3-11-1981

The Affimative Side of the First Amendment

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GEORGIA LAW REVIEW

VOLUME 15 SUMMER 1981 NUMBER 4

THE AFFIRMATIVE SIDE OF THE FIRST AMENDMENT*

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Traditionally, the first amendment, like other provisions of the Bill of Rights, has operated primarily as a negative force in maintaining the system of freedom of expression. It has served to prevent the government from prohibiting, harassing, or interfering with speech or other forms of communication. On the other hand, the first amendment has not been viewed as a significant factor in efforts to promote freedom of expression or to impose limits on governmental participation in the system.

There is growing concern now, however, with the affirmative side of the first amendment. Major distortions in the system — failure of the market place of ideas to operate according to the original plan — have not been solved by the negative approach. The expansion of governmental powers, and the creation of a vast bureaucracy possessing great quantities of information and expertise, have made the government a more pervasive participant in the system of freedom of expression. The underlying trend of modern government toward social control by persuasion rather than by coercion likewise has enhanced greatly the government's affirmative role in the system. New technologies, such as the use of the electronic media for two-way communication between citizen and government, will have the same impact.

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* The John A. Sibley Lecture in Law delivered at the University of Georgia School of Law on April 11, 1981, revised and expanded for publication. For the purpose of improving readability, footnotes have been placed only at the end of paragraphs.

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Most important, the development of rules for employing governmental powers to expand the system of freedom of expression, while at the same time controlling and limiting those powers, is emerging as one of the crucial problems of the future. As we move inevitably toward some form of social control over our destinies, the need to maintain a high degree of *laissez-faire* in the system of freedom of expression, when *laissez-faire* is diminishing or disappearing in the economic sphere, poses a critical dilemma. Unless we are able to resolve that dilemma, the system of freedom of expression as we hitherto have conceived it cannot continue to exist.

The primary initiative in affirmatively promoting the system of freedom of expression must be undertaken by the legislative and executive branches. Thus, one of the major advances in recent years, the freedom of information and sunshine laws, is the creation of the federal and state legislatures. Nevertheless, there is a vital role for the judicial branch of government. Some areas of potential expansion, such as the right of access and the right to know, are suitable for judicial action. In any event, we must rely upon the courts to impose limits on the legislative and executive branches when they seek to promote or participate in the system. The countervailing powers that our courts have come to exercise through the instrument of constitutional adjudication constitute a major hope that other parts of the government can be kept in check.

The Supreme Court, it must be acknowledged, has been reluctant to give affirmative effect, not only to the first amendment, but to other provisions of the Constitution that support our system of individual rights. Thus, the Court has refused to construe the equal protection clause as imposing an obligation on the government to eliminate racial inequalities except where it can be shown that the government was directly and intentionally responsible for the discrimination. The Court likewise has held within narrow confines the "fundamental rights" which are entitled to a special degree of constitutional protection. In the first amendment area, it has failed to expand the right-of-access or right-to-know doctrines. The unwillingness of the Court to take a positive position in promoting affirmative rights was epitomized in its decision in *Harris v. McRae*. Upholding the validity of a government program subsidizing all medically necessary services for indigents except medically necessary abortions, the Court said: "[A]lthough government may not place obstacles in the path of a woman's exercise of her

freedom of choice, it need not remove those not of its own creation."[1]

The provisions in many state constitutions guaranteeing freedom of expression are couched in more affirmative terms than in the first amendment to the Federal Constitution. In place of stating that "Congress [or the state legislature] shall make no law," most state constitutions contain language similar to that of the Connecticut Constitution: "Every citizen may freely speak, write and publish his sentiments on all subjects." The state courts, however, usually have given the same interpretation to these provisions as the United States Supreme Court has given to the first amendment.[2]

The path toward developing the affirmative side of the first amendment is beset with pitfalls. The courts are being asked to deal with awesome problems. Governmental intervention in the system of freedom of expression for affirmative purposes has a decided tendency to accentuate the distortions in the system. The power of the majority, achieved through election of its representatives to positions of control within the government, is magnified by the use of public funds and resources for the dissemination of majority points of view. The imprimatur of the government in itself confers additional weight on official speech or officially sponsored speech. Ideally, extensive measures for the encouragement of opposing speech are necessary, but these are unlikely to materialize on any substantial scale. In any event, such measures are in most instances beyond the capacity of the courts to initiate or maintain. Confronted by this enormous disequilibrium, the courts may be able to do little more than take the disparity into account in the formulation of rules at those points where they do have some degree of control.

Moreover, the courts must create a whole new body of legal doc-

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[1] Harris v. McRae, 448 U.S. 297, 316 (1980). Cases refusing to give affirmative effect to the equal protection clause include Washington v. Davis, 426 U.S. 229 (1976); Milliken v. Bradley, 418 U.S. 717 (1974); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973). Cases in which the Court refused to extend the "fundamental rights" doctrine include Lindsey v. Normet, 405 U.S. 56 (1972); Dandridge v. Williams, 379 U.S. 471 (1970). On the right of access, see Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); on the right to know, see Houchins v. KQED, 438 U.S. 1 (1978); *but cf.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

[2] CONN. CONST. art. I, § 4. *See* Note, *Private Abridgement of Speech and State Constitutions*, 90 YALE L.J. 165 (1980). *But see* Robins v. PruneYard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341 (1979), *aff'd*, 447 U.S. 74 (1980).

trine. Most of the traditional rules derived from the cases protecting freedom of expression from negative interference by government do not apply. The issues are not to be resolved in terms of clear and present danger, full protection, prior restraint, and the like. The balancing test is, of course, applicable in all types of cases. One would hope, however, that more effective rules can be formulated.

Nevertheless, regardless of the difficulties involved, the courts are being called upon to deal with the problems. As one surveys the field, it is apparent that bits and pieces of the puzzle are beginning to take shape. On the whole, indeed, there has been greater progress than one casually might suppose.[3]

This article first examines some general issues pertaining to the formulation of appropriate legal doctrine. It then explores problems raised by governmental promotion of the system of freedom of expression. Finally, it deals with questions arising out of direct governmental participation in the system through engaging in expression of its own.

I. Doctrinal Resources

Formulation of legal doctrine that will serve as a solid basis for affirmative expansion of the system of freedom of expression is not an easy task. Some commentators have expressed doubts that effective legal rules can be devised. The attempt must be undertaken, however, unless we are ready to abandon the whole effort to bring the principles and power of the first amendment to bear upon this area of growing concern.[4]

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[3] Prior discussions of some of the problems may be found in J.A. Barron, Freedom of the Press for Whom? (1973); B.C. Schmidt, Jr., Freedom of the Press vs. Public Access (1976); Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 Tex. L. Rev. 1123 (1974); Cass, *First Amendment Access to Government Facilities*, 65 Va. L. Rev. 1287 (1979); Gottlieb, *Government Allocation of First Amendment Resources*, 41 U. Pitt. L. Rev. 205 (1980); Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 Calif. L. Rev. 1104 (1979); Shiffrin, *Government Speech*, 27 U.C.L.A. L. Rev. 565 (1980); Yudof, *When Government Speaks: Toward a Theory of Government Expression and the First Amendment*, 57 Tex. L. Rev. 863 (1979); Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 Harv. L. Rev. 535 (1980); Note, *Access to State-Owned Communications Media — The Public Forum Doctrine*, 26 U.C.L.A. L. Rev. 1410 (1979) (citing previous "public forum" literature).

[4] For one expression of skepticism about the possibility of formulating satisfactory legal principles, see Yudof, *supra* note 3, at 897-906.

A. *The Distinction Between Governmental Promotion and Governmental Participation*

It is helpful to begin the analysis by drawing a distinction between governmental promotion of the system of freedom of expression and governmental participation in the system. Although both involve affirmative measures to expand the system or to make it work more effectively, the types of controls available and appropriate are somewhat different.

Governmental promotion occurs when the government undertakes to facilitate use of the system by private (or nongovernmental) persons or groups. Examples are the granting of subsidies to candidates in presidential elections, as provided in the Federal Election Campaign Act, or the building of a cultural center for use by community organizations. The resulting expression is private, not governmental. Governmental participation occurs when the communication emanates from the government itself, through a government official, a government agency, or an institution controlled by the government. It is governmental, not private, speech that results. Examples are the State of the Union address by the President or a report issued by the Environmental Protection Agency.

The reason for making the distinction is that, in the case of governmental promotion, one always can insist upon rules directed toward achieving a generally more vigorous and effective system of expression. That is to say, the purpose of the governmental intervention — its only justification under the first amendment — is that greater opportunity for expression, increased diversity, or similar improvements in the system will be secured. More precise rules can be formulated around the achievement of these objectives. This is not always true of governmental participation. In that area, the objective is often a narrower one — to introduce a single additional voice, embodying a particular point of view, into the system. The government is entitled to such a voice. It follows that, as in the case of nongovernmental participation, the government must have freedom to speak its piece, and the rules must make allowance for this. The result has the appearance of a paradox: the greater the governmental intervention, the lesser the restrictions placed upon the government's action.

The dividing line between governmental promotion and governmental participation is, of course, not always clear-cut. In some sit-

uations, the governmental participation is less direct, in that the expression involved may filter through some agency or institution having some private features. Thus the Corporation for Public Broadcasting is composed of private citizens appointed and funded by the government. Moreover, certain types of governmental participation, such as public education and public libraries, though operated entirely by government employees, are designed in some degree to promote expression on the part of others. Nevertheless, the distinction is a useful one. It focuses attention on the impact of the governmental intervention upon the system of freedom of expression and encourages the development of more precise rules related to the actual operation of the system.

B. The Dissenting Taxpayer Analysis

There have been suggestions that controls over governmental promotion of, or participation in, the system of freedom of expression should be formulated in terms of the interests of the dissenting taxpayer. The argument is that governmental intervention for affirmative ends always requires expenditure of public funds and that a taxpayer should not be compelled to contribute to the support of expression with which that taxpayer disagrees. It is noted that the Supreme Court has employed an analysis of this kind in protecting the rights of members of private associations. Thus the Court has held that where there is any governmental compulsion to join a labor union, as in the case of a union shop sanctioned by statute, the dues of such members cannot be used to promote political or ideological causes that those members oppose.[5]

The dissenting taxpayer approach, however, is not useful where governmental, as distinct from private, action is concerned. If applied generally, it would virtually eliminate all governmental expression or support of private expression. Countless objecting taxpayers would always exist, and the administrative problems would be insuperable. Nor is the analogy between the government and a private association sound. The government is an association of all citizens, for manifold objectives, and all members must pay the cost of any legitimate activity. On the other hand, the powers of the government to compel membership in a private association and

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[5] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

to delegate its powers of taxation to that association are very limited. The individual is forced into a relationship that is far more immediate, personal, and potentially offensive to one's individuality than is the relationship of a dissenting citizen to the state. Hence the right of association must be protected more vigorously than the right of a citizen to be free from unwelcome taxation.

In short, so far as the general taxpayer is concerned, there is no basis for complaint so long as the government is operating within the bounds of its authority. The system of freedom of expression does not demand that the taxpayer have any greater control over public funds expended for expression than over public funds expended for other operations of the government.[6]

C. *The Establishment of Religion Analogy*

It has also been suggested that, just as the first amendment prohibits "an establishment of religion," it should also be construed to contain an implied prohibition against "political establishment." Under this doctrine, the government would be prohibited from advocating "political" viewpoints or extending unequal assistance to private dissemination of political ideas.[7]

Here again, the approach does not appear promising. The analogy to the establishment of religion clause does not hold up. That provision clearly excludes governmental expression, or governmental support of private expression, that aids or burdens religion or any form of religion. A reasonably clear-cut area of expression is singled out and specifically forbidden. But it cannot be said that the first amendment similarly forbids all political expression. On the contrary, the government could not operate under any such prohibition. Hence the problem remains of separating out certain forms of political expression, as well as nonpolitical expression, which are outlawed. The criteria for doing that cannot be found in the establishment of religion clause, which grew out of very different considerations and has very different foundations.

