and abstractness, they distract attention from current threats to the system of free expression and, even worse, they threaten to make those threats invisible as such. One of the extraordinary characteristics of the American system of free expression is its capacity to grow and change over time. If the [\*44] system is to promote democratic goals in the twenty-first century, I suggest that the four half-truths should be recognized not only for their contributions to human liberty, but also for their limitations and their damaging effects on some of the most important current free speech controversies.

Copyright (c) 1993 The University of Chicago  
The Univeristy of Chicago Legal Forum

1993

1993 U Chi Legal F 127

LENGTH: 10479 words

The Rules of Evidence and the Rules of Public Debate

Geoffrey R. Stone\*

-----Footnotes-----

\* Harry Kalven, Jr. Professor of Law and Dean, The University of Chicago Law School. I would like to thank Danny Boggs, Anne-Marie Slaughter Burley, Abner Greene, Elena Kagan, Larry Kramer, David Strauss, and Cass Sunstein for their helpful comments on an earlier version of this paper.

-----End Footnotes-----

SUMMARY:

... The specific question I will explore is whether the rules of evidence should serve as the rules of public debate. ... If the reporter knows the information to be false, it is hard to imagine any legitimate purpose to be served by its publication, and a prohibition on publication in such circumstances would in no way undermine either public debate or voter autonomy. ... Does it therefore follow that, by analogy to the rules of evidence, knowingly false statements made in the course of public debate can constitutionally be punished even if they do not constitute libel? Suppose, for example, that X, a candidate for political office, falsely states that he is a graduate of The University of Chicago Law School. ... First, in the perjury context the individual is under oath at the time he makes the false statement. ... These rules exclude evidence because its probative value is thought to be outweighed by the risk that jurors will overvalue the evidence to such a degree that they are more likely to reach a correct result without the evidence than with it. ...

TEXT:  
[\*127]

Professor Frederick Schauer offers a unique and interesting perspective on the responsibilities of a free press, particularly insofar as he draws on the analogy between the standards of a criminal trial and the standards of journalistic behavior. As he observes, "in many respects the journalist is like a criminal court, for when it comes to allegations of official misconduct the publication of the story . . . can have adverse consequences quite severe for the individual involved." n1 Thus, he adds, "it may seem plausible for the journalist . . . to think of herself as being the equivalent of a criminal court in terms of procedures and . . . burden of proof." n2 This is a useful analogy. I would like to build on the point. The specific question I will explore is whether the rules of evidence should serve as the rules of public debate. n3

-Footnotes-

n1 Frederick Schauer, Slightly Guilty, 1993 U Chi Legal F 83, 99.

n2 Id (emphasis omitted).

n3 At the outset, one might wonder whether the constitutional guarantee of free speech has any relevance to the trial process. It is generally agreed that the free speech guarantee serves three primary values--self-governance, search for truth, and individual self-fulfillment. See, generally, Geoffrey Stone, Louis Seidman, Cass Sunstein, and Mark Tushnet, Constitutional Law 1017-24 (Little Brown & Co., 2d ed 1991) ("Stone Casebook"). Although these values do not translate perfectly to the context of criminal trials, they are certainly important factors in shaping the rules of evidence. The search for truth and self-governance rationales clearly undergird much of the law of evidence. Even the self-fulfillment theory finds expression in rules, for example, that recognize the criminal defendant's right to testify in his own behalf and in the privilege against compelled self-incrimination.

-End Footnotes-

I. THE RULES OF EVIDENCE

Let me begin, then, with the rules of evidence. In a trial, the general theory of admissibility or exclusion of evidence is as follows: evidence is admissible if it is both material and relevant, and if its probative value is not substantially outweighed by the dangers of undue prejudice or jury confusion, considerations of time or undue delay, or the furtherance of some external social policy.

Evidence is material if it is offered to prove some fact that is of consequence to the determination of the action. For example, evidence that the defendant earned less than \$ 600 in a particular year is material in a prosecution for failure to file a tax return because a person earning less than \$ 600 is not required to file a return. That the defendant earned less than \$ 600 is not material in a prosecution for armed robbery, however, for poverty is not a defense to the crime of armed robbery.

Evidence is relevant if it has any tendency to make the existence of a material fact either more or less probable than it would be without the evidence. For example, evidence that the defendant owns rat poison is relevant to whether he committed a murder in which the victim was killed with rat poison because it shows that the defendant had the capacity to commit the crime. Such evidence is not, however, relevant to whether the defendant committed a murder in which the victim was strangled because the defendant's ownership of rat poison does not increase the probability that he committed the murder.

Evidence that is both material and relevant is presumptively admissible, that is, such evidence is admissible unless its probative value--the extent to which it actually proves what it is offered to prove--is substantially outweighed by some competing consideration. There are essentially four such considerations. The first is "undue prejudice." "Undue prejudice" exists whenever the jury is likely to give the evidence far more weight than it should and is thus more likely to reach the "correct" result without the evidence

than with it. For example, in an accident case, a plaintiff who has lost the use of his limbs may offer to drag himself across the floor to demonstrate the extent of his injuries. Because of the inflammatory nature of this evidence, the judge is likely to find it unduly prejudicial and, thus, inadmissible.

The concern with jury confusion arises when the evidence is likely to muddy rather than clarify an issue. Again, the assumption is that the jury is more likely to reach the correct result without the evidence than with it. An example might be complex expert testimony on an issue that does not require the presentation of such proof. The concern with time is similarly straightforward. Suppose, for example, the defense counsel wants the judge and jury transported five hundred miles to view the scene of the car accident that led to the litigation. The judge might reasonably find [\*129] that, in light of the availability of photographs, the view is not worth the time.

Finally, the external social policy problem arises when the admission of material and relevant evidence would frustrate some social policy that is external to the trial process itself. An example is the exclusionary rule, which renders inadmissible relevant and material evidence seized in an unlawful search in order to deter the police from engaging in such searches.

## II. MATERIALITY AND RELEVANCE

What does all this have to do with the responsibilities of a free press? As I stated at the outset, the question I want to consider is the extent to which these rules should also be the rules of public debate. After all, these rules are designed to ensure that we have fair, accurate, and expeditious judicial proceedings. These rules play a critical role in our decision whether to find a person guilty of a crime. They are designed to ensure reliable factfinding upon which we base some of society's most important decisions--whether or not to deprive an individual of his liberty or even his life. Should not these same rules be the rules of public debate?

I would like to begin the inquiry with the requirements of materiality and relevance. It should immediately be apparent that the question of whether any particular fact is material or relevant to public debate is quite controversial. Is evidence that a presidential candidate has been unfaithful to her husband relevant to her fitness to be president? Some among us will say it is relevant; others will disagree. Is it relevant if only 70 percent of the people think it relevant? Forty percent? Five percent? Is it relevant if even a single person thinks it relevant?

Happily, we need not decide these questions at this point, for the primary reason for excluding immaterial or irrelevant evidence is that its presentation is a waste of time. If the evidence proves nothing in dispute, why take the time at trial to hear it? Because judicial time and resources are limited, it is costly to hear evidence that serves no constructive purpose. Hence, we toss it out. In public debate, however, there is no similar constraint. For the New York Times to report that a presidential candidate has been unfaithful may be a waste of time if it is irrelevant--that is, if it is of interest to zero voters--but that waste of time is of less concern to society than a waste of limited judicial resources. If the only objection to publication of the information is that no one cares about it, [\*130] we can leave it to the media to make their own decisions about publication. n4

-Footnotes-

n4 The resources available to the media are, of course, not unlimited. But the limitations are not so severe that we cannot leave it to the media to decide what is and what is not worth publishing.

-End Footnotes-

Of course, my "unfaithful candidate" example is more complex, for there may be reasons for concern beyond the arguable irrelevance of the information. I will return to those issues later. n5 For the time being, it is sufficient to say that we do not need rules of relevance or materiality for public debate because such debate is not constrained by the same sorts of time and resource limitations as is the judicial system. n6

-Footnotes-

n5 See Part VI.

n6 For an even clearer example, consider a newspaper story stating that my hypothetical presidential candidate uses a blue toothbrush. That is presumably irrelevant to everyone, but we would hardly bother to prevent the press from publishing the information if it wants to do so. It should also be evident, by the way, that the consideration of time and undue delay can be disposed of in a similar manner. For the most part, these concerns do not pose the problem in public debate that they do in a trial, so we do not need a rule to deal with them.

-End Footnotes-

III. EXTERNAL SOCIAL POLICY

The next basis for the exclusion of evidence is the promotion of some external policy. This situation tends to arise in the law of evidence in two situations. First, in some circumstances, the rules of evidence exclude categories of proof for this reason only when the evidence offered is of relatively slight probative value. This is illustrated by evidence that the defendant in a car accident case made repairs to the car after the accident, such as paying to have the brakes fixed. If such evidence is offered to prove that the brakes were in a defective condition at the time of the accident, it will be inadmissible. This is so because of the combination of two factors.

First, the probative value of the evidence on this point is relatively low because there are many reasons why a person may repair brakes after an accident even if they were not previously in a negligent condition--for example, he may want to be extra cautious in the future. Thus, although the evidence is not irrelevant, it is not highly probative, either. Second, to admit such evidence would deter individuals from improving the safety of their cars after accidents because of a concern that such conduct would later be used against them in court. This is the external social policy. In this situation, the rules of evidence conclude that the probative value [\*131] of the evidence is outweighed by the interest in not frustrating the external social policy of promoting repair. n7

-Footnotes-

n7 FRE 407.

- - - - -End Footnotes- - - - -

If a party offers the same evidence, however, not to prove prior negligence, but to prove that the defendant owns the car (assuming this is in dispute), then the evidence will be admissible despite the fact that its admission may to some extent undermine the external social policy. This is so because the probative value of the evidence on the issue of ownership is high--after all, people ordinarily do not pay to repair cars they do not own.

The second type of rule concerning external social policy operates without regard to the probative value of the evidence. That is, the harm from admission of the evidence is thought to be so great that the evidence is deemed inadmissible regardless of its probative value. This type of rule is illustrated by the exclusionary rule and by the attorney-client privilege. For example, evidence of drugs found in a defendant's possession in an unlawful search is highly probative of guilt. Nonetheless, the exclusionary rule renders the evidence inadmissible. Similarly, proof that the defendant admitted his guilt to his attorney is highly probative of guilt. But such evidence will be held inadmissible in order to promote the confidentiality of the attorney-client relationship.

Interestingly, although we do not usually think of them as rules of evidence for public debate, current First Amendment doctrines closely track these two types of evidentiary rules governing external social policies. The first type of rule, illustrated by the repair rule, finds parallels in the First Amendment distinction between "high" and "low" value speech. n8 For example, nonnewsworthy invasions of privacy are actionable because their probative value to public debate is thought to be low and outweighed by their harm to the individual whose privacy is invaded. Newsworthy invasions of privacy, on the other hand, are protected by the First Amendment because the probative value is higher. Thus, disclosing that X rents sexually explicit movies may be actionable as an invasion of privacy if X is an ordinary citizen, but may be protected speech if X is a candidate for public office. n9 Similarly, a sexually explicit movie that meets the criteria for obscenity can be prohibited, but an equally explicit movie that has serious political, [\*132] literary, artistic or scientific value is protected speech because of its greater First Amendment value. n10

- - - - -Footnotes- - - - -

n8 See, generally, Stone Casebook at 1144-1257 (cited in note 3).

n9 See, for example, *Briscoe v Reader's Digest Association*, 4 Cal 3d 529, 93 Cal Rptr 866, 483 P2d 34 (1971).

n10 *Miller v California*, 413 US 15 (1973).

- - - - -End Footnotes- - - - -

The second type of external social policy rule also finds parallels in First Amendment doctrine. Just as in the exclusionary rule and attorney-client privilege contexts, where we exclude even highly probative evidence from jury consideration because of the harm its use would pose to some external policy, so too do we permit government to exclude from public debate information that

poses a clear and present danger of a grave harm. n11 This is illustrated in the free press/fair trial area, where the Court will uphold restrictions on press coverage if such restrictions are essential to guarantee a fair trial, n12 and in the national security context, where the Court has said it will allow government to restrict the publication of even information that could be quite important to public debate if the publication presents a clear and present danger to a compelling governmental interest. n13 Although we do not usually think of these First Amendment principles as rules of evidence, they are in fact parallel to the logic and structure of the rules we use in the evidentiary system.

-Footnotes-

n11 See Stone Casebook at 1025-1120 (cited in note 3).

n12 Nebraska Press Association v Stuart, 427 US 539 (1976); Landmark Communications, Inc. v Virginia, 435 US 829 (1978).

n13 New York Times Co. v United States, 403 US 713 (1971).

-End Footnotes-

IV. FALSE STATEMENTS OF FACT--LIBEL

Another problem I would like to consider concerns the presentation of false or fabricated evidence. Most commonly, this takes the form of perjury. The rules of evidence do not permit the presentation of knowingly false evidence. The reasons for this rule are clear. Such evidence serves no legitimate purpose in the effort to determine the truth. But it is worse than that, for such evidence is also destructive of the factfinding process. It attempts to distort, distract, and mislead. At best, such evidence will waste time and effort in requiring energy to be devoted to demonstrating that the testimony is false; at worst, the falsehood will not be revealed and the jury will reach the wrong substantive result. Knowingly false evidence is per se inadmissible in the trial context and its presentation is punishable by law. n14

-Footnotes-

n14 See, for example, 18 USC 1621 (1988).

-End Footnotes-

How does this compare to the rules of public debate? The comparison is quite complex. The variant of this problem in the [\*133] context of public debate that has generated the most attention is the issue of libel. The Court has held that libel of public figures and public officials is actionable only if the speaker acted with knowledge of the falsehood or with reckless disregard for the truth. n15 The Court has held further that libel of persons other than public figures and public officials is actionable if the speaker acted negligently. n16

-Footnotes-

n15 New York Times Co. v Sullivan, 376 US 254 (1964); Curtis Publishing Co. v Butts, 388 US 130 (1967).

n16 Gertz v Robert Welch, Inc., 418 US 323 (1974).

-End Footnotes-

The first thing to note is that the Court appears to give less protection to false statements in public debate than the rules of evidence give to false statements in the judicial system. That is, in the judicial context, false statements are prohibited only if they are knowingly false. n17 What, if anything, explains this disparity? One explanation is that the rule against perjury applies to all false statements, whereas the rules governing libel in public debate apply only to false statements constituting libel. Thus, the libel rules arguably serve two purposes. Like the general rule against perjury, they protect the process against the harm caused by false statements. But they also serve another purpose, for they are designed to protect the interests of individuals whose reputations are damaged by false statements. This second purpose falls squarely within the external social policy category. That is, if we take the perjury rules as a baseline, we can say that we restrict false statements in the libel context beyond "knowing falsehoods," not because of our interest in the purity of the process, but because of our additional interest in protecting the reputations of the victims of such expression. [\*134]

-Footnotes-

n17 It is noteworthy that, in defining the law of libel, most jurisdictions recognize an absolute privilege for false statements made in the course of the judicial process. See Bruce Sanford, Libel and Privacy 10.4.2 (Prentice Hall Law & Business, 1987 Supp). Thus, we are more willing to tolerate inadvertent, but negligent or reckless, falsehoods in the judicial process than in public debate, even at the cost of damage to individual reputation. This may be so for two reasons. First, we may conclude there is an even greater need to encourage openness and to avoid chilling effects in the trial setting than in public debate. Second, we may be more willing to tolerate inadvertent inaccuracy in the judicial process because the availability of cross-examination and other devices for discerning inaccuracy at trial make us more confident of our ability to discover and disclose factual error at trial than in public debate. In public debate, counter-speech is less likely than cross-examination at trial to be effective in correcting inaccuracy, and those who may have learned of inaccurate statements in the course of public debate are less certain than jurors at trial to learn of subsequent challenges and corrections. Hence, we may conclude that we do not need to punish mere reckless or negligent false statements at trial because they are less likely to have a harmful effect.