In *Buckley v. Valeo,* the Supreme Court, upholding the funding

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[6] For discussion of the dissenting taxpayer analysis, see Shiffrin, *supra* note 3, at 588-95; Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns,* 93 HARV. L. REV. 535, 549 (1980). *See also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 588-91 (1978).

[7] The proposition is developed in Kamenshine, *supra* note 3.

of presidential candidates, summarily rejected the establishment of religion analogy, saying "the analogy is patently inapplicable to our issue here."[8]

D. The Preferred-Position Principle

In dealing with problems of negative interference by the government with freedom of expression, the fundamental principle of constitutional adjudication is that the first amendment gives expression, as distinct from other conduct, a preferred position. This means that, as a general proposition, individual and societal interests in freedom of expression must be preferred over other individual and societal interests. In short, such other interests may be protected or advanced only by some means apart from control over expression. The preferred-position principle, however, plays a much diminished role when the affirmative side of the first amendment is involved. In such a context, the conflicts of interest are mostly within the system, not between first amendment interests and interests outside the system. In this situation, there is no issue of weighing first amendment interests against other interests.

Rather, the basic principle underlying the formulation of most doctrine dealing with the affirmative aspects of the first amendment is one of improving the performance of the system of freedom of expression. The goal is to maximize the values that the system is designed to advance. The critical importance of the system in a democratic society still remains, but the accommodation of first amendment interests largely takes place within the confines of the system. In some respects, this rationale may be more readily applied than many of those currently advanced for reconciling the system of freedom of expression with other social goals.

E. The Equal Protection Element

The concept of equal protection, whether emanating from the equal protection clause or from an equal protection element in the first amendment guarantee, plays a key role in providing affirmative support for the system of freedom of expression. Basically, equal protection requirements demand fairness as between relevant interests in the dispensation of governmental support. Be-

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[8] Buckley v. Valeo, 424 U.S. 1, 92-93 (1976).

cause orthodox expression, such as an American Legion parade, frequently requests and customarily receives governmental encouragement, the equal protection element assures that unorthodox expression of a similar form, such as a demonstration to protest the draft, receives similar treatment. In other words, the price of not promoting unorthodox speech would be not supporting orthodox speech. Thus, a guarantee that some diversity will be achieved is built into the system.

On the other hand, equal protection doctrine may not be quite as sharp an instrument in controlling affirmative intervention by government as in controlling negative action. In cases of governmental promotion, the facilities or funds available are nearly always limited, and thus the process of selection inherently involves the exercise of greater discretion than in situations where governmental prohibition of *any* communication is outlawed. Where the government participates in the system, its power to select the areas and general character of the expression necessarily must be extensive. Hence some modification in the application of equal protection doctrine may be necessary in creating appropriate rules.

F. The Level of Governmental Intervention and the Macro-Micro Distinction

One key principle in affirmative first amendment cases involves a distinction based upon the level of governmental intervention. Broadly speaking, the government may support expression by selecting a general area, or a broad subject-matter, as the object of its intervention, but may not control expression within that area. A well-known example of this kind of control occurs in governmental regulation of radio and television: the government may require a broadcast licensee to devote a certain percentage of broadcast time to public interest programs but may not censor or otherwise control the content of any particular program. The concept is also found in the structure of a university: the administration makes broad decisions with respect to the courses that shall be taught and their basic subject matter, but the individual faculty member is free to control the presentation in a particular classroom.[9]

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[9] Governmental controls over broadcast programming, but not over a particular program, were upheld in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The macro-micro structure of a university is embodied in the principles of academic freedom.

This distinction between macro-intervention and micro-intervention is, of course, difficult to draw at times. Moreover, the power to control the macro area can be manipulated to effect control of the micro area. Yet the concept is essential in developing legal doctrine that permits governmental support of expression but forbids governmental abuse of power.

Some sort of macro-micro distinction is inherent in the very notion of affirmative governmental support for the system of freedom of expression. In terms of negative interference, the government must keep its hands off *all* expression, regardless of the area or subject matter. When, however, the government undertakes to encourage expression, it must choose some portion of the system to support. In the exercise of this power, the negative commands of the first amendment, including the equal protection element, must be qualified, but the requirements of the system for freedom and diversity must be reasserted at the earliest possible point. The drawing of this macro-micro line thus becomes a crucial feature of affirmative first amendment doctrine.

G. Balanced Presentation and Professional Judgment

Another concept that is crucial in fixing the constitutional boundaries of affirmative governmental intervention in the system of freedom of expression is the idea of a balanced presentation. The doctrine derives from two basic features of our democractic society. First, broadly speaking, it is the obligation of the government to represent all members of the community, not just one or more particular groups. Second, the values of the system of freedom of expression, to a large degree, lie in promoting diversity, in the full and free exchange of diverse ideas, experiences, and information. Hence governmental intervention for affirmative purposes must be directed toward expanding, not contracting, the range of fact and opinion available to the community. This obligation can be expressed as the requirement of making or supporting a balanced presentation.

The concept of a balanced presentation also implies some standards for determining what forms of expression come within the universe of discourse. Questions of relevancy, competency, rationality, and the like cannot be totally excluded. Here the only solution would appear to be the application of professional judgment, that is, the standards utilized by the prevailing scholarly, scientific,

literary, artistic, or other professional establishment. Such reliance upon establishment standards has obvious drawbacks. The establishment, academic or otherwise, frequently has been shortsighted, averse to new ideas, or blind to potential developments. Nevertheless, by training and position, it is likely to possess a certain degree of tolerance and thereby be willing to accept somewhat greater diversity than single-interest groups. In any event, there may be no other structure upon which to rely.

H. Right-to-Know Theory

The right to know, the reverse side of the right to communicate, plays an important role in formulating doctrine concerned with affirmative governmental intervention in the system of freedom of expression. This is true in part because there are many situations where the focus of attention must be upon the rights of readers, listeners, and viewers rather than upon the rights of speakers. Thus, where governmental intervention is justified on grounds of scarcity of physical facilities for communication, guiding principles are found in consideration of the interests of the audience rather than the interests of those wishing to communicate. Likewise, restrictions on governmental participation in the system are derived largely from the impact on those who receive the communication, not on persons seeking to engage in competing communication. Indeed, frequently only the recipients will have standing to challenge the government's action.

In addition, an important aspect of governmental promotion of the system of freedom of expression consists of the right to obtain infromation from the government. Insofar as there is a constitutional obligation for the government to furnish such information, it rests primarily upon the right-to-know doctrine.

I. Institutional Structures to Protect the System

Because broad negative prohibitions are not available to safeguard the system of freedom of expression when the government acts affirmatively to promote the system or to participate in the system itself, it becomes particularly important to find institutional devices capable of modifying the impact of governmental intervention. Institutional measures can be devised, for instance, to isolate administrators of the governmental intervention from partisan political forces. Structural forms also can be framed to utilize

professional training, standards, and discipline as a way of obtaining greater objectivity. Likewise, the principles of academic freedom can be introduced into the system through the use of various structural devices. Other methods can be found for building a certain amount of autonomy and diversity into the machinery employed for governmental intervention.

It is not clear to what extent the use of ameliorating structural devices may be required as a matter of constitutional principle, enforceable by the courts. There is substantial precedent, however, to suggest that the courts may go a considerable distance in this direction. Thus the Supreme Court has held that where a prior restraint of expression is allowed — an especially dangerous form of control — the government must provide strict procedural guarantees, including rapid judicial review. The Court also frequently has used the vagueness and overbreadth doctrines as a procedural device to compel the government to pay attention more seriously to the impact of its regulations upon first amendment rights. These procedural elements of first amendment doctrine have been invoked in situations involving negative interference by the government with freedom of expression. There is no reason why they could not be similarly employed in affirmative promotion programs that pose special dangers to the system of freedom of expression. Even if precise rules could not be framed in constitutional terms, the possibility of designing institutional protections certainly would be an important factor in any judicial approach to maintaining the integrity of the system.[10]

J. Limitations of the Doctrinal Resources

The doctrinal resources available for dealing with the constitutional problem arising out of the affirmative application of the first amendment, at least at this stage of development, clearly have serious limitations. Many of the applicable legal principles can be stated only in very loose form; they cannot match in precision the doctrines available for protecting the system of freedom of expres-

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[10] Cases requiring especially strict procedures where prior restraint is sanctioned include Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Freedman v. Maryland, 380 U.S. 51 (1965). For use of the vagueness and overbreadth doctrines in the first amendment area, see Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Broadrick v. Oklahoma, 413 U.S. 601 (1973). *See also* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970).

sion against negative interference by government. For this reason, and also because of practical considerations, the nature of judicial review in the affirmative area would be different from that in the negative area. The courts cannot be expected to exercise detailed supervision over the countless decisions made by the government in the administration of affirmative programs or in its own participation in the system. In many areas, courts would be confined to intervention only in egregious cases. They would retain a crucial function, however, in keeping alive the basic principles at stake and in gradually moving toward a more refined body of constitutional law.

II. Governmental Promotion of the System

Governmental promotion of the system of freedom of expression is widespread and takes many forms. The first amendment imposes corresponding controls. In some situations, governmental support of private expression is mandatory, that is to say, constitutionally required. In other situations, the government voluntarily creates the mechanism for support, and constitutional conditions attach. A common form of governmental promotion, the granting of funds for private expression, raises special problems. Where facilities for communication are scarce, or the government creates a monopoly, further issues arise. In addition, the right to know has an impact in some areas.

The legal rules to govern these varying situations must be based upon the functions served by the system of freedom of expression and the manner of its operation. It is possible here to discuss only a few of the major issues.

A. The Constitutional Obligation of the Government to Make Facilities for Expression Available

The effective operation of the system of freedom of expression imposes, in some situations, an obligation on the government to make facilities for expression available. The starting point for this obligation is the right of the public to use the streets, parks, and open places for meetings, parades, demonstrations, canvassing, and similar forms of expression. Initially formulated in 1939 in *Hague v. C.I.O.*, the rule is now well-settled. The rationale for the rule has been couched in historical terms, the right being said to have existed from "time out of mind." Essentially, however, the right de-

rives from the needs of the system of freedom of expression. The system demands access to an audience, and places where people congregate in public are natural locations for those seeking to reach potential listeners.[11]

The precise nature of the government's obligation should be noted. Clearly, the right to use the streets, parks, and open places may at times conflict with other uses of these facilities, such as their use for traffic, relaxation, and the like. But the right of expression is not made subordinate to other uses. Rather, the rights coexist, on a roughly equal plane, and the principles for resolving conflicts is not subordination but accommodation of the various interests involved. Time, place, and manner controls are valid only within this context, that is, in resolving issues of physical conflict. Moreover, the principle is firm that the government may exercise no control over the content of the expression and may not discriminate between users on the basis of content.[12]

The mandatory right of access to facilities extends, certainly in theory, beyond the area of streets, parks, and open places. Public facilities that serve the same purposes, are similarly suitable, and are equally necessary to the system of freedom of expression are impressed with the same constitutional obligation. Thus, public buildings appropriate for indoor meetings, such as civic centers, should be governed by the same rules. The Supreme Court has never gone this far and the lower courts are likewise hesitant. Actually, the issue seldom has been pressed. The kind of facility in question is usually available for orthodox expression, such as use by patriotic organizations, and the nondiscrimination rule thus opens the facility to all. The scope of the mandatory obligation principle, however, is potentially extensive.

Other facilities that provide an opportunity for reaching an audience, or for otherwise engaging in expression, also must be made available under current constitutional doctrine. These facilities are of such a nature, however, that the right of expression is subject to

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[11] Hague v. C.I.O., 307 U.S. 496 (1939). *See* Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Hudgens v. NLRB, 424 U.S. 507 (1976).