-End Footnotes-

This understanding of the law of libel sheds light on an interesting question. In his article, Professor Schauer observes that it seems anomalous that under New York Times Co. v Sullivan n18 and similar decisions, a reporter could be held liable for publishing information about a candidate for public office that turns out to be false even if the reporter did not act with knowledge that the information was false at the time she published it. n19 For example, suppose a reporter is 40 percent confident that a candidate for governor had taken a bribe. Schauer posits that under New York Times the reporter who has a 60 percent probability that the information is false would act with reckless disregard for the truth if she published the information. n20 New York Times therefore acts as a deterrent to publication.

-Footnotes-

n18 376 US at 254.

n19 Schauer, 1993 U Chi Legal F at 93 (cited in note 1).

n20 Id at 93-94.

-End Footnotes-

Schauer argues that this may be overly restrictive because there may be voters who would not vote for a candidate who is 40 percent likely to have taken a bribe. n21 But New York Times will prevent the voter from obtaining the information. Schauer posits that in such circumstances New York Times undermines rather than supports the political process because it undermines the autonomy of such voters.

-Footnotes-

n21 Id at 96.

-End Footnotes-

I have several reactions to this puzzle. First, this problem arises only insofar as the reporter does not act with knowledge of falsity. If the reporter knows the information to be false, it is hard to imagine any legitimate purpose to be served by its publication, and a prohibition on publication in such circumstances would in no way undermine either public debate or voter autonomy. The problem therefore arises only insofar as the reporter knows there is a possibility that the information is true, but is deterred from publishing it by the reckless disregard aspect of the rule. But if we were to apply only the evidentiary rule of perjury (knowing falsehood) to public debate, there would be no problem along these lines.

Second, I might quibble with Professor Schauer about whether a 60 percent probability of falsehood constitutes reckless disregard. But that is a mere quibble. The problem as a matter of principle would be the same even if the reporter is 99 percent confident of falsehood. There may be voters who would vote against a candidate if there is even a one percent chance that he had taken a [\*135] bribe, and the question remains: how can we justify denying them that information consistent with voter autonomy?

Third, the situation in which the reporter is only 40 percent or 20 percent or one percent confident of truth can presumably be taken care of by reporting, not the ultimate fact--that candidate X took a bribe, but by accurately reporting the underlying facts from which the reporter draws her inference, thus leaving it to voters themselves to draw whatever inference they see fit. For example, the reporter could report not that X took a bribe, but that "I received an anonymous phone call reporting that X took a bribe," or that "X was indicted for bribery," or that "X was seen taking cash from Y." By adopting such an approach, the reporter avoids making a false statement and gives voters the opportunity to draw their own conclusions from the underlying factual information.

Interestingly, the rules of evidence track this approach. The "opinion rule," for example, which is designed to preserve the autonomy of jurors, ordinarily requires witnesses to state only the underlying information that is within their personal knowledge. It prohibits witnesses from drawing the inferences themselves. n22 That task is left to the jury. At least in the context I am now discussing, reporters arguably should provide only underlying information as well. n23 Indeed, recent judicial interpretations of both the common law and the First Amendment look precisely in this direction. Under the "neutral reportage" rule, courts generally hold that a reporter cannot be held liable for accurately reporting newsworthy libelous statements made by others, n24 and under the doctrine of "false implication," courts generally hold that a reporter cannot be held liable for accurately reporting underlying facts even if the implications drawn from those facts by others are erroneous and libelous. n25 [\*136]

-Footnotes-

n22 FRE 701.

n23 It is true, of course, that expert witnesses are allowed to offer their opinions about the inferences to be drawn from the underlying facts, FRE 702, and reporters might arguably be analogized to expert witnesses in the context of public debate. But even if this is so, expert witnesses themselves can be required to disclose the bases of their opinions so that the jurors can make their own, ultimate assessments. FRE 705. At least in situations where reporters might otherwise act with reckless disregard for the truth, this is a reasonable expectation of them as well.

n24 See Greenbelt Cooperative Publishing Association, Inc. v Bresler, 398 US 6 (1970); Time, Inc. v Pape, 401 US 279 (1971); Edwards v Natl Audubon Society, Inc., 556 F2d 113 (2d Cir 1977); Fadell v Minneapolis Star & Tribune Co., Inc., 557 F2d 107 (7th Cir 1977). See, generally, Sanford, Libel and Privacy at 179-84 (cited in note 17).

n25 See Pierce v Capital Cities Communications, Inc., 576 F2d 495 (3d Cir 1978); Schultz v Newsweek, Inc., 668 F2d 911 (6th Cir 1982). See, generally, Sanford, Libel and Privacy at 184-87 (cited in note 17).

-End Footnotes-

These are relatively recent developments, however. Traditional common law principles were not so generous. To the contrary, historically a reporter could be held liable for accurately reporting libelous statements made by others and for accurately reporting facts from which readers might foreseeably draw erroneous and libelous inferences. n26 To the extent this was so in the past, and to the extent it remains the law in some jurisdictions today (at least when the reporter acts with reckless disregard of the risk of defamatory injury to reputation), the "solution" of having the reporter accurately publish only the underlying factual information would not solve the puzzle.

-Footnotes-

n26 See, generally, Sanford, Libel and Privacy at 179-87 (cited in note 17).

-End Footnotes-

Is this a problem? The net effect of such a rule would be to deter reporters from disclosing information upon which at least some voters might reasonably rely in deciding not to vote for candidate X even if it is only 40 percent or 20 percent or 1 percent likely that candidate X actually did the act. As we already have seen, we do not prevent jurors from learning of such information. That is, although we prevent jurors from hearing knowingly false testimony and the opinions of witnesses about the inferences jurors should draw from the underlying facts, we certainly permit jurors to hear evidence that--standing alone--may be only 40 percent or 20 percent or 1 percent likely to prove some ultimate fact. In short, we trust jurors to make their own judgments in this regard.

Professor Schauer suggests that it is anomalous for us not to have similar faith in the autonomy of voters. If jurors can have such evidence, why not voters as well? This would seem to pose the fundamental question: When may government exclude information from public debate because it does not trust voters to deal with the information in a responsible manner? But it does not.

The reason it does not pose that question should be evident from my earlier statements. We discourage reporters from publishing information that the reporter does not know to be false, but that may be false, not to protect the purity of public debate or to protect voters from possibly inaccurate information, but to protect the reputations of those who might otherwise be the victims of the libel. The problem, in other words, is no different than other problems of restricting speech in order to promote a competing, external social policy. When we prevent individuals from learning of national security information or facts about pending trials or "non-newsworthy" information that invades someone's privacy, we [\*137] deprive at least some citizens of information they might like to have, sometimes even for the purpose of voting. But we do so, not for the purpose of denying them access to the information as such, but to serve some other social policy. Whether that policy is fair trial, national security, individual privacy, or individual reputation makes no difference for these purposes. The critical fact is that the government's purpose is not to deprive voters of information in an effort to "improve" public debate. Thus, the rules of libel law, as presently constituted, do not present us with that problem.

I should note, by the way, that I do not mean to suggest that Professor Schauer's point is unhelpful or that existing libel law strikes the right balance. To the contrary, it may well be that existing libel law is too restrictive of free expression because it deprives individuals of information that they, as voters, would like to act upon even if there is a high probability of inaccuracy. That is an important insight. My point is only that existing libel law is not inconsistent with the rules of evidence governing perjury and that the greater restrictions on false statements in the context of libel law should be understood, in terms of the rules of evidence, as merely another manifestation of the competing social policy paradigm.

#### V. FALSE STATEMENTS OTHER THAN LIBEL

This brings me to another component of the problem of false statements of fact. Up to this point, I have focused only on the law of libel. What about false statements of fact that do not constitute libel? As already noted, the rules of evidence absolutely prohibit knowingly false statements of fact in the judicial context, whether or not they constitute libel. The rule against

perjury is designed to prevent the harm to the system caused by such testimony.

Similarly, the Supreme Court has recognized that there is "no constitutional value in false statements of fact" in public debate. n27 Does it therefore follow that, by analogy to the rules of evidence, knowingly false statements made in the course of public debate can constitutionally be punished even if they do not constitute libel? Suppose, for example, that X, a candidate for political office, falsely states that he is a graduate of The University of Chicago Law School. Surely, if such a statement were made by X while testifying as a witness at trial, it could give rise to a prosecution for perjury. [\*138]

-Footnotes-

n27 Gertz, 418 US at 340.

-End Footnotes-

Interestingly, government rarely has attempted to prohibit false statements in public debate outside the libel context. As a result, there is little law directly on this question, and the Supreme Court has never explicitly addressed the issue. n28 It would certainly be plausible, however, for the Court to uphold such a law, limited to knowing falsehoods, by analogy to the evidentiary rule of perjury.

-Footnotes-

n28 In Garrison v Louisiana, 379 US 64 (1964), the Court stated that simply because "speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution" and that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." Id at 75. Garrison itself involved a prosecution for libel, however, so it is not clear that this statement should be taken to reach beyond the libel context. In several other cases, the Court has reviewed prosecutions for false statements of fact in public debate outside the libel context, and applied the ordinary clear and present danger standard without regard to the falsity of the speech at issue. See Pennekamp v Florida, 328 US 331 (1946); Craig v Harney, 331 US 367 (1947). See also Schaefer v United States, 251 US 466 (1920), in which Justice Brandeis, joined by Justice Holmes, argued in a dissenting opinion that even if speech in public debate is false, it may not be punished unless it creates a clear and present danger. In several more recent decisions, lower courts have upheld the actions of state election commissions in restricting the dissemination of nonlibelous false statements of fact in the context of political campaigns. See, for example, Pestrak v Ohio Elections Commission, 926 F2d 573 (6th Cir 1991); Geary v Renne, 914 F2d 1249 (9th Cir 1990); Tomei v Finley, 512 F Supp 695 (N D Ill 1981).

-End Footnotes-

There are two points I would like to make about this. First, although one could imagine the Court upholding a law limited to prohibiting knowing falsehoods in public debate, it would be much more difficult for the Court to uphold a law that extended to reckless disregard. Upon first glance, one might assume that the extension of New York Times to this situation would be quite

natural. After all, if we can restrict false statements that are libelous if there is reckless disregard, why not false statements generally? As I already have indicated, however, there is an important difference, for libel law is premised on a special concern with protecting individual reputation. That concern is not present with other types of false statements in public debate. Of course, government does have an interest in protecting the quality of public debate. But it would be difficult to explain why a broader restriction (reckless disregard rather than knowing falsehood) is more necessary in the context of public debate than in the context of the judicial process. n29 In any event, if we use the rules of evidence as a guide, as this inquiry presupposes, the burden would be on the proponent of such a broader restriction to explain why the perjury rule of knowing [\*139] falsehood is insufficient to serve the government's legitimate interest in the context of public debate.

-Footnotes-

n29 For some tentative thoughts related to this question, see note 17.

-End Footnotes-

The second point I would like to make about this situation concerns the question whether the Court should uphold a law that prohibits knowingly false statements of fact in the course of public debate. The argument for upholding such a law is clear. Such statements have no constitutional value, they are destructive of public debate, we have routinely prohibited such statements in the judicial process, and all the reasons that lead us to have a law of perjury in the judicial process should lead us to have a similar law in the context of public debate.

Nonetheless, in my view, such a law would be unconstitutional. I must admit, however, that this conclusion turns out to be much harder to justify than I thought it would be when I began this inquiry. Let me begin by disposing of two arguments that might seem to support my conclusion, but that do not really take us very far.

First, in the perjury context the individual is under oath at the time he makes the false statement. Thus, he is on notice of the risk of possible prosecution and he is fully aware of the seriousness of the occasion and of the duty to be scrupulously accurate and truthful. This is not so in the context of public debate, where the speaker or reporter is not under oath. This distinction is not irrelevant, but it does not clinch the case either. I would hasten to point out that there are situations in which we punish false statements even in the absence of an oath. It is unlawful, for example, to make knowingly false statements to a law enforcement officer in the course of his duties. n30 Moreover, one can argue that public debate is sufficiently important to the well-being of society, and knowingly false statements are sufficiently obviously wrong and harmful to that process, that individuals can reasonably be said to be on notice. And this would be especially true for at least two classes of potential defendants--political candidates and members of the press. For at least these two groups, the absence of an oath should not be dispositive.

-Footnotes-

n30 See, for example, 18 USC 1001 (1990).

- - - - -End Footnotes- - - - -

Second, one might argue that, in the context of public debate, the proper response to "bad" speech is not punishment, but counter-speech. That is, we should leave it to the "marketplace of ideas" to sort out the true from the false. This, too, is not irrelevant, but cannot carry the day. Note that the counter-speech/mar [\*140] ketplace of ideas notion is far more compelling when we deal with ideas and opinions than when we deal with facts than can objectively be proved true or false. Moreover, and more important, a similar argument could be made about the trial process. That is, rather than punish perjury, we could simply leave it to the parties and their attorneys to engage in counter-speech to set the record straight for jurors. We do not, however, follow that approach. Rather, we recognize that it takes time and energy to respond to false statements and that disputes over such evidence can distract and confuse jurors, even if they eventually discern the falsehood. And, of course, there is always the possibility that they will not discern the falsehood and that they therefore will reach an erroneous conclusion on the basis of knowingly false testimony. In such circumstances, we reject the counter-speech/marketplace of ideas argument and prohibit perjury outright. It would seem that the same reasoning should prevail in the context of public debate. We can hope that counter-speech will set the record straight, but why open the door to this at all? It is a lot more direct simply to follow the perjury lead and prohibit such statements altogether. n31

- - - - -Footnotes- - - - -

n31 One might argue that in the trial context we are quite concerned about limited time and resources, whereas in the public debate context this is less of a problem. We already saw this in the discussion of immaterial and irrelevant evidence. On this view, we cannot afford the time it takes to engage in counter-speech in trials. Because the time issue is only a part, and probably only a small part, of the concern with perjury, however, this is not an important distinction in this context.

- - - - -End Footnotes- - - - -

In the end, however, I think such a law invalid because of the danger of putting government in the position routinely to decide the truth or falsity of all statements in public debate. The point is not that government does not have a legitimate interest in protecting the quality of public debate. Surely it does. It is, rather, that there is great danger in authorizing government to involve itself in the process in this manner. This danger stems from the possible effect of partisanship affecting the process at every level. The very power to make such determinations invites abuse that could be profoundly destructive to public debate. n32

- - - - -Footnotes- - - - -

n32 Does this mean that the law of perjury should be unconstitutional? This does not follow, for although there are occasional instances in which perjury law, like any other law, can be abused for partisan reasons, the problem is much less likely to arise in the general run of perjury prosecutions than in actions for false statements in public debate.

- - - - -End Footnotes- - - - -

Does this mean that New York Times is wrong and that libel law also is unconstitutional? Not necessarily, for there is a long history of private actions for damage to reputation that seems to coexist reasonably well with vigorous public debate, although the [\*141] question is far from clear. Indeed, I would be particularly concerned about some of the reform proposals of the law of libel, such as those that would permit actions for mere declarations of falsity, n33 precisely because such an approach could effectively turn courts into roving commissions on truth and thus enhance the dangers of partisanship.

-Footnotes-

n33 See, for example, Pierre Leval, The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place, 101 Harv L Rev 1287 (1988).

-End Footnotes-

VI. DISTRUST OF JURORS AND VOTERS

The final aspect of the law of evidence I will discuss focuses on those rules concerned about undue prejudice. These rules exclude evidence because its probative value is thought to be outweighed by the risk that jurors will overvalue the evidence to such a degree that they are more likely to reach a correct result without the evidence than with it.

Consider, for example, a prosecution for armed robbery in which the government offers proof that the defendant has three prior convictions for armed robbery. Such evidence is clearly relevant. That is, the fact that the defendant has three prior convictions tells us something useful about his character--he has the moral capacity to engage in this sort of conduct. Put in relevance terms, it is more likely that a particular individual with three prior convictions for armed robbery committed the crime in question than a particular individual about whom we know nothing. The evidence tends to make the proposition of the defendant's guilt more likely than if we did not have the evidence.

On the other hand, evidence of the defendant's prior convictions, although relevant, is of relatively low probative value. Many people have this characteristic, and the fact of the defendant's bad character--standing alone--moves us only a very small way towards the conclusion that he was the one who committed the particular crime in question. In thinking about the probative value of this evidence, it may be useful to compare it to other kinds of evidence often available, such as eyewitness identification, a confession, or the fact that the defendant was found in possession of the stolen property.

Evidence of the defendant's bad character is thus relevant, but of only low probative value. If that were all there is to the matter, the evidence surely would be admissible. But there is more, for the law of evidence reflects the concern that, presented with such evidence, jurors would tend to give it too much weight. The concern is that jurors who know that the defendant has committed such crimes in the past will regard the defendant as a bad person and thus root against him in the evaluation of the case as a whole. In such circumstances, jurors may tend to see the defendant as someone who should be behind bars whether or not he committed the particular crime charged. "Indeed," they may think, "it really doesn't matter whether he committed this crime, for he probably committed other crimes for which he hasn't been caught or

punished, so we'd better just put him away."

Based on such concerns, the law of evidence provides that the prosecution in a criminal case may not, on its own initiative, introduce evidence of the defendant's bad character. The judgment is that, even though such evidence is relevant, the jury is more likely to reach the correct result in the case if it does not learn of the evidence than if it does. Such evidence is thus per se inadmissible. n34

- - - - -Footnotes- - - - -

n34 See, for example, FRE 404(a).

- - - - -End Footnotes- - - - -

Does it therefore follow that in public debate the press should not report about the bad character of a candidate for political office because of a similar concern that voters, like jurors, will tend irrationally to overvalue the evidence? For example, does the logic of this rule of evidence suggest that the press should not be permitted to report that a candidate previously had been convicted of bribery? The very statement of the example makes clear how counterintuitive such a rule would be when viewed against our usual assumptions about public debate. But why is public debate different in this regard from the trial process?

The answer is not, of course, that voters are better able to deal with such evidence than jurors. As individuals, voters are no different from jurors, and they are subject to the same biases and irrationalities. Moreover, if anything, the trial setting provides a better context for attempting to educate jurors to the risk that they may overvalue such proof. Why, then, is such information appropriate in public debate, even though it is condemned in the judicial process?

There are several explanations. First, in the criminal trial, the prosecution offers such evidence to prove that because the defendant behaved badly in the past he is more likely to have committed the particular crime with which he is now charged. The jury is not being asked to make an overall assessment about how the defend [\*143] ant behaves generally; it is asked to decide whether he did a particular act on a particular occasion.

In the political process, however, voters are asked to make a more generalized assessment of how the candidate will behave when faced with a broad range of possible problems over a period of time. In that context, evidence of character is much more useful, for although it may not tell us much about how the candidate will behave in a single, particularized situation, it does give us a sense of how he will behave in general. To that extent, the probative value of the evidence is much higher in this context than in the usual criminal trial and, indeed, the probative value may be sufficiently great to outweigh the risk of undue prejudice.

Interestingly, this reasoning tracks that of the law of evidence, for although the prosecution is routinely prohibited from introducing evidence of the defendant's bad character to prove he acted in accordance with that character on a particular occasion, it is permitted to introduce such evidence, despite the risk of undue prejudice, if it is relevant to some other issue,

such as motive, identity, intent, or knowledge, where the probative value may be higher. For example, if the defendant is charged with armed robbery, the prosecution could not introduce evidence of the defendant's prior convictions for armed robbery merely to prove his general criminal disposition, but it could introduce evidence that he needed money to buy heroin because such evidence would be highly probative of the defendant's motive to commit the crime. n35

-Footnotes-

n35 FRE 404(b). It is also noteworthy that evidence of character is generally admissible when character is itself an ultimate issue. See Edward W. Cleary, McCormick on Evidence 187 (West Publishing Co., 3d ed 1984).

-End Footnotes-

A second reason why the "admissibility" of bad character evidence in public debate is consistent with the "exclusion" of such evidence in criminal trials is that even in criminal trials the prosecution is permitted to introduce evidence of the defendant's bad character once the defendant voluntarily opens the door to such evidence by offering proof of his own good character. n36 In the political context, it would be reasonable to conclude that the candidate, by virtue of his candidacy, has by definition proclaimed his own good character, thus opening the door to evidence that would rebut that implicit assertion. n37 [\*144]

-Footnotes-

n36 FRE 404(a)(1).

n37 This argument would have as much force in the context of public figures, as distinct from public officials and candidates for public office.

-End Footnotes-

This does not end the matter, however, for even when the prosecution is permitted to introduce evidence of the defendant's bad character in a criminal trial, the evidence must deal with traits of character that are relevant to the crime charged. Suppose, for example, the defendant is charged with embezzlement and, to establish his own good character as proof of innocence, he introduces evidence that he is a financially responsible individual. Although the prosecution will be permitted to respond to this proof with its own evidence that the defendant is not a financially responsible individual, it will not be permitted to prove that he is a person of violent disposition. This is so because the defendant's tendency toward violence is not relevant to the charge of embezzlement, but the risk remains high that, informed of this fact, jurors might nonetheless become unduly prejudiced against him. Thus, such evidence is inadmissible.

What are the implications of this conclusion for public debate? This brings me back to the illustration I used earlier--should the press be prohibited from publishing information to the effect that a candidate was unfaithful to her husband? Although evidence of corruption is clearly relevant to a candidate's fitness for office, what about proof of marital infidelity?

Suppose a state enacts a law prohibiting any person from publishing information disclosing a political candidate's unfaithfulness. Would such a law violate the First Amendment? How would one reconcile such a law with the exclusion of similarly inflammatory and marginally probative evidence in the trial context? One answer, of course, is that such evidence is not marginally probative, but is in fact highly probative of what many voters want--or do not want--in an elected official.

The problem is that unlike the trial context, where we can agree without too much difficulty about what character traits are or are not relevant to whether the defendant committed the crime charged, there is no such consensus about what character traits we seek in a public official. Some voters may care that a candidate consumes too much alcohol, but may not care that he has smoked marijuana. Other voters may care that he once had a homosexual encounter, but may not care that he has been unfaithful to his wife. Some voters may care that a candidate lied to get into college, but may not care that he lied to avoid the draft. In attempting to resolve this problem, it will be useful to clarify precisely why we want to restrict such expression. First, we may want to restrict the dissemination of information concerning some aspects of a candidate's character because we believe that such information is ir [\*145] relevant to a determination of the candidate's fitness for office. But if that is the sole reason for restricting the expression, there is no need to do so, for as I explained earlier, there is no need to restrict the publication of information in public debate merely because it is irrelevant. n38

-Footnotes-

n38 See Part II.

-End Footnotes-

Second, we may want to restrict the dissemination of information concerning some aspect of a candidate's character because a majority believes that the information is irrelevant to the candidate's fitness for office, but it is concerned that a minority will inappropriately consider the information relevant. In this situation, the majority wants to restrict the information because it distrusts other citizens who will give weight to information that the majority thinks should not be considered. For the majority to restrict the publication of information on this basis would be highly paternalistic and, thus, constitutionally problematic. n39 Moreover, as in the false statement context, there is a danger that considerations of partisanship would seriously distort the political process if we were to grant government the power to excise from public debate those facts that the majority thinks the minority should not consider. To justify such a restriction in a principled manner, the majority would have to demonstrate, at the very least, that the minority's different view about the value of the information is clearly irrational. Needless to say, it would be very difficult for the majority to justify such a conclusion, for this sort of paternalism cuts to the very heart of voter autonomy and to the right of each citizen to decide for herself what factors she will consider in deciding how to cast her vote. n40

-Footnotes-

n39 Such paternalistic justifications for the suppression of information in public debate are incompatible with the basic premises of First Amendment

theory, and are thus constitutionally disfavored. See Geoffrey Stone, Content Regulation and the First Amendment, 25 Wm & Mary L Rev 189, 207-17 (1983).

n40 One might ask why this is not also true in the trial context. That is, why not permit jurors to learn of the defendant's general bad character? Is not the decision to deprive jurors of such information equally paternalistic? Two answers come to mind. First, as already noted, in the trial context, proof of character is only circumstantially related to whether the accused committed the particular crime in question, whereas in the political context proof of character is central to the issue of overall fitness for office. In the trial context, the exclusion of the evidence is evidentiary; in the political context, it is substantive. Second, the risk of impermissible partisanship is likely to be much greater in the political than in the trial setting.

- - - - -End Footnotes- - - - -

Third, we may want to restrict the dissemination of information concerning some aspect of a candidate's character because we believe it is irrelevant to his fitness for office or, if relevant, is only [\*146] marginally probative. We fear, however, that like jurors in a criminal trial, we will tend to overreact to the information in an irrational manner. We therefore conclude that we are more likely to reach a sound result in the political process if we are deprived of such information than if we learn of it. If the "we" in this discussion includes all members of the community, without exception, then a law prohibiting the publication of such information would seem consistent with the exclusion of analogous evidence in a criminal trial. The phenomenon of "undue prejudice" is well established in the law of evidence, and there can be little doubt that the exclusion from public debate of such information in the circumstances described would be both sensible and principled. Unfortunately, as a practical matter, this situation is only hypothetical, for it is impossible to conceive of a circumstance in which all members of the community would agree that such information would be both of marginal probative value and unduly prejudicial to the point where they all would want to be deprived of the information.

Fourth, as a practical matter, the issue raised above will arise only in circumstances in which a majority concludes that the information should be restricted, but a minority wants access to the information. In this situation, however, the justification for restricting the information is not that the majority thinks that the minority should not be allowed to consider the information, but that the majority wants to deprive itself of the information. The fact that the minority is also and at the same time deprived of the information is not the result of paternalism, as such. It is, rather, the unavoidable consequence of the majority's desire to deprive itself of the information.

In theory, at least, this is not an insignificant distinction. As we have seen, there are many circumstances in which we deprive voters of relevant information. This is most often the case when the value of the information is thought to be slight or when the value of the information, even if considerable, is thought to be outweighed by the harm caused by its disclosure. The former is illustrated by doctrines governing invasion of privacy; the latter is illustrated by doctrines governing national security or fair trial. On this theory, for the government to prohibit the disclosure of certain information about political candidates, such as information about their sexual conduct, is

at least plausibly constitutional, for it avoids any reliance on a claim of paternalism and fits into the preexisting model for considering the constitutionality of other restrictions on speech. Finally, a law restricting such information may be reinforced by invoking, not only the majority's claim that [\*147] it wants to shield itself from its own irrationality, but also some additional interest, such as protection of the privacy of political candidates. Adding this interest to the restriction side of the equation would strengthen still further the claim for restriction.

#### CONCLUSION

I will close with a few final thoughts on "the responsibilities of a free press." As I have tried to show, in many instances the evidentiary rules of public debate can be reconciled with the evidentiary rules of the judicial process. Although the rules are often different, there are sound reasons for most, if not all, of the differences. It is important to emphasize, however, that in some important instances--such as the non-regulation of false statements and unduly prejudicial disclosures in public debate--we adopt a stance of non-regulation, not because the problems that arise in the judicial process do not arise in public debate, but because we cannot trust government to exercise the power to regulate such expression in public debate.

It is precisely in these situations that the "responsibilities of a free press" are paramount. For although we cannot trust government to regulate false statements of fact and unduly prejudicial material in public debate, this does not mean that such speech cannot seriously undermine public debate and, with it, the democratic process. Traditionally, the press has played a critical role in maintaining this process. Until recently, for example, the press tended not to report information about the private sexual conduct of political candidates. In exercising such discretion, the press acted like a judge in a criminal trial, preventing the people--the jurors--from learning information that arguably would distort their judgment and distract their attention from more important matters.

Today, however, as part of a general breakdown of journalistic standards, the press, driven by rampant commercialism, routinely sensationalizes such information to the detriment of the political process. This poses a fundamental problem, for if we are unwilling to trust government to regulate the press, we must be content to leave the critical decisions about such matters to the press. But it is no longer clear that a society dedicated to maintaining an effective, fair, and open political process should delegate the decision of such fundamental questions concerning the structure and nature of our political process to the unelected, unrepresentative members of the private press. [\*148]

The critical question is thus not only whether we should trust the government to regulate the press, but whether we should trust the press to define our political process. We must understand that the choice that confronts us is more subtle and more difficult than whether we want the government to control the press. It is a choice between two competing power centers--one subject to political control, the other increasingly controlled by the market. As the Hutchins Commission noted a half-century ago, the right of the press to be free is not a rule of nature, but a tool of democracy. The press must not forget that it has responsibilities, as well as rights.

Copyright (c) 1993 The University of Chicago  
The Univeristy of Chicago Legal Forum

1993

1993 U Chi Legal F 197

LENGTH: 6741 words

Rights and the System of Freedom of Expression

David A. Strauss\*

- - - - -Footnotes- - - - -

\* Harry N. Wyatt Professor of Law, The University of Chicago Law School. The Russell Baker Scholars Fund and the Robert B. Roesing Faculty Fund at The University of Chicago Law School provided financial support for this project. An earlier version of this article was presented at The University of Chicago Legal Forum Symposium on "A Free and Responsible Press" in October 1992.

- - - - -End Footnotes- - - - -

SUMMARY:

... One camp holds that the greatest dangers come from government regulation of the press--that is, government regulation that goes beyond the kind of incidental regulations that apply to other businesses, or that seeks to influence the content of what the press communicates. ... These weaknesses in the debate over the regulation of the press reflect a deeper feature of our thinking about issues of freedom of expression: we tend to frame questions about press regulation in such crude terms, and to allow our predispositions to govern, because we lack the conceptual and empirical tools to determine which of the many proposals for regulation of the press is a good idea. ... My suggestion is that current First Amendment doctrine is well suited to consider free speech issues when the claim to freedom of expression is based on the rights of the speaker, but not well suited to addressing structural or systemic issues. ... More generally, one might say that any justification emphasizing the value of speech to the speaker is rights-based, while any justifications that emphasize the value to the listener are structural. ... But by far the most important value of a free press is its structural value--its value to those who read and listen to the media, and its value in maintaining a healthy overall system of freedom of expression, not its value to speakers. ...

TEXT:  
[\*197]

Criticizing the press is a popular habit, and often the critics have good reason. But it is easier to criticize than to propose plausible institutional reforms. And when proposals are made, the debate over them is frequently unsatisfactory. Too often the issue is framed in dichotomous terms. Should we have an autonomous press, or a heavily controlled press? Do we favor an "adversary" relationship between the press and the government, or a "partnership" relationship?

Similarly, too often responses to proposals for reform of the press seem to reflect predispositions and general attitudes. One camp holds that the greatest dangers come from government regulation of the press--that is, government regulation that goes beyond the kind of incidental regulations that apply to other businesses, or that seeks to influence the content of what the press communicates. Others believe that the dangers of such government action are overstated, and that press abuses are sufficiently severe--and remedying them is sufficiently easy--that such regulation should generally be allowed. It seems difficult to focus on the issues in a fine-tuned way that would differentiate among proposed regulations.

These weaknesses in the debate over the regulation of the press reflect a deeper feature of our thinking about issues of freedom of expression: we tend to frame questions about press regulation in such crude terms, and to allow our predispositions to govern, because we lack the conceptual and empirical tools to determine which of the many proposals for regulation of the press is a good idea. In this article, I try to explain why this deficiency in our thinking about the First Amendment exists; why it has come to the fore now; and what we might do to ameliorate it. In order to do [\*198] so, I will rely on a distinction between two different approaches to freedom of expression. The first is an approach based on the rights of the speaker. The second is a "structural" or "systemic" approach: it is based not on the value of the speech to the speaker, but on the value of the speech to the overall system of free expression.

A rights-based justification holds that each individual has a right to speak because speech is in some way especially important to the speaker. Under a rights-based approach, the reason that the government may not suppress speech is, roughly, this: if the particular speakers whom the state proposes to restrict cannot say what they want to say, they will suffer a harm or a loss, and that harm outweighs (in some sense) any legitimate benefit that the restriction might achieve. n1

- - - - -Footnotes- - - - -

n1 This view has been stated in a variety of forms. See, for example, C. Edwin Baker, Human Liberty and Freedom of Speech (Oxford University Press, 1989); Martin Redish, The Value of Free Speech, 130 U Pa L Rev 591 (1982); David A. J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U Pa L Rev 45, 59-70 (1974).