[12] For cases in which use of the streets involving physical interference with other interests, such as the operation of sound trucks or disruption of a school, has been subject to time, place, and manner regulation, see Grayned v. City of Rockford, 408 U.S. 104 (1972); Kovacs v. Cooper, 336 U.S. 77 (1949). For an unequivocal statement of the rule against regulation of content, see Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

a strict rule of compatibility. Instead of applying the principle of accommodation for all interests, the primary use of the facility is fully protected and the opportunity for expression is conferred only where it causes no interference with, or disruption of, the primary use. Thus the right of expression exists but only within interstices not occupied by the primary function.

The Supreme Court has not been entirely consistent in recognizing this qualified right of access to public areas. In *Brown v. Louisiana,* the Court allowed a silent demonstration, protesting discrimination, in a public library. In *Tinker v. Des Moines School District,* it upheld the right of students to express opposition to the Vietnam War by wearing black armbands. But, in *Adderley v. Florida,* a majority of the Court refused to allow a peaceful, nondisruptive demonstration on the grounds of the county jail. Also, in *United States Postal Service v. Council of Greenburgh Civic Associations,* a majority of the Court held that mailboxes used in the postal system did not constitute a limited public forum open to access by civic associations wishing to distribute circulars by placing them in the boxes. Indeed, the prevailing opinion, written by Justice Rehnquist, came close to asserting that no public forum would be recognized beyond those that had been considered traditionally to be such. Despite this wavering on the part of the Court, the constitutional right to use public facilities on a compatible basis seems well-established. The right, although qualified, is of great importance to the system of freedom of expression. It forces the relevant community to listen to the expression of grievances, rather than allowing them to be swept under the rug.[13]

Of course, some public areas or facilities are totally foreclosed to use by outsiders for purposes of expression. One obvious example was noted by Justice Douglas in *Adderley* when he observed that no one "would suggest that the Senate gallery is the proper place for a vociferous protest rally." Nor would one suggest that the pages of a government report, newsletter, or other publication be open to nongovernmental expression. In such cases, the compatibility principle eliminates any obligation on the part of the govern-

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[13] United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 101 S. Ct. 2676 (1981); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Adderley v. Florida, 385 U.S. 39 (1966); Brown v. Louisiana, 383 U.S. 131 (1966). *See also* Healey v. James, 408 U.S. 169 (1972). *Cf.* Grayned v. City of Rockford, 408 U.S. 104 (1972).

ment to grant access to the forum. There is no way that nongovernmental expression can fit into such a facility without destroying entirely the principal function of the facility.[14]

Similarly, governmental facilities of a type that are readily available for nongovernmental expression need not be shared with private persons or groups. Thus, the printing presses of the Government Printing Office may be reserved exclusively for government publications. On the other hand, a powerful argument can be made that governmental monopoly of the airwaves for radio and television broadcasting, to the exclusion of private communicators, would run counter to the affirmative obligation of the government under the first amendment. Perhaps even the maintenance of the postal service is sufficiently crucial to the system of freedom of expression that there is a constitutional obligation on the part of the government to keep it in operation.

Access to facilities for communication is so crucial to the system of freedom of expression that the right extends beyond governmental to certain privately owned facilities that can be considered quasi-public in nature. Obviously, any general requirement that private owners make their facilities available to other persons or groups would curtail drastically the freedom of the owners to communicate, would entail an intolerable degree of governmental regulation, and soon would destroy the entire system of freedom of expression. Thus, as is clear from *Miami Herald Publishing Co. v. Tornillo,* there is no obligation on the part of a newspaper to accord any right to reply to a candidate for election who has been attacked in its columns; indeed, action by a state legislature to compel such access was held to violate the first amendment. On the other hand, if the government allocates scarce facilities or grants a monopoly to private owners, a different issue is presented. This question is discussed at a later point. Likewise, where a private owner takes over traditional governmental functions and a right of access for purposes of expression is compatible with the conduct of the enterprise, there are persuasive grounds for holding the private owner to the same obligations as the government.[15]

The Supreme Court initially made a promising entry into this

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[14] Adderley v. Florida, 385 U.S. 39, 54 (1966). *See generally* Note, *Access to State-Owned Communications Media — The Public Forum Doctrine,* 26 U.C.L.A. L. REV. 1410 (1979).

[15] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

area but recently has withdrawn substantially. As early as 1946, the Court ruled in *Marsh v. Alabama* that the owners of a company town were obligated under the first amendment to allow use of the streets and other company property for the exercise of first amendment rights to the same extent as if the premises were publicly owned. In 1968, in *Amalgamated Food Employees Union v. Logan Valley Plaza,* the Court reached a similar conclusion with respect to privately owned shopping centers, holding that the shopping center was "the functional equivalent" of the business district involved in *Marsh.* In 1974, in *Lloyd Corp. v. Tanner,* the Court drastically cut back on *Logan Valley,* and in 1976, in *Hudgens v. NLRB, Logan Valley* was overruled. *Marsh v. Alabama* still stands, but in the case of shopping centers, malls, and the like, the Court has determined that property rights outweigh first amendment rights.[16]

The refusal of the Supreme Court to extend the *Marsh* doctrine to new forms of quasi-public property not used for communication purposes is unfortunate. It may well be that, where such private property is concerned, the rule of compatibility rather than accommodation should be applied. In other words, first amendment rights should be exercised in subordination to the primary function of the facility involved. Such an approach would give the property owner all the protection needed. Indeed, in *PruneYard Shopping Center v. Robins,* the Court conceded that no constitutional rights of the property owner were invaded by a ruling of the California Supreme Court requiring a shopping center to be open for the exercise of first amendment rights. The damage done to the system of freedom of expression by precluding the use of quasi-public facilities, on the other hand, is substantial.[17]

Despite the Supreme Court's current position on quasi-public facilities, these rules and precedents imposing an affirmative obligation on government to make certain facilities available for expression constitute an important feature of the system of freedom of expression. They are of particular value, of course, in providing a forum for unorthodox and unpopular expression, thereby partially

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[16] Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 318 (1968); Marsh v. Alabama, 326 U.S. 501 (1946).

[17] PruneYard Shopping Center v. Robins, 447 U.S. 74, 85-88 (1980).

offsetting domination of the mass media by more conventional points of view. They also furnish the basic principles for maintaining a more effective system of free expression as the government's role in the life of the nation expands.

B. *Voluntary Provision by the Government of Facilities for Expression*

More and more frequently, the government has undertaken voluntarily to establish facilities intended to be used by private individuals or groups for purposes of expression. These facilities may be designed primarily for such use, as in the case of a civic center, or may be designed for other purposes but made available also for private use, as in the case of a school building. Because the government is acting voluntarily, no issue of a mandatory obligation is present. Nevertheless, the government is not free of constitutional restraints.

It has long been recognized that differentiation between users, if clearly based upon the content of the specific ideas expressed, violates the first amendment. Thus, in *Hannegan v. Esquire,* decided in 1946, the Supreme Court held that denial of second-class mailing privileges to *Esquire* magazine, on the ground that the magazine "did not contribute to the public good and the public welfare," infringed first amendment rights. Similarly, there is no doubt that refusal to allow use of facilities because of race, sex, or similar classifications would not meet constitutional standards. Beyond this point, however, the Supreme Court has not developed any clear theory.[18]

The issues have been posed in two Supreme Court decisions. In *Lehman v. City of Shaker Heights,* a municipal transit authority made space in its cars available for commercial advertising but refused to accept political or public-issue advertising. The Supreme Court upheld the practice. The plurality opinion noted that the city argued that revenue from commercial advertising "could be jeopardized," that passengers "would be subjected to a blare of political propaganda," and that there "could be lurking doubts about

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[18] Hannegan v. Esquire, 327 U.S. 146 (1946). For interesting lower court decisions of a similar character, see Bonner-Lyons v. School Comm., 480 F.2d 442 (1st Cir. 1973); Toward a Gayer Bicentennial Comm. v. Rhode Island Bicentennial Foundation, 417 F. Supp. 632 (D.R.I. 1976).

favoritism, and sticky administrative problems." These were, the plurality opinion declared, "reasonable legislative objectives," and hence the refusal to carry political and public-issue advertising "does not rise to the dignity of a First Amendment violation." Four dissenting Justices took the position that the city, having opened a forum for communication, was barred from "discrimination based *solely* upon subject matter or content," except "where the Government makes a clear showing that its action was taken pursuant to neutral 'time, place and manner' regulations."[19]

Neither analysis of the problem is satisfactory. The plurality opinion allows the government to differentiate solely on the basis of some "reasonable objective," a position that gives virtually no weight to first amendment considerations. The dissenters fail to recognize the complications arising when the government is affirmatively promoting expression by providing facilities for a selected area of expression. They argue that, once the "forum" has been opened, the government may not regulate on the basis of content. The issue before the Court, however, was what the scope of the forum was. This issue is not resolved through "time, place, and manner" theory.

Southeastern Promotions, Ltd. v. Conrad raised the question whether a municipal theater in Chattanooga could refuse to allow presentation of the rock musical "Hair" on the ground that it would not be " 'in the best interests of the community.' " The standard by which the right of access to the theater was to be determined is not made clear in the record. There is some indication that the municipality intended to limit use of the theater to productions "suitable for exhibition to all citizens of the city, adults and children alike," a standard that "Hair" could not meet. A majority of the Court held that the action of the municipal authorities constituted a prior restraint and that the procedures followed had not met the constitutional requirements for imposing a prior restraint. Three Justices, in dissent, contended that the city could limit use of the theater to performances suitable "for the whole family." They did not expand upon the reasons for drawing the

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[19] Lehman v. City of Shaker Heights, 418 U.S. 298, 304, 315, 317 (1974) (emphasis added). Justice Douglas, concurring on the ground that any "forced exposure" to advertising violated rights of privacy, cast the fifth vote to uphold the city. *Id.* at 308 (Douglas, J., concurring).

line at this point, except that Justice Rehnquist observed that such a policy could not be "described as arbitrary or unreasonable." Thus the Court again did not confront the underlying issues.[20]

The problem involved is one of drawing the macro-micro distinction. At the macro level of intervention, the government is entitled to determine the general area of expression that it undertakes to promote; at the micro level, it must not control the content of the expression. To state the problem in this way is by no means to solve it, but it does focus attention upon the crucial factors that must be taken into consideration. It leads to a search for a solution that least offends and best promotes the system of freedom of expression.

In *Lehman* the line between commercial speech and political or public-issue speech, so far as furnishing advertising space is concerned, is a narrow one. Moreover, if either form of expression is to be given preference, it would not be commercial speech which, until recently, was not even considered to be within the system of freedom of expression. In addition, the reasons advanced for excluding political and public-interest speech from the forum do not carry much weight in terms of the function of the system. The financial costs of maintaining first amendment rights is not ordinarily a factor to be taken into account. Aside from the right of privacy, which the majority did not invoke, the system does not contemplate that citizens be spared "the blare of political propaganda." Neither the "lurking doubts about favoritism" nor "sticky administrative problems" constitute reasons for curtailment of first amendment rights. Hence the refusal to accept political or public-interest advertising is not a valid macro distinction but an invalid micro distinction.

Southeastern Promotions presents a different picture. In the system of freedom of expression, the gap between the rights of children and the rights of adults is a broad one. The system assumes a degree of maturity on the part of the participants that children do not possess. The Supreme Court consistently has recognized that important differences do exist. One would be hard put to say, therefore, that the city of Chattanooga could not maintain a facility devoted to theatrical production suitable for children and, in that sense, "for the whole family." Such a selection would qual-

[20] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 548, 569, 572 (1975).

ify as a macro distinction and would be valid. It is very doubtful, however, that the city of Chattanooga intended or practiced such a distinction. If the design or actuality did not conform to the macro distinction, then the refusal to allow the presentation of "Hair" (apart from a valid finding of obscenity) constituted a micro distinction based upon content and was invalid.[21]

The voluntary furnishing of facilities by the government is likely to grow in importance as economic and technical developments make access to the media of communication more difficult for individuals or groups without substantial financial resources. This growth of governmental promotion of the system brings with it serious dangers. Yet they can be kept to a minimum by stringent application of the macro-micro distinction. Once this issue has been resolved, the principles for safeguarding the system become relatively precise. No difference on the basis of specific content is permissible.