- - - - -End Footnotes- - - - -

A structural justification is sharply different. It holds that freedom of expression is important because of the kind of system that free speech creates or supports. Under a structural or systemic approach, an individual's right to speak is derivative and instrumental. An individual is allowed to assert a right to speak not because it is especially important to that individual to be allowed to speak, but because we can bring about the kind of system we think is desirable only by allowing individuals to speak.

My suggestion is that current First Amendment doctrine is well suited to consider free speech issues when the claim to freedom of expression is based on the rights of the speaker, but not well suited to addressing structural or systemic issues. The regulation of the press presents preeminently structural,

not rightsbased, issues. That is why issues concerning press regulation present such difficult conceptual problems.

In Part I, I will try to sharpen further the distinction between rights-based and structural justifications for freedom of expression. In Part II, I will offer an explanation of why structural arguments present such difficulty. In Part III, I will make some tentative suggestions of what we might do to deal better with structural issues. [\*199]

I. THE DIFFERENCES BETWEEN RIGHTS-BASED AND STRUCTURAL ARGUMENTS

Perhaps the best way to bring into focus the distinction between rights-based and structural justifications is to compare freedom of expression with freedom of religious exercise. By far the most important justification for freedom of religious exercise is the rights-based justification. Although some systemic justifications are offered, they are far less intuitive and important than the rightsbased justifications. The contrasts between the right to free exercise of religion and the right to free speech can, therefore, illuminate the difference between rights-based and structural arguments.

Historically, freedom of expression had its roots in the development of the regime of religious toleration. n2 We often think of freedom of expression and freedom of religion in parallel or even identical terms; we refer to the freedom of conscience to include both, or we speak of the freedom to hold one's views and to express them as if these were just different aspects of the same thing. n3 But for all the obvious similarities between freedom of expression and freedom of religious exercise, the two differ in important respects. These differences can be traced to the fact that structural justifications support free speech in ways that they do not support free exercise.

- - - - -Footnotes- - - - -

n2 On the development of religious toleration, see, for example, Quentin Skinner, 2 The Foundations of Modern Political Thought 241-54 (Cambridge University Press, 1978); Joseph LeCler, Toleration and the Reformation (London Publishing Co., 1960).

n3 In such cases as Widmar v Vincent, 454 US 263 (1981), and Lovell v Griffin, 303 US 444 (1938), the Supreme Court relied on the Free Speech Clause to protect acts of religious expression. See also Cantwell v Connecticut, 310 US 296 (1940); Geoffrey Stone, Louis Seidman, Cass Sunstein, and Mark Tushnet, Constitutional Law 1510 (Little, Brown & Co., 2d ed 1991) ("Religious beliefs and expression are forms of speech and, as such, are protected by the free speech clause of the first amendment. . . . What, if anything, does the free exercise clause add to the free speech clause?").

- - - - -End Footnotes- - - - -

First, a cornerstone of the system of freedom of expression is the belief that robust or even acrimonious debate is a sign of a healthy democracy. This is a theme of many of the classics of First Amendment literature--notably Justice Brandeis's famous opinion in Whitney v California n4 and, in a different way, John Stuart Mill's On Liberty. n5 By contrast, robust debate about religious is [\*200] sues is not thought to be a healthy aspect of a democratic political system. If anything, it is a reason to be apprehensive, an indication that a

society may be becoming riven on religious lines. As the Supreme Court explained in *Lemon v Kurtzman*: n6

-Footnotes-

n4 274 US 357, 375-77 (1927) (Brandeis concurring).

n5 John Stuart Mill, *On Liberty* (Hackett Publishing Co., 1978). For a discussion of the emergence of this idea, see Samuel H. Beer, *To Make A Nation* 74-75 (Harvard University Press, 1993). See also *Federalist* 70 (Hamilton), in Clinton Rossiter, ed, *The Federalist Papers* 426-27 (Mentor, 1961) ("The differences of opinion, and the jarring of parties . . . though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority.").

n6 403 US 602 (1971).

-End Footnotes-

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. n7

-Footnotes-

n7 *Id* at 622 (citation omitted). See Paul A. Freund, *Public Aid to Parochial Schools*, 82 *Harv L Rev* 1680, 1692 (1969). This was the basis of the "political entanglement" element of the Supreme Court's test for determining the constitutionality of measures challenged under the Establishment Clause of the First Amendment. See, for example, *Lemon*, 403 US at 622- 24; *Meek v Pittenger*, 421 US 349, 372 (1975) (plurality opinion of Stewart); *Committee for Public Education & Religious Liberty v Nyquist*, 413 US 756, 794-98 (1973) (majority opinion of Powell); *Aguilar v Felton*, 473 US 402, 416-17 (1985) (Powell concurring). The Court has since sharply curtailed its use of this aspect of the Establishment Clause test. See *Lynch v Donnelly*, 465 US 668, 684 (1984); *Mueller v Allen*, 463 US 388, 403-04 n 11 (1983). In doing so, however, it did not question that religious divisiveness is generally undesirable in a democracy. See *Lynch*, 465 US at 684. For more general discussion, including an account of the contrast between religious and political division, see Stephen Holmes, *Gag Rules or the Politics of Omission*, in Jon Elster and Rune Slagstad, eds, *Constitutionalism and Democracy* 43-50 (Cambridge University Press, 1988).

-End Footnotes-

Acrimony about political issues can be a sign of a healthy seriousness about politics in a society. But acrimony about religion is to be avoided if possible.

Second, a standard (and plausible) justification for freedom of expression is that such a freedom is needed so that people can collectively arrive at a decision on matters of public importance. n8 A correct decision about such matters is more likely if there is full debate than if debate is stifled in some way. Arguments roughly along these lines date back at least to Milton and are a staple in justifications of freedom of expression. n9 But the point of

religious toleration is not to allow society to arrive at the truth about religion. The very idea of a publicly ascertainable truth is an anathema to the system of religious toleration, even while the same idea is a presupposition of one of the leading justifications of freedom of expression. [\*201]

-Footnotes-

n8 See, for example, Cass R. Sunstein, Democracy and the Problem of Free Speech (Free Press, 1993); Alexander Meiklejohn, Political Freedom (Harper & Brothers, 1960).

n9 See John Milton, Areopagitica: A Speech for the Liberty of Unlicensed Printing (Doves Press, 1907) (1st ed 1644).

-End Footnotes-

This is not to suggest that freedom of expression and freedom of religion are inconsistent or that their principal justifications are problematic. The two freedoms are in many ways parallel. In part, freedom of expression rests on rights-based foundations similar to those of freedom of religious exercise. But freedom of expression also has a different foundation, one that rests on its importance to an overall system that seeks some objective--a sound political decision, or perhaps a more general form of truth.

One way to think about the two justifications might be to say that the rights-based justification is rooted in the First Amendment itself; without the First Amendment, the protection of that aspect of freedom of expression (like the protection of freedom of religion) would be left to the legislature. But even without a First Amendment, we might infer from the Constitution--from the parts that establish a representative government--a right to free political debate, at least, because that is necessary to make a representative government work. n10

-Footnotes-

n10 See Charles L. Black, Jr., Structure and Relationship in Constitutional Law 35-51 (Ox Bow Press, 1985).

-End Footnotes-

It is sometimes suggested that the contrast is between a justification for freedom of expression that rests on notions of "autonomy" and one that emphasizes systemic goals like community selfdetermination. n11 To the extent this suggestion refers to the autonomy of the speaker, the distinction is similar to the one I am attempting to draw. But this formulation might be misleading if it suggests that the systemic justification does not also serve autonomy. The autonomy at stake in the structural or systemic account is the autonomy of the listeners or the audience, not the autonomy of the speaker. The listeners' autonomy might be impaired if they do not have access to available speech, or if that speech is restricted in a way that expresses disrespect for the audience. n12

-Footnotes-

n11 See, for example, Owen M. Fiss, Free Speech and Social Structure, 71 Iowa L Rev 1405, 1408-11 (1986).

n12 For efforts to base freedom of expression on listener autonomy notions of these general kinds, see T.M. Scanlon, A Theory of Freedom of Expression, 1 Phil & Pub Aff 204 (1972); David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 Colum L Rev 334 (1991). But see T.M. Scanlon, Freedom of Expression and Categories of Expression, 40 U Pitt L Rev 519, 530-35 (1979).

- - - - -End Footnotes- - - - -

More generally, one might say that any justification emphasizing the value of speech to the speaker is rights-based, while any justifications that emphasize the value to the listener are structural. Listener-based justifications are not always explicitly identified as such, but they are probably closer to the mainstream under [\*202] standing of the basis of freedom of expression than speaker-based justifications are. For example, in the American legal culture, perhaps the most widely-held view about the basis for freedom of expression is that free speech is "the guardian of our democracy." n13 This is a listener-based justification: free speech is needed because it is valuable to those who hear it. It is also a structural justification: the value of speech lies in the democratic order that it promotes. But this is not (except derivatively) a rights-based justification. The reason for permitting speech is that it will, in some sense, help promote democracy. If an individual has a right to speak, the right is derivative. It exists only by virtue of the value of the speech to the democratic system. The system, not individual rights, ultimately determines what kind of speech should be allowed.

- - - - -Footnotes- - - - -

n13 See Brown v Hartlage, 456 US 45, 60 (1982).

- - - - -End Footnotes- - - - -

II. THE SPECIAL PROBLEMS OF STRUCTURAL ARGUMENTS

The kind of inquiry we need to determine whether a measure is consistent with freedom of expression differs significantly, depending on whether the justification for freedom of expression is rights-based or structural. An aphorism of Alexander Meiklejohn illustrates the point: "What is essential is not that everyone shall speak, but that everything worth saying shall be said."

n14 That is the idea underlying the structural justification: the value of speech is its value to the overall system, and to the audience that hears the speech, not to the speakers who wish to utter it.

- - - - -Footnotes- - - - -

n14 Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 25 (Harper & Brothers, 1948). For a criticism of this notion, see, for example, Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U Chi L Rev 20, 39-40 (1975).

- - - - -End Footnotes- - - - -

The latter part of Meiklejohn's aphorism captures as well as anything the issues raised by this Symposium, and more generally by the regulation of the press. The problem of a free and responsible press is the problem of making sure that everything worth saying is said. More precisely, the problem is to ensure that everything worth saying is said in such a way that the public can use it. It must be said in a time and place that will make it accessible to the public. It must be said in a way that will make it available to people whose resources of time and attention are limited. And it must be said in a way that allows it to compete effectively with other expression that is no more meritorious (by whatever criterion of merit) but is capable of being expressed more simply and arrestingly. That is the problem that has proved so intractable and that [\*203] has proved to be so difficult for our conceptual and empirical tools to solve. How do we develop standards for determining the extent to which everything worth saying is being said, and said in a sufficiently accessible form? The structural approach requires that we develop some such standards, but it is far from clear how we might go about doing so.

If speech is protected because of a right in the speaker, it is relatively easy to determine the proper scope of regulation. The problem is to decide whether the interests opposing the right are strong enough to justify limiting the right. This is essentially how freedom of religious exercise worked, at least until recently. n15 If a person believes herself to be under a religious duty to decline to pay taxes, for example, or to use drugs that have been outlawed, or to engage in racial discrimination, the appropriate question is whether the social interests in prohibiting such conduct are strong enough to justify the incursion on religious liberty.

- - - - -Footnotes- - - - -

n15 So far as freedom of religion is concerned, it now appears to be the law that only measures that discriminate against religion are considered infringements on the right. Measures that only have an impact on the ability to practice a religion generally require no special justification. See *Employment Division v Smith*, 494 US 872 (1990). Measures that affect freedom of speech, however, can be unconstitutional even if they are not directed against speech of a certain content. See, for example, *Schneider v State*, 308 US 147 (1930). See, generally, *Leathers v Medlock*, 111 S Ct 1438, 1442-47 (1991).

- - - - -End Footnotes- - - - -

This kind of inquiry is hardly easy, of course. But it is far more manageable than the kind of inquiry that must be undertaken when the justification for expression is structural, or is based on the rights of the listener. Suppose, for example, that the question is whether a television station has shown too much advertising and not enough news programming. Of course, one might ask whether this is a determination that should be made by the government at all. But even if that question is put to one side, the problem remains. The question might be asked, for example, by a self-regulatory body created by the broadcasting industry that is trying to devise standards for the proper mix of news and advertising. The question would be no less intractable.

This is obviously a structural, listener-oriented issue, rather than an issue about the rights of broadcasters to express themselves. And it is a far more complex question than whether religious liberty should yield to a public interest. The problems occur on two levels: in the positive characterization

of an existing state of affairs, and in giving a normative account of what a desirable state of affairs would be. [\*204]

The positive problem is that it is often difficult to describe, even in the crudest terms, the bias, if any, of a particular mix of expression. During the last presidential campaign, for example, the different career paths of the two principal candidates' spouses set off a debate (or a crypto-debate) over the proper role of women in society. Suppose a question arose about whether the press coverage of that issue was biased in one direction. (Again, one can leave aside any issues about regulation for the moment; assume the question were asked as a matter of self-examination by the press.) How would one decide whether the bias was present? Is there too much speech in favor of women working outside the home, because the elites whose views are propagated by the press are disproportionately of that opinion? Or is the debate biased in the other direction, because so many aspects of the popular culture, endorsed in (for example) television programs, reflect that view?

The same question might be asked about, for instance, racial discrimination. It is for the most part not respectable, at least among the elites, to be an open proponent of racial discrimination. One essentially never encounters an open advocate of racism in the broadcast or print media, except in a context that either discredits the advocate or at least treats him or her as a curiosity. On the other hand, it is certainly plausible to say that the press and broadcast media put forward enormous amounts of material that implicitly endorses racial stereotypes. Decent arguments can, therefore, be made that the mix of expression provided by the media on this issue is biased in each direction.

Not only are there severe difficulties in characterizing the existing mix of expression; it seems at least as difficult to define what an optimal mix would be. Suppose the goal were to give each point of view on a subject--for example, whether women should work outside the home--an equal chance in the so-called marketplace of ideas. n16 Even if an "equal chance" meant an equal number of minutes on television, how would one determine what counts as a point of view on a subject? There are many shadings of opinion on most issues. And even if one could individuate points of view in this way, it is incorrect to assume that equality of minutes of exposure is the same thing as equality of opportunity to persuade. Some positions are significantly harder to adequately explain. In the 1988 presidential campaign, then Vice President George Bush charged that then Governor Michael Dukakis had granted a prison [\*205] furlough to a convicted murderer, who, while out, committed serious crimes. The charge was easily and quickly made. Dukakis's response was not obviously unreasonable on the merits--the Massachusetts furlough program had been instituted by his Republican predecessor; such programs were common; the overall success rate of the program was reasonably high--but it was much more elaborate than the charge. n17 One might define equality in this free speech "market" to require that the more complex side be allowed more time to explain its views; but that would invite abuses and arbitrariness. On the other hand, defining equality in a way that does not allow more time to one side seems to ignore reality and skew the debate.

- - - - -Footnotes- - - - -

n16 I will later suggest that this popular metaphor is misleading. See pages 206-07.

n17 On this episode, see, for example, Sidney Blumenthal, Pledging Allegiance: The Last Campaign of the Cold War 264-65 (Harper Collins Publishers, 1990).

- - - - -End Footnotes- - - - -

These structural problems are intractable, conceptually and empirically, in ways that far surpass whatever difficulties there are in balancing rights against countervailing public interests. The issues that have troubled First Amendment law recently have been issues that raised these structural concerns, rather than the rightsbased concerns that parallel religious freedom. For example, defining the constitutional limits on selective government subsidization of speech is a notorious problem. The Court's recent cases on the subject are difficult to reconcile and reveal no consistent approach. n18 This is, in most instances at least, a structural problem rather than a problem of defining speakers' rights. The danger is that the government has skewed the system of expression--the free speech "market"--in an unacceptable way. n19

- - - - -Footnotes- - - - -

n18 For an analysis of the cases that reaches this conclusion, see Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion, 1992 S Ct Rev 29, 38-45.

n19 On the dangers that selective regulation will have a "skewing" effect, see, for example, Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm & Mary L Rev 189, 198-200 (1983).