Here again, we find certain built-in protections for the system. The pressures for government to supply facilities for orthodox speech carry with them the requirement of similar support, within the macro area, for unorthodox speech.

C. Government Subsidies

Governmental promotion of expression frequently takes the form of a government subsidy. At the present time, governmental funding of private expression is widespread, ranging from financing of presidential candidates to support of scientific study and research to provision for cultural activities. The volume of expression dependent upon governmental resources is likely to increase as time goes on. Plainly, this dependency raises serious questions for the system of freedom of expression.

The controlling principles are the same as for other forms of voluntary governmental support for the system. The government may select the general area for subsidization — that is, make macro distinctions — but it may not dictate the content of a specific com-

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[21] For cases in which the Supreme Court has recognized the difference between first amendment rights of children and adults, see Erznoznik v. City of Jacksonville, 422 U.S. 205, 212-13 (1975); Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944). *See also* Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321 (1979).

munication — that is, make micro distinctions. Both judgments are likely to raise more difficult problems, however, when the government is supplying funds than when it is simply furnishing physical facilities for communication.[22]

In the only decision where it squarely faced these issues, the Supreme Court upheld the basic right of the government to subsidize expression but failed to deal adequately with some important macro problems in defining the area selected for governmental support. *Buckley v. Valeo* involved a challenge to public financing of presidential election campaigns. The legislation established a fund, derived from general revenues, to be used for financing party nominating conventions, general election campaigns, and primary campaigns. The amount of money made available for nominating conventions and the general election campaign varied as between "major" parties, "minor" parties, and "new" parties. Major parties, defined as those whose candidate obtained twenty-five percent or more of the popular vote in the most recent election, received substantial fixed amounts. Minor parties, defined as those whose candidate obtained at least five percent but less than twenty-five percent in the last election, received a percentage of the major party entitlement based on the proportion of their votes to the average of the major parties. New parties, those receiving less than five percent of the vote in the last election, as well as newly created parties, received no financing, except that a new party receiving five percent or more in the ensuing election could obtain post-election payments under the same formula as minority parties. Funding for primary election campaigns was made available for candidates who raised at least $5000, counting only the first $250 from each person, in each of twenty states. These funds were calculated on a matching basis, allowing each candidate an amount equal to the private contributions received, up to $250 per contributor. No comparable funds were available for candidates who did not run in party primaries but attempted to get on the ballot through petition or by other means.[23]

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[22] We are not dealing here with the situation where the government spends public funds to purchase materials according to its own specifications, as where it contracts with a consulting firm to purchase a documentary or a report on a particular issue. Such use of government funds involves governmental participation in the system of expression and raises issues considered at a subsequent point.

[23] Buckley v. Valeo, 424 U.S. 1 (1976).

The Supreme Court had no trouble in sustaining the basic constitutionality of the subsidy scheme. It summarily ruled that the expenditures were authorized by the general welfare clause. After rejecting arguments based on analogy to the religion clauses of the first amendment, the Court disposed of the contention that the legislation violated the free speech clauses of the first amendment in two sentences:

> [The legislation] is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus [it] . . . furthers, not abridges, pertinent First Amendment values.[24]

Inasmuch as partisan political activity is a highly sensitive area so far as governmental intervention is concerned, the approval of public funding in this area would seem to imply a broad acceptance by the Supreme Court of any public funding of expression that could be found to promote the system of freedom of expression. In this respect, the decision in *Buckley v. Valeo* became a major constitutional landmark.

On the other hand, the selection of an area for subsidization — the macro level of governmental intervention — presented more difficult issues. The subsidy program excluded any political party that obtained less than five percent of the vote in the most recent election, except for the possibility of post-election funding. It also refused funds at the primary stage to parties not holding conventions and to candidates not participating in primary elections. The result was that the area lines were drawn greatly to the disadvantage of minority parties and independent candidates. On the face of it, the selection of the area for promotion would not seem to conform to the requirements of the first amendment.

The Supreme Court treated this issue purely as one involving a nonsuspect classification under the equal protection clause. The fact that the government could show some "reasonable" grounds for the distinction was held sufficient. At the same time, the Court drastically underplayed the damage done to the system of freedom of expression by excluding minority parties and partially excluding

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[24] *Id.* at 92-93.

independent candidates. It dismissed the harm done to minority interests as "speculative" and insufficient to "overcome the force of the governmental interests against use of public money to foster frivolous candidacies, create a system of splintered parties, and encourage unrestrained factionalism."[25]

The response of the Supreme Court is not adequate to deal with the delicate problems raised by governmental subsidization of expression. The reasonable classification standard of the equal protection clause assures that virtually any decision made by the government as to the area of support will be upheld; some substantial reason usually can be found for any distinction. The government must have leeway in making the macro judgment involved but, because first amendment rights are at stake, the courts should utilize a more rigorous test, one that takes into full account the significance of the line drawn for the system of freedom of expression.

Under the subsidy scheme adopted by Congress, all new and minority parties were totally excluded. Such parties traditionally have played a significant role in the system of freedom of expression, not by winning elections but by presenting alternative policies to the electorate. The same is true of independent candidates. Very few of such parties or candidates receive five percent of the vote. Moreover, government funds, whether at the level set in the legislation before the Court or at higher levels sanctioned by the decision, have a major impact upon all participants in the election — parties, candidates, and the electorate. It would seem to follow that complete elimination of support for all minority parties and independent candidates cannot be reconciled with a healthy system of freedom of expression. It is not that the system necessarily must provide all participants equal or proportionate facilities for communication. The system does require, however, that there be adequate opportunity for minority viewpoints to be heard — to obtain a foothold from which to grow, if and when accepted. The governmental promotion embodied in the legislation approved in *Buckley v. Valeo* does not provide this opportunity.

Distinctions made at the micro level in connection with government subsidies are likely to raise even more difficult issues. The problem is that, in the case of promotion by financial subsidy, the government is not simply providing an instrumentality for expres-

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[25] *Id.* at 101.

sion and inviting all users who fit within the macro qualifications to utilize it. In that situation, decisions as to who is entitled to take advantage of the governmental promotion can be determined by relatively objective rules. In the subsidy situation, unless there are unlimited funds or limited recipients, the government is affirmatively selecting the grantee and thereby focusing on the expression contemplated by that recipient. Hence the government is drawn into the process of making detailed judgments about specific content. Thus the grant-making machinery usually requires the government to scrutinize concrete proposals with a view to determining the competency of the grantee, the validity of the ideas expressed, the effectiveness of the techniques to be used, and even the quality of taste exhibited. These are all highly subjective judgments of the very kind that government is not supposed to make at the micro level.

How, then, is it possible to keep the government within the bounds required by the system of freedom of expression? No easy answer is presently available, but certain general considerations can be stated.

In the first place, certain areas should be closed to promotion by government subsidy or open only to the kinds of subsidy that can be controlled by reasonably objective rules. There are, in other words, some forms of government subsidy that are simply incompatible with the system of freedom of expression and therefore not constitutionally permissible. One such area is religion, although that result would be determined by the religion clauses of the first amendment without regard to the free expression clauses. Another area might be partisan politics, except where the class of recipients is determined objectively, such as *all* candidates in an election, and the funds are subject to no control over content. Other areas might be added as experience grows.

Beyond this, there may be circumstances where the government, although entitled to make distinctions at the micro level on the basis of content, has unduly narrowed the range of ideas for which the subsidy is available and thereby violated the principle of balanced presentation. Issues of this nature were presented in *Advocates for the Arts v. Thomson,* a case the Supreme Court declined to review.[26]

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[26] Advocates for the Arts v. Thomson, 532 F.2d 792 (1st Cir. 1976), *cert. denied,* 429 U.S.

In *Thomson,* the New Hampshire Commission on the Arts had been set up to administer grants-in-aid to individuals and groups whose artistic endeavors had "substantial artistic and cultural significance." Grants over $500 had to be submitted to the Governor and Executive Council of New Hampshire for final approval. Under this program, the Commission made a grant to the publishers of *Granite,* a journal of poetry, fiction, translations, and letters. When the grant came up for renewal, the Commission voted *Granite* a second award of $750. At a meeting of the Governor and Council, the grant was approved. Immediately thereafter, the Governor and members of the Council were shown a poem that had been printed in *Granite,* entitled "Castrating the Cat." The Governor and Council then reconvened the meeting and reversed their decision. The Governor characterized the poem as "an item of filth," and the letter of notification to the Commission explained the rejection upon the ground that *Granite* had published "obscenities." There was no claim, however, that the poem was legally obscene.[27]

The publishers of *Granite* and others brought suit against the

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894 (1976).

[27] 532 F.2d at 793 & n.2. The poem reads as follows:

CASTRATING THE CAT
—It is better to marry than to burn—
St. Paul

you may keep both balls preserved in a jar
on the mantle piece

he will be tamer more loving
to his keepers

he will not stray after cat cunt
and his urine will not smell
should he spray the mattress

—a simple swipe of scapel [sic]
along the scrotum
and it is done—

do not let the image of your own hulk
drawn down a bannister of razor blades
finger the inside of your sac

think of him as a tenor in the choir

—and it is done
the nurse washes her hands of him
yes she smiles we clipped his wings—

Governor and the Council alleging that the grant had been denied on the basis of a "personal adverse reaction" and that this constituted a denial of their first amendment rights. The district court dismissed the action and the Court of Appeals for the First Circuit affirmed. The court of appeals held that the public funding of the arts was constitutional, citing *Buckley v. Valeo,* but declined to review the government's decision to reject an application for a grant. "The decision to withhold support," the court said, "is unavoidably based in some part on the 'subject matter' or 'content' of expression, for the very assumption of public funding of the arts is that the decision will be made according to the literary or artistic worth of competing applicants." Hence, it concluded, "the standard of artistic merit . . . and guidelines elaborating it do not lend themselves to translation into first amendment standards." The court did say, however, that "a claim of discrimination would be another matter": "distribution of arts grants on the basis of such extrinsic considerations as the applicants' political views, associations, or activities would violate the equal protection clause, if not the first amendment, by penalizing the exercise of those freedoms."[28]

The dilemma posed by *Thomson* is not readily resolved. Indeed, the problem is not limited to expression on cultural matters; it extends to government subsidy programs concerned with scientific, economic, social, political, and other areas of expression. One cannot take the position that there are no constitutional limits; the possibilities of abuse are too obvious. Nor can one expect the courts to exercise a detailed and refined supervision over the award of government grants. Yet, in egregious cases, the courts have an obligation to act. Their judgment must be based upon the proposition that government subsidization of a single, narrow set of ideas does not promote the system of freedom of expression. A minimum degree of diversity is essential to the health of the system. The judgment as to when the boundaries have been drawn too narrowly

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as above the errors flesh is heir to
like St. Simeon on his desert pole
unwashed in rags
who picked up each worm that fell
from his arm bid it eat and put it back
Michael McMahon

[28] 532 F.2d at 794, 795, 797-98 & n.8.

must rest upon existing professional standards and the general "state of the art." The courts can draw guidance in such situations from an analogy to the academy. The principles of academic freedom require some degree of balanced presentation, artistic freedom for the individual recipient, and judgment by persons competent to appraise. As vague as these guidelines are, they are better than no limitations.