- - - - -End Footnotes- - - - -

Other current First Amendment issues of great importance also seem intractable because they raise structural questions. The exceedingly important set of issues concerning campaign finance reform is an example. The Supreme Court's opinions often treat the issue as if the rights of speakers were at stake. But while there is some self-expressive interest involved in having the ability to spend large amounts of money to influence the outcome of an election, it is difficult to believe that those interests would be unduly injured by some reasonable limit on campaign contributions and expenditures, if such a limit were needed to prevent a distortion of [\*206] the system. The problem is that the danger of distortion operates in both directions. The great threat of a system of campaign finance regulation is that, in the guise of improving the system, it will in fact distort the system in a different direction, by protecting incumbents' interests. n20 Consequently, the difficult First Amendment questions raised by campaign finance reform cannot be answered without addressing structural issues about what a wellfunctioning speech "market" would look like.

- - - - -Footnotes- - - - -

n20 See Buckley v Valeo, 424 US 1, 31-33 (1976).

- - - - -End Footnotes- - - - -

Issues of press responsibility are quintessentially structural, not rights-based, issues. n21 The reason we maintain a free press is not for the sake of the speakers, if by that we mean the owners of the media. The value of a free press is its value to the system of freedom of expression--its value to the listeners and readers. To be sure, many speakers will find that the only way they are able to propagate their views at all effectively, or to an audience of reasonable size, is through the media. For them, press freedom will be a speakers' rights issue as well. But by far the most important value of a free press is its structural value--its value to those who read and listen to the media, and its value in maintaining a healthy overall system of freedom of expression, not its value to speakers.

-Footnotes-

n21 I am indebted to my colleague Elena Kagan for this point.

-End Footnotes-

That is why issues of press freedom and responsibility are so difficult to analyze. It is not just a matter of identifying a right, a countervailing social interest, and the proper balance between the two; not that that is such a simple matter, but it is much easier than the structural question. Structural questions require us to determine the biases of the current system of expression and to describe an ideal, or at least a superior, system. Those are the tasks for which our current tools are inadequate.

In this connection, the popular metaphor of the marketplace of ideas is especially misleading. That metaphor suggests that we have exactly what we in fact lack. We have a good idea of what a well-functioning economic market looks like. In economic markets we can specify what conditions will, if satisfied, lead to results that are in some sense optimal. We can say that an industry is too concentrated, or that information or transaction costs are too high, and that if those conditions are corrected, the market will produce better results.

Those are precisely the kinds of things that it is so difficult to say about speech. We do not have remotely as good a theory about what constitutes a well-functioning speech market, or about what [\*207] kinds of improvements must be made to ensure that a certain system of expression will produce desirable or optimal outcomes. Perhaps the most pernicious feature of the "marketplace of ideas" metaphor is that it blinds us to this inadequacy in our thinking about freedom of expression.

To summarize my argument so far: the distinctive feature of discussions about the proper role of the press, as well as discussions of several other issues on the frontiers of First Amendment law today, is that they require us to analyze questions concerning the structure of the system of freedom of expression and not just to balance rights of expression against other social interests. Our conceptual and empirical tools, which are fairly well developed to address rights-based issues, are weakest when we attempt to deal with those structural issues.

III. ADDRESSING STRUCTURAL ISSUES

What might be done to correct this deficiency? In particular settings we have a reasonably good idea of when a system of expression is well-ordered. A

proceeding in court, for example, is a small-scale system of expression. We have elaborate rules (not only the rules of evidence, n22 but rules and rulings allocating time and other resources between the parties) that are designed to ensure that one side does not have an unfair advantage. There are similar rules governing parliamentary assemblies and meetings of organizations of all kinds. n23 At the most abstract level, I believe that one can specify the content of a well-functioning system of freedom of expression by reference to an ideal observer: a well-functioning system is one that would be chosen by a person who wanted to arrive at the correct answer to the questions considered by the system, and had no other interests. n24 But obviously it is difficult to derive from that very abstract formulation specific principles that might be helpful in deciding actual issues. And it is difficult to generalize from the particular cases where we have a sense of what a well-functioning system of expression looks like. [\*208]

-Footnotes-

n22 For an illuminating discussion of the analogy between the rules of evidence and the system of free expression, see Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U Chi Legal F 127.

n23 Compare Harry Kalven, Jr., *The Concept of the Public Forum*, 1965 S Ct Rev 1, 12 ("What is required is in effect a set of Robert's Rules of Order for the new uses of the public forum, albeit the designing of such rules poses a problem of formidable practical difficulty.").

n24 See Strauss, 91 Colum L Rev at 369-70 (cited in note 12).

-End Footnotes-

In the absence of a strong theoretical framework, one thing we can at least do is to collect data that would enable us to reach better-informed conclusions on the central questions raised by any effort to improve the press through regulation. n25 To a large extent, the current presuppositions of First Amendment law treat government regulation as a threat. Undoubtedly that is true sometimes; surely it is sometimes false. If we had a better understanding of when it was true, we could proceed with greater confidence to address the structural issues that have now moved to the fore in First Amendment law. Four possible empirical inquiries seem especially appropriate.

-Footnotes-

n25 On the need for expanded empirical investigation of the foundations of First Amendment law, see Robert C. Entman, *Putting the First Amendment in its Place: Enhancing American Democracy through the Press*, 1993 U Chi Legal F 61; L.A. Powe, Jr., *The Supreme Court, Social Change, and Legal Scholarship*, 44 Stan L Rev 1615 (1992).

-End Footnotes-

(1) What correlation is there between the views expressed in newspaper editorials, or in the bias given to news stories in both print and broadcast media, and the views of various actors--such as owners, consumers (readers and viewers), and advertisers? n26 The presumption against regulation assumes that an unregulated press will produce an adequate range and diversity of views. We

cannot know whether that assumption is true until we know whose views are actually reflected. More important, any regulatory effort should be directed to correcting the biases that exist. If, for example, the media principally reflect the views of advertisers, that suggests one regulatory approach. n27 If the media reflect the biases of consumers, the case against regulation is far stronger.

-Footnotes-

n26 See C. Edwin Baker, Advertising and a Democratic Press, 140 U Pa L Rev 2097 (1992).

n27 See id at 2200-19.

-End Footnotes-

(2) How independent of political influence has public broadcasting been? Public broadcasting in the United States has a twenty-six year history. n28 We should by now be able to arrive at a reasonably accurate estimate of whether it is possible to sustain a system of public broadcasting without undue political influence. To the extent political independence cannot be maintained, the presumption against regulation is strengthened; to the extent it can, government ownership of one among many competing media outlets should be viewed as a possible structural corrective to biases existing in the system. [\*209]

-Footnotes-

n28 See, generally, Public Television: A Program for Action, The Report and Recommendations of the Carnegie Commission on Educational Television (Bantam Books, 1967).

-End Footnotes-

(3) What have been the effects of FCC regulation of the broadcast media? The dual system of regulation of the media in this country has, in effect, conducted a natural experiment over the last half-century. The broadcast media have been regulated by the FCC; the print media have been left unregulated. n29 A comparison of the two media might go a long way in helping to assess the real risks of government regulation. Has the result been a substantial difference in political orientation, willingness to criticize the government, or some other material aspect of the content of the speech engaged in by the print and broadcast media respectively?

-Footnotes-

n29 See Lee C. Bollinger, Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media, 75 Mich L Rev 1, 27 (1976) (this difference in the treatment of the media is "the best of both worlds"). These ideas are further developed, with emphasis on the notion of an "experiment," in Lee C. Bollinger, Images of a Free Press ch 5 (University of Chicago Press, 1991).

-End Footnotes-

(4) What effect has government ownership or regulation of content had on the media in other, similar societies, especially on the propensity of the press to criticize the government? First Amendment scholarship, like much of American constitutional law scholarship, has been distinguished by its lack of interest in comparative studies. The American doctrines governing hate speech, for example, have developed without any apparent consideration of the fact that laws forbidding hate speech are commonplace in other democracies. Of course, that does not mean that such laws should necessarily be adopted here; it may be that the experience of other nations demonstrates that we should not follow the same path, or the differences in cultures and political systems may mean that there is little to be learned by comparative study. But at least there is a basis for empirical study that should not be neglected.

The same is true of the structural issues concerning the press that are the subject of this Symposium. Western European nations display a variety of forms of government ownership and regulation of the press. It may be difficult to extrapolate directly from their experience. But some aspects of their experience are likely to be instructive. In any event, an inquiry into the proper structure of regulation of the press in America should not proceed in ignorance of the experience of similar nations.

Freedom of expression is a developing and highly elaborate area of constitutional law that attracts a great deal of thoughtful attention. But there is a sense in which the most interesting problems in the system of freedom of expression--conspicuously including the proper scope of regulation of a "free and responsible [\*210] press"--are not well addressed by current First Amendment doctrine or current First Amendment thought. In this article, I have suggested that the reason for this is that the nature of the most important problems has shifted in a fundamental way. Today First Amendment rights, conceived as the rights of the speaker, are, to a greater and greater extent, important mostly in a derivative sense. They are important because they serve broader systemic and structural values. Until we have the conceptual and empirical tools to address those structural issues, solutions to many of today's problems will continue to elude our grasp.

Copyright (c) 1995 University of Cincinnati Law Review.  
University of Cincinnati

SPRING 1995

63 U. Cin. L. Rev. 1119

LENGTH: 37677 words

ARTICLE: GOD SAVE THIS POSTMODERN COURT: THE DEATH OF NECESSITY AND THE  
TRANSFORMATION OF THE SUPREME COURT'S OVERRULING RHETORIC

Andrew M. Jacobs\*

-Footnotes-

\* Associate, Jenner & Block, Chicago. B.A., 1989, University of Illinois;  
J.D., 1992, Harvard Law School. The author wishes to thank Professor Richard  
Parker for his encouragement and Professor Duncan Kennedy for his spring 1992  
course "American Legal Thought," which provoked the thoughts that led to this  
Article.

-End Footnotes-

SUMMARY:

... The ideal invoked by Justice Marshall--of law as an autonomous,  
apolitical realm of reason--reached its zenith in the late nineteenth century in  
the writings of Dean Christopher Columbus Langdell of Harvard Law School. ...  
This Article analyzes overrulings of the Supreme Court by exploring the  
transformation in legal thought from the classical thought of the nineteenth  
century to the fragmented, postmodern thought of the late twentieth century that  
robbed Justice Marshall's plea for the compelling hand of reason of its force.  
... I. CLASSICAL LEGAL THOUGHT AND NINETEENTH CENTURY OVERRULING: COMPULSION  
AND OBJECTIVITY ... B. Overrulings and Stare Decisis in the Contemporary  
Supreme Court: Postmodernism and the Antithesis of Classical Legal Thought ...  
Justices White, Blackmun, and O'Connor, although concurring in the result,  
vigorously disputed what they perceived to be a "break with precedent" and  
argued for "a categorical approach" under which any expression falling into an  
unprotected category would not be subject to First Amendment restrictions on  
content-based discrimination. ... While Justice Blackmun and Chief Justice  
Rehnquist may not see eye to eye on most major jurisprudential issues of our  
day, coherence in the law would be served if these Justices would adopt the dual  
prescription of privileging consensus where possible and according greater  
respect for precedent under a reinvigoration of stare decisis. ...

TEXT:  
[\*1119]

Power, not reason, is the new currency of this Court's decisionmaking.  
Justice Thurgood Marshall nl

-Footnotes-

n1 Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

- - - - -End Footnotes- - - - -

INTRODUCTION

In his biting dissent in Payne v. Tennessee, n2 Justice Marshall appealed to an ideal of law as reason to criticize the Court's holding that states may constitutionally require victim impact statements at capital hearings, an overruling of the Court's decision only two terms before in South Carolina v. Gathers. n3 The ideal invoked by Justice Marshall--of law as an autonomous, apolitical realm of reason--reached its zenith in the late nineteenth century in the writings of Dean Christopher Columbus Langdell of Harvard Law School. n4 Langdell's ideal of law as a science of reason has broken down generally within the law because the postrealist legal thought of today finds unremarkable the idea of adjudication as an exercise of largely unconstrained discretion. n5 The Langdellian ideal has also broken down in the area of overruling, as partisans of both the right and left regularly inveigh against the "illegitimate" overrulings of their opponents. n6 Thus, Justice Mar- [\*1120] shall's fiery dissent elicits no shock and fails to delegitimize the decision in Payne.

- - - - -Footnotes- - - - -

n2 Id. (Marshall, J., dissenting).

n3 490 U.S. 805 (1989), overruled by Payne v. Tennessee, 501 U.S. 808 (1991).

n4 See generally Thomas C. Grey, Langdell's Orthodoxy, 45 U. PITT. L. REV. 1 (1983).

n5 E.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 193 (1992) (stating that the primary legacy of legal realism was the demise of the ideal of legal reasoning as a unique form of reasoning, distinct and autonomous from political and moral thought).

n6 E.g., Payne, 501 U.S. at 844 (Marshall, J., dissenting) ("Power, not reason, is the new currency of this Court's decisionmaking."); ROBERT H. BORK, THE TEMPTING OF AMERICA 73 (1989) (" 'Eminent scholars from many fields have commented upon [the Warren Court's] tendency towards overgeneralization, the disrespect for precedent, even those of recent vintage, . . . and the seeming absence of neutrality and objectivity.' " (quoting Milton Handler, The Supreme Court and the Antitrust Laws, 1 GA. L. REV. 339, 350 (1967) (alteration in original))). Another commentator, noting the frequency with which the Warren Court overruled constitutional precedents, lamented the "death" of stare decisis. Earl M. Maltz, Some Thoughts on the Death of Stare Decisis in Constitutional Law, 1980 WIS. L. REV. 647.

- - - - -End Footnotes- - - - -

This Article analyzes overrulings of the Supreme Court by exploring the transformation in legal thought from the classical thought of the nineteenth century n7 to the fragmented, postmodern thought of the late twentieth century n8 that robbed Justice Marshall's plea for the compelling hand of reason of its force. Where Supreme Court overrulings were once performed n9 as compelled events, the Court's overruling performances now fundamentally differ,

ultimately failing to achieve the legitimizing effect of necessity. A close analysis of this fundamental shift in Supreme Court overruling rhetoric illustrates not only the descriptive difference between the two eras, but also the very real crisis of legitimacy developing in the overruling rhetoric of our postmodern Court. Save for occasional partisan histrionics on the issue of stare de- [\*1121] cisis, n10 there has been no scholarly examination of how the Supreme Court overrules--through what rhetoric it justifies, or fails to justify convincingly, its decisions to make new law and, more importantly, how the Court's rhetoric of justification reflects the evolution of American legal thought. This Article's analysis of these heretofore ignored questions consists of two parallel discussions.

-----Footnotes-----

n7 Duncan Kennedy, *The Rise and Fall of Classical Legal Thought, 1850-1940* (1975) (unpublished manuscript, on file with the University of Cincinnati Law Review) [hereinafter Kennedy Manuscript]. Duncan Kennedy described nineteenth and early twentieth century American legal theory and practice as "classical legal thought." Id. Kennedy set forth the characteristics of classical legal thought, see *infra* part I.A, in his oft-cited, unpublished work. See Kennedy Manuscript, *supra*. A small portion of Kennedy's work was published as Duncan Kennedy, *Towards a Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3 (1980) [hereinafter Kennedy, *Historical Understanding*]. Kennedy's term has acquired great currency in the study of nineteenth century legal history. E.g., HORWITZ, *supra* note 5, at 3-31; Grey, *supra* note 4, at 2 n.6.

n8 Many describe late twentieth century legal thought as "postmodern" in some fashion. For an illustrative list of postmodern critiques of contemporary law, see J.M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1970 n.24 (1992). It is important to distinguish a postmodern critique of law, in which the critic takes a postmodern philosophical stance toward law, from a critique of law as a postmodern cultural artifact. The former is normative, while the latter is descriptive. This Article is in the latter category. But see Francis J. Mootz III, *Postmodern Constitutionalism as Materialism*, 91 MICH. L. REV. 515, 524 (1992) (attacking postmodernism severed from normative commitments on the grounds that all critiques entail normativity and stating that "Justice Scalia's legal opinions should not blithely be accepted as symptoms of a fragmented, incoherent culture; they should be criticized for spinning a fantasy about the character of legal dialogue, a fantasy that ultimately warps the dialogue").

n9 One premise of this Article, discussed throughout, is that adjudication is an act of performance. Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1609 (1991) (citing Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1264 (1947)). This premise begs the question, beyond the scope of this Article, of to whom this performance is directed. See Abner J. Mikva, *The Care and Feeding of the United States Constitution*, 91 MICH. L. REV. 1131, 1134 (1993). Mikva noted:

Ask a group of judges for whom they write, and you will get at least as many answers as there are judges. Some judges say they write for posterity; others

say they write for law school audiences to read and to teach; others say they write for the bar; some say they write for the parties; some get belligerent at the question.