Applying such principles, it would appear that Governor Thomson and the Executive Council were unwilling to allow the recipients of the fund sufficient first amendment space. Theirs was not a professional judgment but, as the circumstances showed, a hasty, personal one. The government of New Hampshire had no obligation to award grants for "artistic and cultural" expression, but when it decided to do so, it was bound to accord the recipients a wider range of ideas and tastes than was accorded *Granite.*

Vindication of first amendment rights, even to the limited degree here proposed, raises difficult problems of implementation. Nevertheless, it is important that the principles be establishd, that both the government and the public comprehend what the Constitution requires, and that the legal standard be elaborated and refined through the process of application in concrete cases.

In the final analysis, protection against abuses in programs for government subsidization of expression probably will be found mainly in institutional devices for assuring that the goals of the system of freedom of expression are realized. As noted above, one such device is the delegation of power to make decisions at the micro level to an independent group of persons, distinguished in their field and relatively isolated from partisan political forces or single-issue interests. Thus, as Professor Shiffrin has pointed out, the key defect of the program involved in *Thomson* was that the Governor and Executive Council of the state, all purely political figures, had the power to set aside the decisions of the Commission on the Arts.[29]

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[29] Shiffrin, *supra* note 3, at 646. For further discussion of institutional arrangements designed to protect the system, see Canby, *supra* note 3; Kamenshine, *supra* note 3; Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions,* 37 OHIO ST. L.J. 247, 257-59 (1976); Shiffrin, *supra* note 3; Yudof, *supra* note 3.

D. *Scarcity of Physical Facilities and Government-Created Monopoly of Facilities*

Governmental promotion of the system of freedom of expression may take place when a scarcity of physical facilities for communication exists or when the government itself has created a monopoly of such facilities. The need for governmental intervention becomes acute when the physical scarcity occurs in a major medium of communication, such as radio or television. A hands-off position by the government in such a situation would result in grave distortion of the system, chaos in the system, or both. A similar distortion occurs, on a smaller scale, when the government awards a monopoly of certain facilities to a single communicator.

The problems occasioned by physical scarcity or governmental monopoly must be distinguished from those caused by economic scarcity. The system of freedom of expression is by definition a *laissez-faire* system and must tolerate differences in the economic capacity of the various participants. Some governmental intervention to assist those further down the economic ladder is often desirable, as the government-subsidy programs demonstrate. But any attempt to eliminate all differences based on economic factors would involve governmental regulation and governmental domination on a scale that would destroy the system.

Governmental regulation of access to scarce physical facilities, or to a government-created monopoly, is more manageable. Yet there are serious complications. The rules framed for governmental intervention must take into account not only the rights of those entrusted with control of the facilities, but also the rights of those seeking to use the facilities and the rights of those receiving the communication. Accommodation of these three, often conflicting, interests is not readily achieved.

The most important area where physical scarcity exists is in radio and television communication. There is currently a dispute as to whether physical scarcity still exists in this area. That controversy will not be reviewed here. Suffice it to say that, first, the Supreme Court continues to act on the premise of scarcity and, second, we certainly have not reached the point where access to radio and television facilities is available to the same degree as the streets, printing presses, motion picture cameras, and other means of communication.

As already noted, there is a strong mandatory element present

with respect to the electronic facilities. The state may "own" the airwaves but it cannot withhold the use of such facilities from its citizens any more than it could withhold the use of the streets or prohibit the manufacture of printing presses. If the electronic media are to fit within the system of freedom of expression, the government must exercise its obligation to make them available to potential participants in the system, both communicators and listeners. The issue has never been raised in such a stark form. But this affirmative constitutional obligation underlies and shapes the formulation of legal doctrine in this area.

The major exposition by the Supreme Court of the constitutional position of the various participants concerned with the electronic media was rendered in *Red Lion Broadcasting Co. v. FCC,* decided in 1969. In that case, upholding the fairness doctrine against a challenge that it abridged the first amendment rights of the broadcasting stations, the Court laid down three interlocking principles. First, the Court declared: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." By way of emphasis, it repeated: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." Second, as to the rights of the licensees, the Court said:

> There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

Third, with respect to those using the electronic media for communication, including the licensees themselves, the Court made clear that the first amendment "forbids FCC interference with 'the right of free speech' " in the broadcasting of particular programs. Implicit in the Court's decision was a fourth principle: to some extent, at least, persons other than the government's licensees have a constitutional right to use scarce facilities. As the Court said: "There is no sanctuary in the First Amendment for unlimited private censorship [that is, for the licensees "to communicate only their own views on public issues"] operating in a medium not open to all." On these four propositions, it may be said, the constitu-

tional structure of the electronic media rests.[30]

The actual system of regulation for the electronic media, established by Congress in the Federal Communications Act and elaborated by the FCC, does not take full advantage of the constitutional possibilities. Congress rejected a system of governmental allocation of available broadcast time among all potential participants. It likewise refused to establish a common-carrier system, under which licensees would be required to open their facilities to those seeking to use them. Instead, it created a hybrid system, with major emphasis on the rights of licensees as communicators. Individual broadcasters were given a free license to operate on a particular wavelength subject only to certain restrictions pertaining to the extent of their monopoly, certain responsibilities as trustees to the listening public, and certain obligations to outsiders who seek to use their facilities for communication.[31]

The main restrictions upon the monopoly powers of licensees are antitrust in character. They relate to the number of stations that may be owned by a single licensee, the relationship of networks to individual stations, joint ownership of broadcasting stations and newspapers in the same locality, and similar matters. These regulations have been uniformly upheld by the Supreme Court and present no serious constitutional problem.[32]

The responsibilities of licensees to the listening public are based upon the provisions of the Federal Communications Act that broadcasting licenses be issued and renewed on the basis of "public interest, convenience and necessity." Under this "public interest" standard, the FCC has imposed certain requirements designed to achieve some balance in the character of the programs offered. It also has developed and applied the fairness doctrine, under which licensees must provide reasonable opportunity for the discussion of issues of public importance and make provision for the various points of view on such issues to be presented. But the Federal Communications Act specifically forbids governmental censorship of particular programs. These provisions are a classic example of permitting governmental intervention at the macro level to pro-

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[30] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389-90, 392 (1969).

[31] Federal Communications Act, 47 U.S.C. §§ 151-609 (1976 & Supp. III 1979).

[32] FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978); National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

mote the system while prohibiting governmental interference at the micro level. They, too, have been consistently upheld by the Supreme Court.[33]

Provision for access by outsiders to radio and television facilities is meager. If, in the course of a presentation of views on a controversial issue of public importance, a personal attack is made upon any identifiable person, that person must be given a chance to reply. Also, if one candidate for an elective office is granted time, a station must make equal time available to other candidates for that office. Similarly, if a station endorses one candidate, it must give other candidates an opportunity to respond. Recently, Congress has provided that candidates for federal elective office must be allowed to purchase "reasonable amounts of time." Otherwise, access to broadcasting facilities is determined by the licensees.[34]

The structure thus established for the use of radio and television facilities would seem to constitute the bare minimum demanded by the affirmative side of the first amendment. It falls far short of meeting the standards of a thriving, successful system of freedom of expression. The Supreme Court, however, has shown no inclination to press the requirements of the first amendment any further. Indeed, in *Columbia Broadcasting System v. Democratic National Committee,* a majority of the Court ruled that, although a broadcasting station accepted paid commercial advertising, it had no obligation under the first amendment to accept paid political advertising. The Court did not pass upon the power of Congress or the FCC to require licensees to accept political advertising, but strongly indicated such a measure would be upheld. Thus, while the basic constitutional framework remains in place, little advance can be anticipated so far as the judiciary is concerned. More progress, such as additional requirements that radio and television be open to all political candidates, would seem to rest in the hands of

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[33] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); National Broadcasting Co. v. United States, 319 U.S. 190 (1943). The provision against censorship of particular programs is 47 U.S.C. § 326 (1976).

[34] The personal-attack rule and the rule giving a political candidate the opportunity to respond were upheld by the Supreme Court in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); *see also* Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). The requirement of reasonable time for federal candidates was upheld in Columbia Broadcasting Sys. v. FCC, 101 S. Ct. 2813 (1981).

the legislative and executive branches.[35]

The advent of cable television may alter substantially the constitutional framework of the electronic media. By substituting wires for airwaves, it is possible to bring to the viewer a virtually unlimited number of channels. Hence the scarcity factor is greatly reduced or eliminated. The impact on the rights of broadcasters, communicators, and recipients will depend upon the ultimate structure of the cable-television system. If opportunities to seek an audience on cable television become as open as opportunities to communicate by use of the streets or printing presses, then governmental intervention to promote the interests of the communicators or recipients would be confined largely to antitrust measures. On the other hand, if elements of physical scarcity remain, or the effect of prior scarcity persists, an affirmative obligation under the first amendment would continue. The burden of meeting such an obligation would fall for the most part on the legislative and executive branches, but the formulation of doctrine and its application in appropriate instances remain the responsibility of the courts.

In addition to areas where physical scarcity occurs naturally, as in the case of radio and television, the creation of a government monopoly may have a very similar effect upon the system of freedom of expression. In such a situation, affirmative rights under the first amendment likewise may arise. An interesting example of the problem is presented by *Consolidated Edison Co. v. Public Service Commission*, decided in 1980. The issue there arose out of the practice of the Consolidated Edison Company, a public utility, to include in the billing envelopes sent to its customers inserts dealing with "the benefits of nuclear power" and similar controversial issues. The New York Public Service Commisson prohibited the practice, and Consolidated Edison challenged that order as violating its first amendment rights. On this negative interference issue, the Supreme Court, two Justices dissenting, upheld the Consolidated Edison position. The Court did not have before it, and hence did not decide, the latent affirmative promotion issue involved in the case. In view of the monopoly position of the public utility, what were the first amendment rights of potential communicators and the general public to have the billing facilities of the utility available to present or hear other sides of the questions under

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

discussion?[36]

There is much to be said for the proposition that the first amendment rights of the third parties should be given recognition here. As a result of the monopoly granted by the government, the utility possessed a unique facility for communication, namely, a ready-made audience that was forced to open the billing envelope when it arrived in the home or office. Access to that facility, in a manner compatible with the primary function served by the billing apparatus, plainly would advance the discussion of important issues. Granting access to all comers might not be compatible with effective operation of the billing process. But imposition of a fairness doctrine, under which the utility was required to make adequate provision for the presentation of opposing views, surely would be feasible. The use of the first amendment in such a manner would promote significantly the system of freedom of expression.

E. The Right to Know

Right-to-know doctrine, as previously noted, plays an important role in justifying various forms of governmental promotion, such as subsidies, and in determining the scope of governmental intervention where allocation of scarce facilities is necessary. It also has the potential of providing a constitutional basis for obtaining from the government information necessary to enrich the system of freedom of expression. Its value for this purpose seemed to have come to a dead-end with the decisions of the Supreme Court in *Houchins v. KQED* in 1978 and *Gannett Co. v. DePasquale* in 1979. The promise of the right-to-know doctrine was revived suddenly in 1980, however, in *Richmond Newspapers, Inc. v. Virginia.*[37]

Prior to *Houchins,* the Supreme Court had been urged to recognize a first amendment right to compel the government to disclose information by giving newspaper reporters access to prisons and

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[36] Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980).