Id.

n10 For a discussion of stare decisis, see supra note 6 and accompanying text.

- - - - -End Footnotes- - - - -

Part I argues that the nineteenth century Court's overrulings reflected the characteristics of what legal scholars have termed classical legal thought. The aspects of the Court's overruling rhetoric that were most quintessentially classical produced what Duncan Kennedy has called "the effect of necessity," n11 because case authority and logic literally compelled results, and the Justice performed his opinion in submission to these sources of law. The Court's nineteenth century performance, exemplified by its overrulings, reflected a post-Enlightment narrative of law as an autonomous, rational discipline. In the nineteenth century Justice's subjective experience of compulsion, reason triumphed over man in an enactment of Dean Christopher Columbus Langdell's grand narrative of the law as science. n12

- - - - -Footnotes- - - - -

n11 Professor Kennedy used the term in his spring 1992 legal history course, "American Legal Thought." In his manuscript, Kennedy refers to the centrality of the judicial experience of compulsion. Kennedy Manuscript, supra note 7, at 15.

The phrase "the effect of necessity" describes the experience of compulsion with an apparent sensitivity to the idea of adjudication as performance. See Levinson & Balkin, supra note 9, at 1609. The phrase also shows an apparent sensitivity to the emerging law-as-literature movement. See, e.g., Robin West, Adjudication Is Not Interpretation: Some Reservations About the Law-As-Literature Movement, 54 TENN. L. REV. 203, 203-04 n.1 (1987) (describing three strands of the law-as-literature movement).

n12 See generally Grey, supra note 4.

- - - - -End Footnotes- - - - -

Part II argues that the Court's overruling rhetoric of the late twentieth century has fundamentally changed, reflecting and enacting what has been called "the postmodern condition" of knowledge. This postmodern rhetorical performance--characterized by the agency of particular Justices, fragmented discourse, the collapse of larger narratives within substantive areas of the law, and the absence of the nineteenth century's grand narrative of scientism--utterly fails to produce the effect of necessity. This basic change in the Court's performance, occurring in the wake of the realist critique of legal thought as indeterminate, reinforces that realist vision and creates a crisis of legitimation. The Article concludes with tentative suggestions as to how the Court might resolve, or fail to resolve, this rhetorical crisis of legitimation.

[\*1122]

I. CLASSICAL LEGAL THOUGHT AND NINETEENTH CENTURY OVERRULING: COMPULSION AND OBJECTIVITY

Classical orthodoxy is the thesis to which modern American legal thought has been the antithesis. Prof. Thomas Grey n13

-Footnotes-

n13 Id. at 3.

-End Footnotes-

A. Classical Legal Thought

While the ultimate purpose of this Article is to comment meaningfully on the character of contemporary Supreme Court overrulings, this Article's commentary rests on an explanation of the contrast between the rhetoric in contemporary Supreme Court overrulings and that of their nineteenth century counterparts. This Article posits that nineteenth century overrulings possessed many of the characteristics of what Professor Duncan Kennedy termed "classical legal thought," Kennedy's label for his paradigm of late nineteenth and early twentieth century jurisprudence. n14 While scholars differ in their periodization of classical legal thought, n15 the use of the term "classical" to describe nineteenth century legal thinking has achieved such currency that conservative legal thinkers assemble to discuss approvingly "The Revival of Classical Jurisprudence." n16 To facilitate this Article's comparison of classical and contemporary overrulings, I briefly discuss classical legal thought.

-Footnotes-

n14 E.g., Kennedy, Historical Understanding, supra note 7; Kennedy Manuscript, supra note 7.

n15 Professor Kennedy placed the period of its ascent at 1850-1940. See Kennedy Manuscript, supra note 7. Professor Horwitz regarded 1870 to 1905 as the period in which classical thought was most coherent and prevalent. Horwitz, supra note 5, at 7-31. Horwitz marked the Supreme Court's decision in Lochner v. New York, 198 U.S. 45 (1905), as both the apex of classicism and the moment at which classicism began to unravel. Id. Lochner gave birth to progressive critiques of classical legal thought. Id. This Article focuses primarily on the latter half of the nineteenth century without attempting any stark periodization.

n16 See Norman Barry, The Classical Theory of Law, 73 CORNELL L. REV. 283, 291 (1988) (lamenting the breakdown of classical thought and arguing for a "restoration of the classical idea of law"); Richard A. Epstein, The Classical Legal Tradition, 73 CORNELL L. REV. 292, 298-99 (1988) (suggesting that "new accounts of property and contract" will vindicate classical thought). Professors Barry and Epstein delivered speeches at a Cornell Federalist Society Symposium on Law and Public Policy, The Crisis in Legal Theory and the Revival of Classical Jurisprudence.

-End Footnotes-

Professor Duncan Kennedy analyzed legal thought of the late nineteenth and early twentieth centuries with particular attention to how courts legitimized their decisions. Anticipating later focus on adjudication as performance, n17 he argued in 1975 that one of the primary features of classical adjudication was the judge's performance of judging as submission to precedent, characterized by the experience of compulsion. n18 Kennedy has recently described this classical performance as producing "the effect of necessity," a term borrowed for this Article. n19 Another characteristic of classical legal thought was "deduction based on abstract operative concepts." n20 Among these abstract operative concepts were, first, the classics' highly elaborate division of all things legal into a series of corresponding pairs of power types. The classical mind relentlessly mapped the legal world into complementary spheres, such as public or private, federal or state, and state or state. Because each paired opposite had absolute power within its designated sphere of influence, the classicists could decide cases simply by determining what entity had power over the parties. The state simply could not interject itself into realms deemed private; nor could the federal government intrude on state sovereignty within its recognized parameters. Another source of abstract principles from which the classicists reasoned was the Constitution. n21 On this classical terrain, highly abstract principles again compelled and commanded particular results.

-Footnotes-

n17 See Levinson & Balkin, supra note 9, at 1609.

n18 Kennedy Manuscript, supra note 7, at V-17. Kennedy stated:

Each of the salient characteristics of Classical law was an indispensable element in the case for an impersonal, neutral, judicial role. The casting of all legal rules in terms of the wills of legal actors meant that the judge could always claim that he was acting in subordination to an external compulsion. The parties to a contract, or the sovereign, decided everything; he decided nothing. He simply executed.

Id. The idea that classical concepts were operative and that they determined cases "refers to the [judge's] experience of being bound. The process of deriving subrules from operative concepts is experienced as compulsory." Id.

n19 For a discussion of Professor Kennedy's work, see supra note 11 and accompanying text.

n20 Kennedy Manuscript, supra note 7, at V-11.

n21 Id. Professor Kennedy posited that "in Classical legal thought, the claim was that the judges could use the clauses of the Constitution and the most abstract common law maxims as operative premises." Id.

-End Footnotes-

In his influential article Langdell's Orthodoxy, Professor Thomas Grey analyzed the structure of nineteenth century legal thought, primarily through the lens of Christopher Columbus Langdell, Dean of the Harvard Law School from 1870 to 1895. n22 Grey found that the law-as-science theme pervaded nineteenth century legal thought as jurists and commentators strove for a system of maximal completeness with a correct explanation for every imaginable case. As Grey pointed out, classical doctrine rested on a series of principles (apparently Ken- [\*1124] nedy's "abstract operative concepts"), the total explanatory power of which gave law the character of a science. n23 Through scientific deduction, these abstract concepts yielded more particular subrules. The asserted completeness of nineteenth century legal thought was one face of its scientism; the judicial claim to derivation of objectively correct decisions from precedent was another. n24 The first dimension of scientism told us that judicial determinations were correct. The second dimension told us that judges were not the authors of these decisions, but were merely obeying the commands of the law. Grey's analysis of scientism in nineteenth century thought conforms entirely with Kennedy's description of classical adjudication as the experience of compulsion.

- - - - -Footnotes- - - - -

n22 See generally Grey, supra note 4.

n23 Id. at 15.

n24 Id. This was the claim that law consisted of a series of axioms, like geometry, that yielded "correct" outcomes. Id. at 19.

- - - - -End Footnotes- - - - -

The remainder of Part I argues that nineteenth century Supreme Court overrulings epitomize classical legal thought and identifies three rhetorical devices in the overrulings that make them distinctly "classical." The Court's use of all three devices was calculated to create the effect of necessity, or the appearance that even the Court's overrulings were inevitable in light of precedent and the abstract operative concepts embodied in the Constitution. Showing the classical character of the Court's performance in these overrulings serves two purposes. First, Part I presents a novel application (to overrulings) of an established way of thinking about nineteenth century judging (the classical paradigm). Second, and more importantly, Part I evokes what is absent in our current milieu, thereby allowing us to experience current overrulings in a historical context.

B. The Effect of Necessity and Nineteenth Century Supreme Court Overrulings

At first blush, the overrulings of the Supreme Court look like the worst vehicle imaginable to illustrate the character of classical legal thought. After all, courts of last resort are not bound by precedent as are lesser courts. Also, overruling is the exercise of judicial power most antithetical to production of the effect of necessity. Necessity is a function of the scientism attributed to law, whereas overrulings are instances in which the law is altered, and at least one previously valid growth in the law is cut away and denounced as "wrong." n25 Interest- [\*1125] ingly, there are several ways in which even these overrulings embody classical legal thought by making rhetorical moves that have an unmistakably classical character. That the Court's

decisions reflected the scientism of nineteenth century legal thought is all the more remarkable because the foremost nineteenth century exponents of scientism in law viewed constitutional law as fundamentally "unscientific." n26

-Footnotes-

n25 Cf. Robert M. Cover, *The Supreme Court, 1982 Term--Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983) [hereinafter Cover, *Nomos*] (arguing that the rejection of alternative results in adjudication is violence and stating that, "confronting the luxuriant growth of a hundred legal traditions, judges assert that this one is law and destroy or try to destroy all the rest"); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1608-10 (1986) (arguing that the foregoing point is not a criticism of judging).

n26 Grey, *supra* note 4, at 34 (referring to Dean Langdell and fellow Harvard Professors Beale and Ames by stating that "the classicists did not regard public law, including constitutional law, as amenable to scientific study at all").

-End Footnotes-

Each of the following three subsections explores a rhetorical tool employed by the nineteenth century Supreme Court in its (relatively few) overrulings to show how those overrulings were quintessentially classical. First, subsection 1 argues that the Court sought to preserve the experience of adjudication as a passive submission to text through "ventriloquism," the attribution of the overruling to other, earlier cases in which the overruling was not yet a fait accompli. Second, subsection 2 shows how the Court's overrulings were sometimes the function of a classical analysis of the relative powers of the federal and state courts. Third, subsection 3 contends that the Court sometimes experienced its overrulings as a submission to constitutional text and deductive reasoning.

1. Ventriloquism and Compulsion

One of the primary characteristics of nineteenth century judging is the experience of compulsion, or the effect of necessity. A "necessary" overruling is, at least superficially, a paradox. After all, how could the reversal of a previous outcome, itself compelled and necessary, be compelled? This presented a formidable conundrum to the nineteenth century judicial mind. Yet the classical mind was able to reconcile the apparent contradiction between compulsion and making new law in the following way: The judge announcing the overruling did not in fact overrule the case. The actual overruling had already taken place, years before, in the evolution of a line of cases inconsistent with the later overruled case. This act of judicial ventriloquism (or voice-throwing) preserved necessity. During the evolution of the line of inconsistent cases, the Court could explain that the new cases were not inconsistent. In the overruling case, the Court did not exercise judicial power to change law, or to make new law, but merely obeyed the command of earlier judges. Never mind that such "obedience" necessarily entailed

[\*1126] some disobedience. The classical mind's fetish for compulsion and necessity shows the centrality of that effect to the classical performance. Ventriloquism played a major rhetorical role in eight of the twentyeight overrulings made by the nineteenth century Supreme Court. This subsection examines five of those eight opinions to show the centrality of ventriloquism to the classical performance.

The Court first deployed ventriloquism in an overruling in the 1830 case of *Gordon v. Ogden*.<sup>n27</sup> In *Gordon*, the plaintiff had sought in the district court a recovery of \$ 2600, an amount in excess of the \$ 2000 minimum that conferred jurisdiction on the Supreme Court. The plaintiff obtained a judgment for only \$ 400, which, even if trebled under applicable patent law, would still only amount to \$ 1200, well below the jurisdictional minimum.<sup>n28</sup> The plaintiff appealed to the Supreme Court, arguing that the Court had jurisdiction over the case because he had alleged a claim for more than \$ 2000 in his complaint. Plaintiff cited *Wilson v. Daniel*,<sup>n29</sup> a 1798 Supreme Court case standing for precisely that proposition. The *Gordon* Court, per Chief Justice Marshall, declined to find jurisdiction, not because *Wilson* was inapposite ("that case, it is admitted, is in point"), but because a "a contrary practice had since prevailed"<sup>n30</sup> in a pair of intervening cases, *Cooke v. Woodrow*<sup>n31</sup> and *Wise & Lynn v. Columbian Turnpike Co.*<sup>n32</sup> In *Cooke v. Woodrow*, while taking jurisdiction of an appeal by defendant below, the Court explained that "if the judgment below be for the plaintiff, that judgment ascertains the value of the matter in dispute."<sup>n33</sup> *Cooke* thus used the \$ 2000 minimum to create, not to limit, jurisdiction. *Cooke* was, nonetheless, used to limit jurisdiction in *Gordon*. In *Wise & Lynn*, the Court dismissed an appeal where judgment in the circuit court had been below \$ 2000, although the claim in the circuit court had been for an amount over \$ 2000.<sup>n34</sup> The *Wise & Lynn* Court did so without discussing the earlier, contrary *Wilson* case and without formulating the rule announced in *Gordon*.<sup>n35</sup>

-----Footnotes-----

n27 28 U.S. (3 Pet.) 33 (1830).  
 n28 *Id.* at 34-35.  
 n29 3 U.S. (3 Dall.) 401, 405 (1798) ("The thing demanded . . . and not the thing found, constitutes the matter in dispute between the parties." ).  
 n30 *Gordon*, 28 U.S. (3 Pet.) at 34.  
 n31 9 U.S. (5 Cranch) 13 (1809).  
 n32 11 U.S. (7 Cranch) 276 (1812).  
 n33 *Cooke*, 9 U.S. (5 Cranch) at 14.  
 n34 *Wise & Lynn*, 11 U.S. (7 Cranch) at 276.  
 n35 *Id.*

-----End Footnotes-----

Chief Justice Marshall experienced the overruling of *Wilson* as mere obedience to the precedents of *Cooke* and *Wise & Lynn*, both of [\*1127] which were supposedly inconsistent with *Wilson*. Marshall dutifully created the appearance of compulsion: He volunteered that he would "be much inclined to adhere" to *Wilson*'s precedent, "although that case was decided by a divided court, and although we think, that upon the true construction of . . . the judicial act [of 1798], the jurisdiction of the court depends upon the sum in dispute between the parties as the case stands upon the writ of error."<sup>n36</sup> Nonetheless, Marshall could not do his judicial duty of fealty to that

precedent because Wilson had already been overruled: "A contrary practice had since prevailed." n37 Thus, Marshall did not overrule Wilson, a task already done, and the Court was able to perform the creation of a new rule as obedience to an old rule.

-----Footnotes-----

n36 Gordon v. Ogden, 28 U.S. (3 Pet.) 33, 34 (1830).

n37 Id.

-----End Footnotes-----

Marshall's rhetorical device of compulsion-by-ventriloquism proved to be useful in the second half of the nineteenth century as the classical Court strove to achieve the appearance of compulsion and necessity while overturning established doctrines in two different areas of the law: municipal bonds and the Commerce Clause. In Kountze v. Omaha Hotel Co., n38 the Court altered the rule that governed whether appellant would have to post bond for the appealed damage award to stay its execution. The Court cited a number of decisions allowing bonds for less than the amount of the appealed damage award n39 and announced that such bonds were not required, but that "decisions had undoubtedly modified the rule [requiring bond before a losing defendant could appeal a damage award], and, indeed, had overruled it." n40 Again, judicial power was not exercised because the Court experienced (or at least rationalized) the new rule as obedience to prior commands. Harmony prevailed. Likewise, in Morgan v. United States, n41 the Court overruled Texas v. White, n42 a decision allowing states retroactively to limit the negotiability of state bonds, with the blithe announcement: "It is apparent that the original decision of the court in reference to the Texas indemnity bonds in Texas v. White has been questioned and limited in important particulars in the subsequent cases involving the same questions." n43

-----Footnotes-----

n38 107 U.S. 378 (1882).

n39 Id. at 387-90. The Court cited Roberts v. Cooper, 60 U.S. (19 How.) 373 (1856), a case in which the Court upheld a trial court's decision to require a bond for a mere \$ 1000 where the damage from the delay would be \$ 25,000, on the ground that the action was in ejectment, where only nominal damages were required. 107 U.S. at 387. The Court also cited Rubber Co. v. Goodyear, 73 U.S. (6 Wall.) 153 (1867), in which the Court upheld a bond of \$ 225,000 where damages exceeded \$ 300,000, on the tautological theory that " 'it is not required that the security shall be in any fixed proportion to the decree. What is necessary is, that it be sufficient.' " 107 U.S. at 388 (citing Rubber Co., 73 U.S. at 156). Finally, the Court cited French v. Shoemaker, 79 U.S. (12 Wall.) 86 (1870), in which the Court upheld a \$ 500 bond for a controversy over an interest valued at \$ 5000. 107 U.S. at 389.

n40 Kountze, 107 U.S. at 387.

n41 113 U.S. 476 (1885).

n42 74 U.S. (7 Wall.) 700 (1868).

n43 Morgan, 113 U.S. at 496 (citation omitted).

- - - - -End Footnotes- - - - -

In Brenham v. German American Bank, the Court held that a municipality could not issue negotiable bonds under any circumstances. n44 Brenham was a particularly transparent use of the device of projection because the Court's claim that the intervening cases had already done the dirty work of overruling was clearly wrong, even when taking at face value the Court's statement of the cases preceding (and justifying) the overruling. The Court did not state that it was overruling contrary precedents, but instead relied upon the projected sound of its judicial voice: "We, therefore, must regard the cases of Rogers v. Burlington and Mitchell v. Burlington, as overruled in the particular referred to, by later cases in this court." n45 The Brenham Court relied upon a litany of intervening cases, discussing extensively, among others, Claiborne County v. Brooks and Norton v. Dyersburg. n46 Yet those cases established only the proposition that the municipalities did not have inherent or implied powers to issue bonds. Remarkably, the Brenham Court conceded that, under Claiborne County, municipalities whose charters contained an explicit grant of power to issue bonds had that power constitutionally. Creating an even more stark and irreconcilable contradiction between Brenham's holding and its antecedents, the Brenham Court conceded that, under Norton, cities did not have an express power to issue bonds in support of the city's ownership of stock in a railway corporation unless that power was expressly conferred: "The power granted to a municipal corporation to become a stockholder in a railroad company did not carry with it the power to issue negotiable bonds in payment of the subscription, unless the latter power was expressly or by reasonable implication conferred by the statute." n47 The overruled cases of Rogers and Mitchell, however, were cases in which the grant of power to issue bonds was explicit, making the Court's statement that Claiborne and Norton overruled Rogers and [\*1129] Mitchell transparently wrong. n48

- - - - -Footnotes- - - - -

n44 144 U.S. 173, 187 (1892).

n45 Id. (citing Rogers v. Burlington, 70 U.S. (3 Wall.) 654 (1866), overruled in part by Brenham v. German Am. Bank, 144 U.S. 173, 182-83, 187 (1892); Mitchell v. Burlington, 71 U.S. (4 Wall.) 270 (1867), overruled in part by Brenham v. German Am. Bank, 144 U.S. 173, 182-83, 187 (1892)).

n46 Id. at 184-85 (citing Norton v. Dyersburg, 127 U.S. 160 (1887); Claiborne County v. Brooks, 111 U.S. 400 (1883)).

n47 Id. at 185 (emphasis added) (citing Kelley v. Milan, 127 U.S. 139 (1888); Norton, 127 U.S. at 160).

n48 In Rogers, the municipal charter authorized a municipality to borrow money for "any public purpose." 70 U.S. at 659-60. The Court held that this delegated to a municipality the power to borrow money for a railroad company. Id. at 664-65. In Mitchell, the Court held that a provision in a municipal charter authorizing a town to borrow money for "any public purpose" was a delegation of power to borrow money to construct a road through the town. 71

U.S. at 273-74.

- - - - -End Footnotes- - - - -

The Brenham Court doubly expresses the scientist urge in nineteenth century jurisprudence. First, Brenham shows the classicists' deeply felt need for harmony, because cases were made to stand for propositions that they flatly disclaimed so that no actual, present Justice would have to acknowledge tearing the seamless fabric of precedent by performing an overruling. Instead, the nonconforming precedent was already removed, the offending patch deleted, the smooth contours of precedent restored, and the "violence" of adjudication n49 euphemized away. Second, Brenham shows how entranced the classicists were by their tools of harmonization. The use of ventriloquism to reconcile plain contradiction shows the power of that tool in the classical mind; in Brenham, that tool performed the honestly insuperable task of harmonizing diametrically opposed holdings.

- - - - -Footnotes- - - - -

n49 See Cover, Nomos, supra note 25, at 53.

- - - - -End Footnotes- - - - -

Ventriloquism also played a key role in one of the most significant doctrinal revisions conducted by the late nineteenth century Court--its reshaping of the Commerce Clause. n50 In *Leloup v. Port of Mobile*, n51 the Court held that a state tax on an interstate telegraph business violated the Commerce Clause, thereby effectively overruling *Osborne v. Mobile*, n52 in which the Court had upheld as constitutional an ordinance charging interstate railroads a differential licensing fee. The Court did not, however, admit to overruling *Osborne*. Instead, the Court held that its recent Commerce Clause cases had actually overruled the offending case. n53 The Court even characterized the intervening cases that overruled *Osborne*, not as overrulings, but as "recurrences to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall." n54 In this way, [\*1130] the Court doubly disclaimed its agency: first, by throwing its voice to the sixteen years of intervening cases; and, second, by attributing even to the former cases, acknowledged as overrulings, fealty to an ultimate source of law, such that no new law was ever truly made. n55

- - - - -Footnotes- - - - -

n50 For a general discussion of the Court's Commerce Clause jurisprudence during this period--as the Court moved from Chief Justice Marshall's Madisonian position that some state regulation impacting commerce did not violate the Commerce Clause to the modern position that affords state regulations little deference--see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* section 6-4 (2d ed. 1988).

n51 127 U.S. 640 (1888). Interestingly, *Leloup* was a unanimous decision of the Court that came to the opposite conclusion, although it did not explicitly overrule the previous unanimous decision in *Osborne v. Mobile*, 83 U.S. (16 Wall.) 479 (1872). *Leloup*, 127 U.S. at 644.

n52 83 U.S. (16 Wall.) at 479.

n53 Leloup, 127 U.S. at 648.

n54 Id.

n55 Chief Justice Marshall was to the classicists what Framers' intent was to Robert Bork, see BORK, supra note 6, at 153-55, and what Framers' intent and English common law would be to Antonin Scalia. Justice Scalia's reliance on both Framers' intent and the history of the English Declaration of Rights of 1689 as a foundational source for Eighth Amendment law in *Harmelin v. Michigan*, 501 U.S. 957 (1991), is discussed infra notes 266-69. Of course, the indeterminacy that Judge Bork and Justice Scalia would avoid through foundationalism crops up again in the choice of whose intent they select as the foundation of knowledge. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 229 n.96 (1980).

- - - - -End Footnotes- - - - -

The Court also threw its voice in *Leisy v. Hardin*, n56 in which it held that Iowa's prohibition of unlicensed liquor sales from other states violated the Commerce Clause. n57 In one of the License Cases, n58 *Peirce v. New Hampshire*, n59 the Court upheld a New Hampshire law that, like the Iowa law, regulated the interstate transportation of liquor, reasoning that the states had the latitude to regulate commerce where Congress was silent. n60 Overruling *Peirce*, the Court in *Leisy* again showed its unwillingness to acknowledge its agency. The *Leisy* Court invoked a six-year-old case, *Bowman v. Chicago & Northwestern Railway*, in which it had struck down a state law regulating wharfage by holding that the regulation of wharfage was a peculiarly national power reserved to Congress under the Commerce Clause. n61 Thus, the Court could have held that it was extending the doctrine of *Bowman* to the regulation of alcohol by finding that alcohol was as inherently national as wharfage, but the Court instead made the broader claim that the *Leisy* holding was entailed by, or contained in, the *Bowman* holding. n62 This peculiar claim again exposes an inner tension that nicely illustrates the classics' fetishistic desire never to make new law: if a case many terms before entailed this result, then intervening cases (and, indeed, *Bowman* itself) should have explicitly overruled *Peirce*. The obvious answer is that the Court overruled nothing in *Bowman*, but that, in *Leisy*, *Bowman* overruled *Peirce*.

- - - - -Footnotes- - - - -

n56 135 U.S. 100 (1890).

n57 Id. at 125.

n58 46 U.S. (5 How.) 504 (1847).

n59 Id. at 554.

n60 Id. at 579.

n61 *Leisy*, 135 U.S. at 119 (citing *Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465, 507-08 (1885)).

n62 Id. at 124.

- - - - -End Footnotes- - - - -  
[\*1131]

2. Powers Absolute Within Their Spheres, Hierarchy, and Compulsion

Many of the Supreme Court's overrulings from the nineteenth century illustrate another characteristic of classical legal thought: the classical devotion to power-based analysis. Professor Kennedy has argued that one of the defining characteristics of classical thought was the separation of competing forces into correlative realms such as the public-or-private distinction and the state-or-federal distinction. n63 The classicists, of course, did not invent these distinctions, but they did invest them with talismanic power. Langdell and other classicists made law a science by deploying these all-encompassing, self-implementing categories that dictated the outcome of any particular dispute: certain powers were public, others private, some necessarily federal, others state. Just as the state had absolute power over public affairs, it had none over private matters. The classificatory scheme was all-encompassing, and its tautological labels decided each case, investing the classifications with the explanatory power of a science. Overrulings based on state court primacy illustrate the categorical nature of classical legal science as well as the classical attraction to power-based analysis.

- - - - -Footnotes- - - - -

n63 Kennedy Manuscript, supra note 7, at II-8, II-9. Kennedy noted that "everyone within the classical legal elite seemed to conceive the absoluteness of the state and federal governments within their spheres as consistent with a condition of peace, of legitimate harmony." Id. (citing "The Relation of Private to Public Law," a separately paginated article within Professor Kennedy's unpublished manuscript).

- - - - -End Footnotes- - - - -

The first of these nineteenth century overrulings based on state-federal powers analysis was *Green v. Neal's Lessee*. n64 The Green Court construed a Tennessee statute of limitations for adverse possession. n65 In *Green*, the Court considered for the first time whether to follow its own earlier interpretation of a state statute or a state court's later, contradictory interpretation of that same statute. The Green Court opted to overrule the prior Supreme Court cases interpreting the adverse possession statute and to adopt the Tennessee Supreme Court's interpretation of the Tennessee statute. n66 The Court reasoned that, just as federal courts hold the power to determine federal statutes, state courts possess absolute power to interpret state statutes: "Would not a change in the construction of a law of the United States, by this tribunal, be obligatory on the state courts?" n67 The Court held that the state law was supreme in the conflict because the statements of state courts [\*1132] are in fact a part of the law:

- - - - -Footnotes- - - - -

n64 31 U.S. (6 Pet.) 291 (1832).

n65 Id. at 292-93.

n66 Id. at 301.

n67 Id. at 299.

- - - - -End Footnotes- - - - -

The decision of this question, by the highest judicial tribunal of a state, should be considered as final by this court; not because the state tribunal, in such case, has any power to bind this court; but because . . . a fixed and received construction by a state in its own courts, makes a part of the statute law. n68

- - - - -Footnotes- - - - -

n68 Id. at 298 (citing Shelby v. Gruy, 24 U.S (11 Wheat.) 361 (1826)).

- - - - -End Footnotes- - - - -

Thus, the state court's holding was not interpretation, but was literally a command, creating the experience of compulsion. Although state courts were not superior courts, they nonetheless occupied the role of the intervening cases in the ventriloquist line--the role of making law, forbidden to the subjective experience and performance of the classical judge. In choosing the Tennessee court's interpretation, the Supreme Court "preserved harmony . . . in the state and federal tribunals." n69 The Green Court's approach also foreshadowed the Court's explicit development of a powers-within-their-spheres analysis at the height of the classical period.

- - - - -Footnotes- - - - -

n69 Id. at 301.

- - - - -End Footnotes- - - - -

The Court next confronted the situation of Green in Suydam v. Williamson. n70 In Suydam, the Court adopted the same solution as the Green Court--deference to the state court. The Suydam Court, however, reached this result by a much more explicit resort to sovereignty analysis, re-creating the classical map of state-federal relations as a complete, totalizing explanatory tool. First, the Court re-created the map:

- - - - -Footnotes- - - - -

n70 65 U.S. (24 How.) 427 (1860).

- - - - -End Footnotes- - - - -

As between the judgments of state courts, and those of courts of the United States, [state court holdings] are binding where there is a conflict between them, except in cases arising under the Constitution and laws of the United States, when the judgments of the Supreme Court of the United States are of controlling authority. n71

-Footnotes-

n71 Id. at 432.

-End Footnotes-

Second, the Court made clear the absoluteness of the powers of both state and federal agents within their spheres: "Every sovereign has the exclusive right to command within his territory; and the laws which originate rights to real property are commands addressed to the members of the State . . . and in this respect the sovereignty of New York has not been impaired by her adoption of the Federal Constitution." n72 [\*1133] The Suydam Court created highly formal categories with complete explanatory power, n73 illustrating the formal and categorical nature of classical legal thought. n74

-Footnotes-

n72 Id. at 433. The Court continued to underscore the distinctness of the state and federal realms and the absolute character of the powers of each in its appropriate sphere by asserting that "the power to establish federal courts, and to endow them with a jurisdiction to determine controversies between certain parties, affords no pretext . . . for removing any obligation of her citizens to submit to the rule of the local sovereign." Id. This passage is redolent of Kennedy's characterization of classical legal thought. See supra note 63.

n73 Cf. Grey, supra note 4, at 24. Professor Grey stated: "The classical scientist accepted that a legal system must be comprehensive, as well as having the logical virtues of completeness, formality, and conceptual order." Id.

n74 E.g., HORWITZ, supra note 5, at 7-31 (describing classical legal thought as categorical and formalistic); Steven A. Siegel, Lochner Era Jurisprudence and the American Constitutional Tradition, 70 N.C. L. REV. 1, 23-62 (1991) (describing the conceptual and categorical nature of nineteenth century constitutional thought).