[37] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Gannett Co. v. DePasquale, 443 U.S. 368 (1979); Houchins v. KQED, 438 U.S. 1 (1978). In general, on right-to-know doctrine, see Emerson, *Legal Foundations of the Right to Know,* 1976 WASH. U.L.Q. 1; Emerson, *First Amendment Doctrine and the Burger Court,* 68 CALIF. L. REV. 422, 464-67 (1980). Citation to other discussions may be found in O'Brien, *The First Amendment and the Public's "Right to Know,"* 7 HASTINGS CONST. L.Q. 579 (1980); Note, *The First Amendment Right to Gather State-Held Information,* 89 YALE L.J. 923 (1980).

their inmates. The Court had refused to do so in the particular instances before it but had left a general impression that such a right to obtain information did exist under some circumstances. *Houchins,* however, appeared to eliminate any such hope; in a four-to-three decision, the Court rejected another effort by the press to obtain access to a prison. Chief Justice Burger, in an opinion joined by Justices White and Rehnquist, declared: "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." Justice Stewart, concurring, agreed that "the First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by the government." The position seemed confirmed a year later in *Gannett* when, in a five-to-four vote, the Court upheld a trial judge in excluding the public and the press from a criminal pretrial hearing, giving virtually no weight to first amendment claims.[38]

Richmond Newspapers involved a challenge to an order of a trial judge excluding the public and the press from a criminal trial. In a seven-to-one decision the Supreme Court held that, absent an overriding interest articulated in findings, the exclusion was invalid. There were six opinions, but all the Justices in the majority agreed that the first amendment required that the public and the press have access to a criminal trial.

Chief Justice Burger, joined by Justices White and Stevens, emphasized that criminal trials historically had been "open to all who cared to observe," noted that the "core purpose" of the first amendment was to assure "freedom of communication on matters relating to the functioning of government," concluded that the "First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees," and quoted right-to-know language from earlier decisions to support his position. He did not mention *Houchins* but distinguished the earlier prison cases on the ground that penal institutions were not "open" or public places. Justice Stevens, in a concurring opinion, called the decision "a watershed case," saying: "Today . . . for

[38] Gannett Co. v. DePasquale, 443 U.S. 368, 391-93, 401-06 (1979); Houchins v. KQED, 438 U.S. 1, 15, 16 (1978). *See also* Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment." Justices Stewart and Blackmun were less enthusiastic, but agreed that the first amendment compelled the result reached by the Court.[39]

Justice Brennan, joined by Justice Marshall, argued that prior cases had never ruled out the proposition that "public access to information may at times be implied by the First Amendment and the principles which animate it." He elaborated:

> [T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of government. . . . Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open" . . . but the antecedent assumption that valuable public debate — as well as other civic behavior — must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but for the indispensable conditions of meaningful communication.[40]

Justice Brennan proceeded to carry right-to-know doctrine to a further stage. He noted that "the stretch of this protection is theoretically endless." Hence "[a]n assertion of prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded." Justice Brennan suggested two helpful principles. First, "the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information." Second, "the value of access must be measured in specifics"; "what is crucial in individual cases is whether access to a particular government process is important in terms of that very process."[41]

Justice Powell did not participate in the decision. However, his

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[39] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-80, 582-83 (1980).

[40] *Id.* at 587-88 (italics in original).

[41] *Id.* at 589.

views in the prison cases, including a dissent in *Houchins,* were close to those of Justices Brennan and Marshall. Justice Rehnquist dissented, believing that the reasons for closing a trial to the public should not be subject to judicial review.[42]

It is difficult to assess the impact of the *Richmond Newspapers* case. The decision can be viewed as a very narrow one, limited to a situation where the information sought historically has been available to the public and the press. In this sense, *Richmond Newspapers* is little more than a negative-interference case, protecting the press against governmental infringement upon a traditional right. On the other hand, the Supreme Court did hold, for the first time, that the first amendment does compel the government to furnish some information. Moreover, the language of the opinions is supportive of a broad application of right-to-know doctrine to the gathering of information. Four Justices — Brennan, Marshall, Powell, and Stevens — seem prepared to go some distance, and Justice Brennan's effort to delineate some subsidiary principles should move the argument along. Where these conflicting forces will lead cannot now be predicted. Meanwhile, of course, the major burden of compelling the government to furnish information to the public and the press is borne by the freedom of information acts and the sunshine laws.

III. Governmental Participation in the System

Governmental participation in the system of freedom of expression takes many forms. It includes speeches by government officials, press releases and press conferences, publication of periodicals such as the *Monthly Labor Review* and the *Smithsonian,* operation of the public schools, maintenance of public libraries and museums, and many other activities. The volume of governmental participation grows as society becomes more complex and more dependent on collective action. Governmental expression is necessary, and indeed is an integral part of the system, but it also poses dangers for the system. It is imperative, therefore, to formulate the basic principles that justify governmental participation in expression and to develop the limitations necessary to keep the system open and vigorous.

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[42] *Id.* at 604-06. *See also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 776-78 (1978) (Powell, J.).

We start with the proposition that, in general, governmental participation in the system of freedom of expression is constitutionally permissible. Moreover, the government clearly has wide latitude. There are no overall requirements of neutrality, of balanced presentation, of accuracy, of fairness, of equal time for opposing views, or the like. The government's right of expression, in short, runs parallel in many respects to that of any other participant in the system.[43]

There are, however, some recognized limitations. The government may not employ expression in a coercive way, as a sanction, to accomplish results not constitutionally or statutorily authorized. Although there are no Supreme Court decisions expressly on the point, it would seem clear that the government may not use expression in a manner that violates the constitutional right of privacy of any person. Subordinate government subdivisions, deriving their powers by delegation from a superior authority, may not engage in forms of expression that would be *ultra vires*. Moreover, various kinds of indirect controls exist. Thus, countervailing expression from nongovernmental sources is protected by the negative noninterference rules of the system and encouraged by programs of governmental promotion.[44]

These forms of restraint on governmental expression are not discussed here. Rather, attention is given to some less well-charted areas that are beginning to assume importance. First, there are certain forms of governmental participation, such as expression directed at a captive audience or governmental expression where the source is concealed, which are incompatible with any system of freedom of expression. Second, certain areas, such as expression advancing a religious view or supporting a partisan political candidate, are foreclosed to government. Third, in the operation of certain government institutions designed to educate and inform the

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[43] For Supreme Court recognition of the general right of the government to expression, see Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 97 (1977); Wooley v. Maynard, 430 U.S. 705, 717 (1977). For general discussion of governmental participation, see T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 697-716 (1970); Canby, *supra* note 3; Shiffrin, *supra* note 3; Yudof, *supra* note 3.

[44] With respect to governmental expression as a sanction, see Bantam Books v. Sullivan, 372 U.S. 58 (1963); Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated on other grounds*, 609 F.2d 355 (9th Cir. 1979). On the *ultra vires* issue, see Yudof, *supra* note 3, at 912-17. *See also* T. EMERSON, *supra* note 43, at 697-716.

citizenry, governmental expression must meet certain standards and allow for diversity. Fourth, certain structural arrangements, such as the creation of semi-independent agencies, are available to introduce a degree of autonomy and promote diversity in governmental expression.

A. The Captive Audience and Covert Expression

Several forms of governmental expression are in blatant conflict with the system of freedom of expression. The most important of these is expression directed at a captive audience. The government's right to speak does not extend to a right to compel anyone to listen. Compulsory listening is the counterpart of compulsory expression of a belief. The requirement that any person entertain a belief, opinion, or idea, or be forced to listen to the government's version of events, is an affront to dignity and an invasion of autonomy. It is in direct opposition to the principle that citizens have the sovereign power to instruct their government. Moreover, it is hardly an effective method for discovering the truth or arriving at a consensus. Indeed, compulsion to listen is the hallmark of a totalitarian society.[45]

The basic principle involved is widely accepted. It was recognized, at least by some members of the Supreme Court, thirty years ago in *Public Utilities Commission v. Pollak*, where passengers on buses regulated by the District of Columbia Public Utility Commission were subjected to radio broadcasts of music and news, and has been reiterated on a number of occasions since that time. Commentators uniformly have extolled the principle. Frequently the issue is framed in terms of protecting the individual against invasion of privacy, but the problem is essentially one of a first amendment nature.[46]

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[45] Cases which forbid government to compel affirmation of a belief include Wooley v. Maynard, 430 U.S. 705 (1977); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[46] Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952). Recognition of the captive-audience principle also appears in Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 542 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205, 208-11 (1975); Lehman v. City of Shaker Heights, 418 U.S. 298, 305-08 (1974) (Douglas, J., concurring); Columbia Broadcasting Sys. v. National Broadcasting Co., 412 U.S. 94, 127-28 (1973); Rowan v. United States Post Office Dep't, 397 U.S. 728, 736-38 (1970). The *Rowan* and *Erznoznik* cases involved the validity of government regulation of private speech alleged to have involved a captive audience. Commentators on the captive audience issue include L. TRIBE, *supra* note

There are, of course, difficulties in application of the "captive audience" principle. Thus a majority of the Supreme Court did not support the claim in the *Pollak* case, and only Justice Douglas found that the advertising at issue in *Lehman v. City of Shaker Heights,* noted above, was directed at a captive audience. The tension between the principle outlawing a captive audience and that granting a right of access is apparent. At what point is a person expected to turn away from an unwanted sight or message, and at what point is it considered that such a person has been compelled to see or to listen? Moreover, the system of compulsory education has never been thought to raise a "captive audience" issue, presumably because it deals with children and because those who can afford to do so are allowed to opt out. Despite these frayed edges, however, the captive audience doctrine remains firm.

A second form of governmental expression that clearly contravenes the principles of the first amendment is covert expression. Concealment of the fact that the origin of the expression is the government itself serves no valid purpose and subverts the system of freedom of expression. Although nondisclosure of the source of private speech is often necessary to prevent retaliation against the speaker, no such justification applies in the case of governmental speech. On the other hand, failure to disclose governmental participation in the system creates a false appearance of independence, seriously distorts the system, and undermines public confidence. There are no Supreme Court decisions that address this issue, but the principle that covert expression is impermissible under the first amendment cannot be doubted.

Governmental expression directed at a captive audience has not occurred on any significant scale to date in the United States. Likewise, covert expression, though widely practiced by the CIA in the recent past, apparently does not pose a serious problem at the present time. Nevertheless, as 1984 draws near, we would do well to remember the constitutional protections against these abuses of governmental expression.

6, §§ 12-19; Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor,* 53 COLUM. L. REV. 960 (1953); Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken To?,* 67 NW. U. L. REV. 153 (1972); Stone, *Fora Americana: Speech in Public Places,* 1974 SUP. CT. REV. 233, 262-72.

B. Prohibited Areas for Governmental Expression

Certain areas are foreclosed to the government either because the expression would violate an express constitutional prohibition or because the expression would not relate to a proper function of government. The two main areas of this nature are expression concerned with religion and expression taking sides in partisan politics.

1. Religion. The first amendment guarantees free exercise of religion and prohibits an establishment of religion. Regardless of how narrow an interpretation is given to the free exercise clause or how low the wall of separation between church and state, these provisions plainly prohibit governmental expression supporting or opposing religion in general or any particular form of religion. It is true that individual members of the government frequently invoke the name of a particular deity or otherwise express support for a particular religious belief or religious group. Such conduct, like the motto "In God We Trust" on our coins, traditionally has not been considered, on *de minimis* or other grounds, a violation of the first amendment. Or, at least, no remedy has been devised so far. Yet the basic principle holds that governmental expression attempting to carry governmental support or opposition beyond these customary points runs squarely counter to the letter and spirit of the religion clauses of the first amendment.

Application of this principle involves making some difficult distinctions. In the first place, the principle implies, if not a definition of "religion," at least a differentiation between "religious" and "secular" viewpoints. In most cases, making this judgment is not a problem; the proper classification is clear beyond dispute. At times, however, drawing the distinction may arouse controversy. Current efforts to require the teaching of "creationism" in the public schools, on a par with or as an alternative to the theory of evolution, pose such an issue. In this situation, it is necessary to examine the nature of the expression, the extent to which it rests on faith rather than empirical fact, the degree to which it partakes of a traditional religious orientation, and perhaps even the motivation behind the expression. These are all considerations that the government, including the judicial branch, usually is forbidden to take into account so far as private expression is concerned. But when governmental expression touches on religion, such considerations cannot be avoided.

In the case of "creationism," for instance, it would be relevant that the theory was based upon the Bible, clearly a religious source; that it was predicated on the conduct of a "divine being," clearly a religious concept; and, that it was held as a matter of dogma or faith, clearly not a secular foundation. Under such circumstances, it would seem to follow that the teaching of "creationism" in the public schools would be governmental expression of a religious viewpoint and hence forbidden by the first amendment. Indeed, the Supreme Court reached a similar conclusion in a negative-interference case, *Epperson v. Arkansas,* where it invalidated a state statute that forbade teaching "the theory or doctrine that mankind ascended or descended from a lower order of animals." As time goes on, far closer questions may be presented.[47]

A second distinction implied in the prohibition against governmental expression in the field of religion involves the difference between advocating or opposing religion and talking about religion; in a public school context, the distinction is between "teaching religion" and "teaching about religion." Thus, although it would violate the first amendment to teach "creationism" in a public school as fact or dogma, it does not infringe upon the first amendment to teach about "creationism" as a social phenomenon. While this distinction is reasonably clear in theory, it becomes hazy in practice, especially for a particular teacher in a schoolroom context. For reasons developed later, only in egregious cases would it be feasible, or indeed desirable, to call an individual teacher to account. Nevertheless, the basic principle must remain intact.

2. Partisan Politics. The other main area from which governmental expression should be excluded is that of "partisan politics." Here again, the lines are difficult to draw. Clearly, most governmental expression is "political" in nature. It is the business of government to govern the country on behalf of the people as a whole and that operation is by its very nature "political," calling for expression that deals with "political" issues. On the other hand, it is not the function of government to use the common resources of the country to support or oppose a particular person or group seeking political power. The selection of those who are to compose the government is the prerogative of the sovereign people. Nor is it the function of the government to engage in activities designed to or-

[47] Epperson v. Arkansas, 393 U.S. 97 (1968).

ganize or mobilize individual citizens for political decisionmaking. That also is the function of the electorate. The government's obligation to represent the people as a whole demands that it refrain from such forms of "partisan politics."

It follows that the use of governmental expression to support a particular candidate for political office is not permissible. Here, as in the case of religion, there are some traditional and perhaps necessary qualifications. Government officials in power, particularly at the higher levels, customarily make speeches or otherwise campaign for their own reelection or for the success of their party. Frequently this is done "on government time." As long as it is confined to top policymaking officials and does not involve direct expenditure of government funds, it may be overlooked. Beyond this point, however, any governmental support of particular candidates or parties in an election is improper and not within the constitutional power of government.

A more difficult question arises with respect to governmental expression where an issue, rather than a candidate, is submitted to popular vote, as in the case of a referendum on a proposed constitutional amendment. Obviously, the government should have the right to pursue its policies through providing information, opinion, and argument on such questions. Yet it would seem equally certain that it is not a proper function of government to organize a detailed campaign, staffed by government employees and complete with committees, meetings, rallies, mailing lists, and door-to-door canvassing. The point at which governmental expression becomes "partisan" in this sense may be subject to disagreement. Yet the principle involved would seem clear.

A similar principle would apply to lobbying of the legislature by the executive branch of government. Direct approaches to legislative committees or individual members of the legislature, with information, argument, and assistance, are commonplace and necessary. On the other hand, engaging in a grass roots campaign among voters to organize direct pressure on the legislature should be left to private citizens. This is a problem, of course, about which the legislative branch is likely to be sensitive and for which legislative remedies are often available.

The Supreme Court has never passed directly on these issues. Nevertheless, the distinction between partisan politics and other political activities has received recognition. In *Branti v. Finkel,* the

Court held that the dismissal of two county assistant public defenders, solely on the ground that they were members of the Republican Party, violated their first amendment rights. The question before it, the Court said, was "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." The Court answered that question by saying unequivocally that "partisan political interests" could never be considered relevant to the performance of the job of assistant public defender. Similarly, the Hatch Act, which forbids government employees to take "an active part in political management or political campaigns," is aimed at partisan political conduct. While the Hatch Act can be criticized as imposing overbroad restraints upon government employees acting in their individual capacity, it is based upon a policy that differentiates between partisan and other political activity. A similar policy is expressed in the provision of the Public Broadcasting Act that prohibits the Corporation for Public Broadcasting from endorsing candidates or political parties. Finally, those state and lower federal courts that have had occasion to rule on these questions have, by and large, reached results consistent with the principles set forth above.[48]

C. *Government Institutions Designed to Educate and Inform the Citizenry*

A substantial portion of governmental expression takes place within the framework of government institutions designed to educate and inform members of the polity. One goal of such institutions is, of course, socialization. They are concerned with passing on the history, culture, and ways of thinking that are necessary to obtain a viable consensus. In a democratic society, however, these institutions also have the task of developing in the individual citi-

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[48] Branti v. Finkel, 445 U.S. 507, 518 (1980); *see also* Elrod v. Burns, 427 U.S. 347 (1976). The Hatch Act, codified at 5 U.S.C. § 7324(a)(2) (1976), was upheld in United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973). The Public Broadcasting Act provision is 47 U.S.C. § 396(f) (1976). State and federal decisions include Stern v. Kramarsky, 84 Misc. 2d 447, 375 N.Y.S.2d 235 (Sup. Ct. 1975); Stanson v. Mott, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976); Mountain States Legal Foundation v. Denver School Dist. No. 1, 459 F. Supp. 357 (D. Colo. 1978); Miller v. Miller, 87 Cal. App. 3d 762, 151 Cal. Rptr. 197 (1978). For discussion of these and other cases, see Yudof, *supra* note 3, at 912-17; Note, *supra* note 6, at 536-45.

zen independence, creative thinking, the ability to solve problems, and similar qualities. Tension exists between the goals of achieving socialization in aid of a sense of collective responsibility on the one hand and achieving autonomy and diversity on the other. Ultimately, some balance must be struck. However that is done, the role of governmental expression in the operation of these educational and informational institutions is somewhat different from its role in aid of the day-to-day operations of governance. Governmental participation is justified, and the system of freedom of expression advanced, only if governmental expression supports the pluralist forces in the structure. The affirmative side of the first amendment, therefore, imposes some obligation on the part of the government to maintain these institutions on an open and democratic basis.

What should be the function of the courts in guiding this development? Some sense of the problem can be gained by a brief examination of governmental participation in two important institutions — public education and public libraries.

1. Public Education. The system of public education is a major area of governmental participation in expression. There are some external controls over the manner in which the government manages this institution. Thus, under the doctrine of *Pierce v. Society of Sisters,* parents may opt out of the system altogether, providing they can afford to pay for an equivalent private education. Likewise, competition from private educational institutions, especially at the university level, operates as a spur and a check upon the public educational structure. Yet, by and large, assurance that public education will not lapse into an instrument for inculcating a sterile conformity must come from internal principles built into the system itself.[49]

The doctrinal basis for judicial intervention to maintain the open features of the public education system has long existed. The rationale of *Pierce* was that the "fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." The Court added: "The child is not the mere creature of the State." In *West Virginia Board of Education v. Barnette,* outlawing the compulsory flag sa-

[49] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

lute in public schools, the Court stressed the constitutional obligation of the school system to assure the "freedom to be intellectually and spiritually diverse." *Epperson v. Arkansas* confirmed that the courts "have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief." *Tinker v. Des Moines Independent School District* reiterated that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[50]

It is true that judicial controls over the public school system must be exercised with care and restraint. Detailed supervision by the courts over the operations of the schools is not feasible; nor would it advance the cause of free expression. But here again, the courts must perform the role of keeping alive the fundamental principles at stake and intervening where clear threats to those principles appear.

Implementation of the constitutional obligation of the government to maintain an open system of public education involves the development of a set of subsidiary principles. At least two such principles are of major importance. The first, which applies mainly to the top levels of the structure, is the principle of balanced presentation. The other, designed to maintain looseness, or breathing space, in the lower levels of the system, embodies the concept of academic freedom.

The principle of balanced presentation derives from the nature of the government's duty to avoid narrow or one-sided indoctrination. It is buttressed by the monopoly, or near monopoly, position occupied by the government in the area of education, by the quasi-captive character of the recipients of the government's communication, and by broad right-to-know considerations. In essence, it requires that, in designing curriculum, adopting text books, prescrib-

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[50] Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 506 (1969); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). Other cases where the Supreme Court has stressed the importance of an open system of education include Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). *See also* Note, *Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents*, 14 HARV. C.R.-C.L. L. REV. 485, 492-503 (1979). *But see* Ambach v. Norwick, 441 U.S. 68 (1979).

ing classroom plans, and making similar policy decisions, the school authorities must provide a fair coverage of the information, ideas, opinions, and approaches to the subject matter involved. The inquiry is not into whether the decisionmakers have considered "ideological content" rather than "educational value" — they have to consider those matters — but whether they have provided a rounded view of the relevant materials. The issue of what is "relevant," in turn, must be determined upon the basis of prevailing standards in the educational, scholarly, and scientific communities.

Application of the balanced-presentation requirement in extreme cases does not pose a difficult problem. For example, a school system that made no provision for curricular materials dealing with black history, ideas, or contributions would not meet the test, and an institution that failed to give a course in astrology would not be compelled to do so. Other situations, such as the mix of theories taught in the social sciences, would entail more troublesome questions. As suggested above, the courts should intervene only where failure to observe the principle is relatively clear.

The concept of academic freedom has a long history in this country. Developing out of the struggles for greater freedom in research, publication, and teaching at institutions of higher learning, the basic precepts have been elaborated and refined, embodied in formal statements, applied in concrete cases, and developed into a kind of common law by such organizations as the American Association of University Professors. Although the tenets of academic freedom have never been incorporated fully into the first amendment, they have greatly influenced the courts in cases involving governmental intervention in the affairs of academic institutions. They are well-suited to the task of defining the rights of subordinate participants in the public education structure along lines that will make room for experimentation, diversity, creativeness, and independence of thought. Thus, applying academic-freedom principles, a faculty member would be given substantial leeway in the manner of presentation of the subject, the choice of additional reading materials, the exposition of ideas, pursuit of academic interests outside the classroom, and other aspects of life and work in the institution. Similarly, students who perform delegated institutional functions, such as editing a newspaper subsidized by public funds, would be free to carry on their editorial duties without detailed interference from superior officials. The

dividing line between permissible control from the top and freedom at the operating level would be based, once again, upon the macro-micro distinction. Choice of the subject matter to be taught, for instance, would be the prerogative of the top level in the structure, but the details of class presentation would be, within the limits of competency, the domain of the teacher.[51]

Supreme Court decisions to date have been consistent with the foregoing analysis but, with the exception of the teacher-loyalty cases, the Court has had little occasion so far to deal with these problems. Lower courts have been divided in their approaches and results. The issues are being raised with greater frequency and urgency, and significant developments soon may occur.[52]

2. Public Libraries. Public libraries are also institutions that, in a democratic society, are designed not only for transmitting past culture but for developing autonomy and diversity. Here right-to-know factors are especially strong. This form of governmental participation in expression, therefore, is required by the first amendment to serve the needs of an open society. Public-school libraries have, in one sense, a narrower purpose, in that they are intended for the use only of the school population, but the constitutional obligation to encourage democratic values there is equally, if not more, compelling.