-End Footnotes-

In County of Cass v. Johnston, n75 the Supreme Court unmistakably displayed the classical affinity for experiencing adjudication as obedience to system-level rules. County of Cass posed a far more difficult adjudicative task than cases like Suydam and Green, which presented straightforward conflicts between Supreme Court decisions and decisions of state supreme courts. In County of Cass, the Court overruled Harshman v. Bates County n76 on a question of Missouri law. To do so, the Court needed to find Missouri law conflicting with Harshman v. Bates County, even though the County of Cass Court frankly admitted that the precise issue before it had never been considered by the Missouri courts. n77 The question in County of Cass was whether a particular provision of the Missouri Township Act violated the Missouri Constitution. The Missouri Township Act provided that a municipality could only purchase the capital stock of a railroad where authorized by a two-thirds vote in a township election. n78 The Missouri Constitution barred municipalities from acquiring stock " 'unless two-thirds of the qualified voters of the . . . town, at a regular or special election to be held therein, shall assent thereto.' " n79 The only difference between the two was that the Township Act allowed two-thirds of those voting

to authorize stock purchases, while the language of the Constitution required the authorization of two-thirds of all voters in the municipality.

-Footnotes-

n75 95 U.S. 360 (1877).

n76 92 U.S. 569 (1875).

n77 County of Cass, 95 U.S. at 366 ("It is true that the objection now made to the law was in no case presented or considered.").

n78 Id. at 365.

n79 Id. (alteration in original) (quoting MO. CONST. of 1865, art. XI, section 14).

-End Footnotes-

The Court eventually upheld the Township Act as consistent with the Missouri Constitution. To do so, it could have merely overruled Harshman, saying that the question of the Township Act's constitutionality was open under Missouri law, especially in light of the Court's admission that Missouri courts had never considered the relationship between the "two-thirds" clauses in the Missouri Township Act and the Missouri Constitution or the meaning of the "two-thirds" clause in the Constitution. n80 Instead, the Court dramatically illustrated its desire to experience its overrulings as submissions to system-level rules by constructing a paradigmatic state-federal conflict in the interpretation of a state law where none existed. The Court had a problem with State v. Winkelmeier, n81 a Missouri case construing the similar phrase "a majority of the legal voters of the city" to mean a majority "of all the legal voters of the city, and not merely of those who at a particular time choose to vote upon the question." n82 Winkelmeier's interpretation of a phrase almost identical to the one in the Missouri Constitution accorded with Harshman and was diametrically opposed to the interpretation the County of Cass Court ultimately reached, and it undermined the County of Cass Court's characterization of Missouri law.

-Footnotes-

n80 Id. at 366 ("It is true that the objection now made to the law was in no case presented or considered.").

n81 35 Mo. 103 (1864).

n82 County of Cass, 95 U.S. at 366.

-End Footnotes-

The Court rested its holding on State v. Mayor of St. Joseph n83 and State v. Binder, n84 two Missouri cases that it claimed were contrary to Winkelmeier. In Mayor of St. Joseph and Binder, the relevant statutes called for questions to be put "to a vote of the qualified voters of the city" and required "a two-thirds of such qualified voters to sanction the same." n85 Those statutes were ambiguous because the phrase "such qualified voters" could refer to all

qualified voters or merely to those participating in the vote. The statutes differed markedly from the Missouri Constitution, which required the assent of "two-thirds of the qualified voters . . . at a regular or special election." n86 Nonetheless, the Court held that these two inapposite cases, in combination with Winkelmeier, made the construction of the Missouri Constitution's provision so well-settled under Missouri law that the Court could defer to "Missouri law" and overrule Harshman.

- - - - -Footnotes- - - - -

n83 37 Mo. 270 (1866).

n84 38 Mo. 450 (1867).

n85 County of Cass, 95 U.S. at 367-68 (emphasis added) (citing Binder, 38 Mo. at 450; Mayor of St. Joseph, 37 Mo. at 270).

n86 Id. at 363.

- - - - -End Footnotes- - - - -

Having finally assembled a paradigmatic federal-state conflict from these less-than-promising materials, the Court reached its classical syllogism. The Missouri Supreme Court had considered the question; the Supreme Court was bound to obey this state authority; quod erat demonstrandum, Harshman was overruled: [\*1135]

We conclude, therefore, that the Supreme Court of Missouri, when it decided the case of The State v. Linn County, and held the law in question to be constitutional, did not overlook the objection which is now made, but considered it settled by previous adjudications. That case is, therefore, to be considered as conclusive upon this question, as well as upon that which was directly considered and decided, and, as a rule of State statutory and constitutional construction, is binding upon us. It follows that our decision in Harshman v. Bates County, in so far as it declares the law to be unconstitutional, must be overruled. n87

- - - - -Footnotes- - - - -

n87 Id. at 369.

- - - - -End Footnotes- - - - -

The logical energy expended so that the Court could experience this overruling as compelled by state law dramatically illustrates the nineteenth century Court's fetish for compulsion and power-based analysis.

The County of Cass Court's odd use of its own precedent also shows the Court's desire to experience its results as compelled by federal-state powers analysis. The Court cited a recent case, St. Joseph Township v. Rogers, in which it had construed the phrase "a majority of the legal voters of a township" in an Illinois statute to mean a majority of those voting, implying strongly the Court's actual theory of the Missouri Constitution. n88 Strikingly, however,

the Court did not cite its own opinion in St. Joseph Township as authority for its construction of the Missouri Constitution. Instead, the Court made a strangely elliptical use of its own precedent, noting that it had relied on a Missouri case in reaching its holding in St. Joseph Township. n89 Additionally, the Court string-cited Illinois, Minnesota, and Tennessee authority for the proposition that, absent an express limitation, a clause requiring the assent of a majority of voters means a majority of those voting, not a majority of all voters. n90 Again, the Court reminded itself that it did not construe state law, but merely received and submitted to rules of construction announced in state courts.

-Footnotes-

n88 Id. at 368 (citing St. Joseph Township v. Rogers, 83 U.S. (16 Wall.) 644 (1872)).

n89 Id. at 368-69 ("Among other authorities cited in support of this proposition is the case of State v. Mayor of St. Joseph . . .").

n90 Id. at 369 (citing People v. Wiant, 48 Ill. 263 (1868); People v. Garner, 47 Ill. 246 (1868); People v. Warfield, 20 Ill. 160 (1858); Taylor v. Taylor, 10 Minn. 107 (1865); Louisville & Nashville R.R. v. County Court, 1 Tenn. (1 Sneed) 637, 638 (Davidson County Ct. 1854)).

-End Footnotes-

3. The Constitution as Talisman

A third way in which nineteenth century overrulings were typical of classical legal thought was in their use of talismanic reasoning from [\*1136] constitutional text. The Constitution, like the general principles of the common law, was a source of abstract general principles from which the classicists deduced particular results. n91 In several overrulings, the nineteenth century Supreme Court engaged in deduction from the abstract principles set forth in the Constitution. As we have seen in subsections 1 and 2, the classical mind preferred to experience overrulings as submission, although each overruling in submission to constitutional text left open the question of how a single text ineluctably led to a particular conclusion when that text had previously led to the opposite result. The classicists alternately ignored or finessed this paradox, but armed with their talisman and deductive powers, ultimately concluded in each instance that prior decisions were simply wrong. This subsection discusses talismanic use of the Constitution in overrulings by making primary reference to the Legal Tender Cases n92 and also discussing the Propeller Genesee Chief v. Fitzhugh. n93

-Footnotes-

n91 Kennedy Manuscript, supra note 7, at V-11. Kennedy contended: "In Classical legal thought, the claim was that the judges could use the clauses of the Constitution and the most abstract common law maxims as operative premises." Id.

n92 79 U.S. (12 Wall.) 457 (1870).

n93 53 U.S. (12 How.) 443 (1851).

- - - - -End Footnotes- - - - -

One of the most celebrated and hotly contested overrulings of the nineteenth century was the Court's reversal of its decision in Hepburn v. Griswold n94 that Congress did not have the power to issue paper money as legal tender. n95 In the Legal Tender Cases, Justice Strong clearly experienced his overruling of Hepburn v. Griswold, not as a freely made jurisprudential choice, but as submission to constitutional text. The Constitution is a ubiquitous and powerful agent in Justice Strong's text: He argued that the judiciary should presume the constitutionality of legislation because "all the members of Congress act under the obligation of an oath of fidelity to the Constitution." n96 Con- [\*1137] gress should be trusted because it is a mere creature of the Constitution. "When investigating the nature and the extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted." n97 The Constitution is necessarily general, Justice Strong argued, and therefore, the Court must induce general principles from the document and deduce particular conclusions from those general principles. n98

- - - - -Footnotes- - - - -

n94 75 U.S. (8 Wall.) 603 (1869).

n95 The Legal Tender Cases, 79 U.S. (12 Wall.) at 457. While this issue seems amusing by current standards, and the opponents of paper money seemed remarkably literal in their views, the foes of paper money fervently felt that the stability of the national economy rode on their prevailing in the Legal Tender Cases. Counsel opposing constitutionality, one Mr. Potter, argued vehemently that in the Constitution

"Congress referred only to metallic money. From time immemorial, in all countries, in all ages of the world, the precious metals have been the medium of exchanges, and the strict moneys. . . . It is true that, at certain periods in the history of some of the States, the skins of the beaver passing by tale; strings of shells, known as wampum, passing by measure; and packages of tobacco of defined weights were . . . used as money."

Id. at 464 (quoting argument of Mr. Potter). Mr. Potter would be relieved to know that the nation's economy continues to grow 120 years later and has not yet turned to a wampum or tobacco standard.

n96 Id. at 531.

n97 Id.

n98 Id. at 531-32. Strong argued: "It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines." Id. at 532. Finally, Strong cited Chief Justice Marshall for this view of the Constitution as the classical font of general principles: " 'Its nature,

therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.' " Id. (quoting McCullough v. Maryland, 17 U.S. (1 Wheat.) 316, 326 (1819)).

- - - - -End Footnotes- - - - -

Having established his method, Justice Strong identified the Legal Tender Clause of the Constitution as controlling in the case. That clause provides: "The Congress shall have Power . . . To coin Money, regulate the Value thereof, and of foreign Coin." n99 Counsel for appellees, Mr. Potter, strenuously argued for a narrow interpretation of that provision to restrict Congress to authorizing the issue of metallic money. n100 Justice Strong summarily rejected the attempts of advocate Potter and dissenting Justice Field to abstract from the clause the principle that coinage must have minimum value, stating that "the Constitution does not speak of it." n101 At the same time, Justice Strong acknowledged that the grant of power in the Legal Tender Clause should be construed expansively, because Justice Field's restrictive reading (that the mention of coins was a tacit restriction of that power to make metallic money) was "not the manner in which the Constitution had always been construed." n102 Justice Strong was reluctant to abstract from the Legal Tender Clause either a negative implication that Congress' powers were limited or a positive implication that the clause contained a guarantee that all money had some fundamental value.

- - - - -Footnotes- - - - -

n99 U.S. CONST. art. I, section 8, cl. 5.

n100 The Legal Tender Cases, 79 U.S. (12 Wall.) at 464 (argument of Mr. Potter).

n101 Id. at 553.

n102 Id. at 544.

- - - - -End Footnotes- - - - -

Instead, Justice Strong rested his holding on a broad view of the Necessary and Proper Clause, which he interpreted using principles inconsistent with those that he used to interpret the Legal Tender Clause. While he would not abstract from the Legal Tender Clause the general principle that money must be metallic, Justice Strong abstracted a highly general purpose from the Necessary and Proper [\*1138] Clause. n103 More than "the mere execution of all powers definitely intrusted to Congress and mentioned in detail," the Necessary and Proper Clause "was intended to confer upon the government the power of self-preservation." n104 Justice Strong induced this general principle with no real support beyond the text of the clause itself, citing only some dicta unrelated to the Necessary and Proper Clause that stated that the Constitution provides the government with unspecified "means of self-preservation." n105 Because the Necessary and Proper Clause allowed the government to preserve itself, and the Legal Tender Acts, passed during wartime, were a measure aimed at preserving the Union, those Acts were constitutional. Notwithstanding internal inconsistencies in Justice Strong's reasoning, the common denominator in the Legal Tender Cases is fealty to the Necessary and Proper Clause.

-Footnotes-

n103 Id. at 533.

n104 Id.

n105 Id. (quoting Cohens v. Bank of Virginia, 19 U.S. (6 Wheat.) 264, 414 (1821)).

-End Footnotes-

Tellingly, the dissenters also experienced their outcome as submission to constitutional text. Justice Field offered this quintessentially classical observation: "The only loyalty which I can admit consists in obedience to the Constitution and laws made in pursuance of it. It is only by obedience that affection and reverence can be shown to a superior having a right to command." n106 Like Justice Strong, Justice Field cited the constitutional provision that he believed controlled the dispute--the Legal Tender Clause. n107 Having identified the relevant clause, Justice Field construed its language: "When the Constitution says that Congress shall have the power to make metallic coins a legal tender, it declares in effect that it shall make nothing else such tender." n108 Thus, the two sides in this deep and significant dispute reached opposing results through application of similar methods, showing the unity of nineteenth century legal thought. So long as premises were shared, doctrinal coherence and necessity, two central concerns of the classical mind, were not threatened. When compared to splits in relatively minor twentieth century overrulings, the jurisprudential accord between Strong and Field is striking.

-Footnotes-

n106 Id. at 680-81 (Field, J., dissenting) (emphasis added).

n107 Id. at 647 (Field, J., dissenting).

n108 Id. at 651 (Field, J., dissenting).

-End Footnotes-

In other overrulings, the nineteenth century Court presented reversal as compelled by constitutional text. In The Propeller Genesee Chief v. Fitzhugh, n109 Justice Taney wrote for a Court that overruled [\*1139] its prior decision in The Steam-Boat Thomas Jefferson n110 that admiralty jurisdiction was limited to tidewaters. In Genesee Chief, Congress had passed a law extending the jurisdiction of the federal district courts to certain cases on lakes and navigable waters. n111 Justice Taney first ruled out the Commerce Clause as a possible source of validity for the law, which did not purport to be a regulation of commerce. This left Justice Taney with the question, long decided in the negative, whether the Court's admiralty jurisdiction extended beyond tidewaters to the internal lakes of the young nation. n112 Justice Taney framed the issue as a need to interpret the constitutional grant of judicial power to "all cases of admiralty and maritime jurisdiction." n113 He first argued that, if considered as a matter of first impression, logic compelled the conclusion that admiralty jurisdiction extended to the Great Lakes because "these lakes are in truth inland seas," containing

commerce, separating nations, and serving as battle sites. n114

-Footnotes-

n109 53 U.S. (12 How.) 443 (1851). Genesee Chief was an eight-to-one decision. Id. at 463 (Daniel, J., dissenting).

n110 23 U.S. (10 Wheat.) 428 (1825). The decision in The Steam-Boat Thomas Jefferson was unanimous. Id. at 460.

n111 53 U.S. at 451.

n112 Id. at 453-54.

n113 Id. at 460.

n114 Id. at 453.

-End Footnotes-

Nonetheless, the Court had held to the contrary in The Thomas Jefferson, and it was that case "which mainly embarrassed the court in its inquiry." n115 Against the rule of The Thomas Jefferson, Chief Justice Taney mounted two quintessentially classical arguments. First, like Justice Strong, Justice Taney abstracted a highly general principle to obey, so that his decision would not present itself primarily as his own reasoned judgment. Justice Taney explained that "one of the great objects of the framers of the Constitution was . . . a perfect equality in the rights and the privileges of the citizens of the different states." n116 Under this principle, admiralty jurisdiction must extend inland, or "the navigable waters of the West [would be] denied the benefits of the same courts and the same jurisdiction for their protection which the Constitution secures to the States bordering on the Atlantic." n117 Second, Justice Taney argued that the rule in The Thomas Jefferson that admiralty jurisdiction extended to the tidewaters, the eighteenth century English rule, was inappropriately generalized from England to America and thus was not properly understood to be within the Constitution. n118 Taney's fundamental objection to the English rule was that "[the Constitution] does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice." n119 Thus, like Hepburn in the Legal Tender Cases, The Thomas Jefferson was contrary to both the text and the abstract principles embodied in the Constitution and was summarily overruled.

-Footnotes-

n115 Id. at 454.

n116 Id.

n117 Id.

n118 Id. at 456-58.