The basic principle governing the application of the first amendment to the maintenance of a public library is the principle of a balanced presentation. The selection and removal of books must be done on a basis that fairly takes into account differing ideas, viewpoints, and treatments of the subject, within the boundaries of prevailing professional standards. Put in other terms, the govern-

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[51] Cases where the Supreme Court has utilized concepts of academic freedom in upholding individual rights against governmental intervention include Papish v. Board of Curators, 410 U.S. 667 (1973); Healy v. James, 408 U.S. 169 (1972); Shelton v. Tucker, 364 U.S. 479 (1960); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[52] The lower court cases are collected in 1 N. DORSEN, P. BENDER, & B. NEUBORNE, EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 805-90 (4th ed. 1976). *See also* R. O'NEIL, CLASSROOMS IN THE CROSSFIRE (1981); Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused From Objectionable Instruction?*, 50 SO. CAL. L. REV. 871 (1977); Note, *Schoolbooks, School Boards, and the Constitution,* 80 COLUM. L. REV. 1092 (1980); Note, *supra* note 50, at 489-92; *Developments in the Law — Academic Freedom,* 81 HARV. L. REV. 1045 (1968); Note, *Public Forum Theory in the Educational Setting: The First Amendment and the Student Press,* 1979 U. ILL. L.F. 879.

ment may not draw too tightly the circle around the right of the users of the library to obtain certain information, entertain certain opinions, or read or hear about certain ideas. The government may, of course, limit the scope of the facility to a specified area — a macro decision — but within that area it may not make the micro decision to censor out particular points of view.

Implementation of this principle, of course, is not without its difficulties. Yet they are not insuperable. For one thing, the range of materials available in a library is considerably broader than that of materials used in a classroom; hence judgments about inclusion and exclusion need be less refined and are more susceptible to review by judicial authority. Likewise, at least in instances where books are removed because of ideological content, the reasons are likely to come out in the open; in such cases, the objectives sought by removal usually are not achieved through secrecy. Finally, once again, problems of implementation in this field should not be a ground for abandoning the principle.

The issues presented in book-removal cases, which are becoming more and more common, are well illustrated by *Pico v. Board of Education, Island Trees School District,* now before the Supreme Court. In *Pico,* three members of the Board of Education of the Island Trees School District on Long Island attended a conference sponsored by "a conservative organization" at which "lists of books considered objectionable by some persons together with excerpts" were distributed. Subsequently, two of the Board members checked one of the lists against the card index in the school libraries, and the Board, after an informal meeting, ordered the principals of the schools to remove a number of "objectionable" volumes. The Board's action soon became known in the community and resulted in considerable controversy. The Board defended its action on the ground that the books "were anti-American, anti-Christian, anti-Semitic, and just plain filthy." After a public hearing, appointment of a committee of school staff and parents, and reconsideration, the Board voted to return two books to the library but directed that eight others be removed. The banned books included *The Fixer,* by Bernard Malamud; *Slaughterhouse-Five,* by Kurt Vonnegut; *The Naked Ape,* by Desmond Morris; *Down These Mean Streets,* by Piri Thomas; *Best Short Stories by Negro Writers,* by Langston Hughes; and *Soul on Ice,* by Eldridge Cleaver. A group of students brought suit for declaratory and injunctive relief.

The district judge granted the Board of Education's motion for summary judgment on the ground that its actions "did not sharply implicate first amendment values," but fell "within the broad range of discretion constitutionally afforded to educational officials who are elected by the community."[53]

The Court of Appeals for the Second Circuit, in a two-to-one vote, reversed and remanded the case for trial. Judge Sifton took the position that, although the mere removal of a controversial book would not make out a prima facie violation of the first amendment, in this case the "unusual and irregular intervention in the school libraries' operation by persons not routinely concerned with such matters," the "ambiguous" explanation offered by the Board of Education for its actions, and other "irregularities" created the inference that "political views and personal taste are being asserted not in the interests of the children's well-being, but rather for the purpose of establishing those views as the correct and orthodox ones for all purposes in the particular community."[54]

Judge Newman, concurring in the result, argued that the "plenary power of school officials transgresses First Amendment limits . . . when their actions tend to suppress ideas." "It is one thing to teach, to urge the correctness of a point of view," he said, but "it is quite another to take an action that condemns an idea, that places it beyond the pale of free discussion and scrutiny." The removal of a book from the school library, he declared, "can . . . pose a substantial threat of suppression." This is especially true "when the disapproval is political in nature — when exclusion of particular views is motivated by the authorities' opinion about the proper way to organize and run society in general." Because the complaint alleged that the removal "was motivated in part by the School Board's objection to the political views expressed in those books," and the action "was taken under circumstances that pose a threat to the free expression and exchange of ideas within the school community," Judge Newman concluded that a trial was necessary to determine "precisely what happened" and whether, "in the circumstances of this case, the School Board's actions . . . created a sufficient risk of suppressing ideas to constitute a violation of the

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[53] Pico v. Board of Educ., Island Trees School Dist., 474 F. Supp. 387, 398 (E.D.N.Y. 1979).

[54] 638 F.2d 404, 414-15, 417 (2d Cir. 1980), *cert. granted*, 50 U.S.L.W. 3278 (U.S. 1981).

First Amendment."[55]

Judge Mansfield dissented. He believed that "this court should keep its hands off," that it was improper "to substitute a court's view of what student curriculum is appropriate for that of the Board." As to the merits of the first amendment issue, he contended that "the First Amendment entitles students to reasonable freedom of expression but not to freedom from what some may consider to be excessively moralistic or conservative selection by school authorities of library books to be used as educational tools."[56]

The three opinions present three possible approaches to the problem. Judge Mansfield believes the courts should not intervene at all in decisions by the school authorities regarding the selection or removal of books from school libraries. Judge Sifton's view is that a violation of the first amendment occurs when the circumstances of removal show that the judgment of the school authorities was made not on the basis of educational value but to establish certain views as the correct or orthodox ones. Judge Newman holds that the first amendment issue is whether the actions of the school board in fact created a risk of belief in the community that certain ideas were officially disfavored, and that the existence of such an actual risk must be demonstrated at the trial.

None of these approaches is entirely satisfactory. Judge Mansfield's nonintervention would mean, of course, that no judicial remedy existed no matter how flagrant the violation of the first amendment by the school authorities might be. Judge Sifton's inquiry into whether the purpose of the Board of Education was based on educational value or an intent to suppress ideas requires proof of motivation, always difficult to establish. Moreover, Judge Sifton passes rather lightly over the dilemma that the function of the school authorities is to make decisions on the contents of books and that any decision to exclude necessarily results in withholding the ideas expressed in the excluded book from the users of the library. Judge Newman relies upon a "chilling effect" theory, seek-

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[55] *Id.* at 432, 433, 434, 439.

[56] *Id.* at 419, 432. Judge Mansfield stressed that most of the objections to the books ordered removed was that they contained indecent or vulgar materials. It is clear, however, that Judge Mansfield would have reached the same conclusion quite apart from that issue, which is not considered here.

ing to determine the impact of the removal upon the community. This approach has the advantage of reflecting the reality in many book-removal cases and seeks to focus on some of the more objective facets of the situation. On the other hand, it makes the issue turn upon the manner of removal; removal of books done quietly and without fanfare would not, on this theory, constitute a violation of the first amendment. Moreover, it imposes the burden of making an elaborate presentation upon those challenging the action of the school authorities. Most important, it does not extend protection to the full extent of first amendment theory; it fails to take into account the rights of the users of the library to have access to a variety of points of view.

The principle of balanced presentation provides an alternative theory: the Board of Education in *Pico* has drawn the boundaries of a school library arbitrarily and too narrowly. The kind of information, ideas, and viewpoints found in *Down These Mean Streets, Soul on Ice,* or *Slaughterhouse-Five* clearly should not be cast out of a high-school library as "anti-American." The excluded books all met professional standards of quality. The circumstances of the case, such as the "unusual and irregular intervention" by the school board and the impact on the community, confirm this judgment. The motivation and "chilling effect" theories need not be discarded; they should remain as supplemental approaches. But the balanced-presentation doctrine seems to encompass the full scope of first amendment theory and to be most relevant to the functioning of a system of freedom of expression.[57]

D. Structural Arrangements to Provide Greater Diversity in Governmental Expression

As in the case of governmental promotion of the system of freedom of expression, when government itself engages in expression, certain structural arrangements can be devised to lessen the dangers and increase the diversity of governmental expression. Such structures include delegation of authority and decentralization, the creation of autonomous bodies that develop their own professional

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[57] For other discussion of the library books problem, see Estreicher, *supra* note 52; O'Neil, *Libraries, Liberties and the First Amendment,* 42 U. CIN. L. REV. 209 (1973); Note, *Censoring the School Library: Do Students Have the Right to Read?,* 10 CONN. L. REV. 747 (1978).

standards and traditions, the shielding of the government communicators from partisan political forces, and the like. The impact of these arrangements is to give governmental participation in the system an effect somewhat closer to that of governmental promotion of the system. It should be noted that this result is not always desirable. It may be that the government should speak in a single, clear voice or that government communicators should not be cut off in elitist fashion from the active political forces of the community. Where circumstances warrant it, however, arrangements of the kind enumerated are available.

In some areas, subordinate governmental officials and subordinate political subdivisions are subject to the complete control, so far as official expression is concerned, of their superior officers or authority. For example, the government may prohibit police, prosecutors, and other government agents from revealing information that would prejudice the right of an accused to a fair trial. In addition, the government may, of course, prevent its employees from disclosing secret information vital to national security. Similarly, although the issue seems never to have been decided formally, a state may prevent a municipality or other political subdivision from engaging in political or any other kind of expression.[58]

There are some areas, however, where the government should be structured in such a way as to create semi-autonomous enclaves in which government officials function without direct control over their immediate operations by higher or centralized authority. One major area of this nature, as previously noted, is that of public education, where the principles of academic freedom give teachers, administrators, and students leeway to develop and carry on their own traditions. Another area, likewise mentioned above, is that of libraries, museums, and the like, where professional standards provide a buffer against special-interest forces. Professor Canby has pointed out that government institutions performing an "editorial function," such as student newspapers, law reviews, radio and television stations, and similar enterprises have been protected in the courts against intervention in the day-to-day conduct of their affairs. The Corporation for Public Broadcasting is another example of an agency intended to operate with a substantial degree of inde-

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[58] *See* Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978), *appeal dismissed*, 439 U.S. 1060 (1979); Yudof, *supra* note 3, at 865-69.

pendence from the government.[59]

The autonomy of these government institutions rests in part on statutory provisions but increasingly on constitutional grounds. To a large extent, the system operates on the distinction between macro-level decisions and micro-level decisions. Higher echelons of government determine broad policy, the autonomous agency functions within the limits of that policy, and the higher echelons do not interfere on a selective basis. These methods of blunting the monopolistic effects of governmental participation in expression have significant potential.

IV. Conclusion

If the system of freedom of expression is to operate effectively in our society, now and in the future, we must give more attention to the affirmative side of the first amendment. Grave distortions in the system cannot be eased or eliminated without measures that go beyond the traditional safeguards to protect expression against governmental interference, as crucial as those safeguards continue to be. The expanding role of government in promoting and participating in the system brings with it serious dangers but also carries a great potential. If that potential is to be realized, however, the basic principles under which the opportunities for expression by individuals and groups can be expanded, and expression by government and its agencies kept within bounds, must become an integral part of our political philosophy.

In this task the judicial branch of government has a difficult role to play. The emerging doctrines, such as the macro-micro division of powers and the principle of balanced presentation, are vague and unformed, at least at this stage. There is danger that the looser rules necessarily invoked on the affirmative side of the first amendment may result in relaxation of the rules applicable to the negative noninterference side. Many will think it is not wise to inject the courts into situations where, at times, they can deal only with egregious cases rather than exercise more complete control over the implementation of constitutional principles.

These are serious problems, but they can be overcome. The

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[59] *Cf.* Canby, *supra* note 3, at 1134-64; Note, *Freeing Public Broadcasting From Unconstitutional Restraints,* 89 Yale L.J. 719 (1980) (both emphasize the excessive governmental entanglement with the Corporation).

courts have been and must remain the keeper of the American conscience in upholding the rights of the individual against encroachment by the government. They should continue this role in dealing with the affirmative side of the first amendment. Indeed, here the courts are on a one-way road: to the extent that they are willing to act, the result can only be an expansion, not a restriction, of the system of freedom of expression. Already we have traveled further along this road than many of us realize, but much further progress remains.