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## OUR IMPERIAL FIRST AMENDMENT

*Paul D. Carrington\**

### I. INTRODUCTION: THE PREMISES OF DEMOCRATIC GOVERNMENT

I come to the First Amendment not as a member of the *cognoscenti*, but as an observer of the secondary effects on judicial institutions of some interpretations of the Amendment made over the last thirty-five years or so. I deplore those specific effects and I will be direct in saying so. But in considering them, I have been struck by the extent of the federal courts' progress in subordinating to their own governance a wide range of other issues of great concern to citizens, all in the name of the First Amendment, a text intended to foster democratic institutions.

This usurpation has been achieved by extravagant interpretation of the Amendment to fashion a new and elastic principle of natural law. That principle has been stretched to fit a wide array of matters very distant from the aims of the First Amendment or of the Fourteenth (through which the First Amendment has been made applicable to state and local governments) as those aims have been generally understood by the citizens disfranchised by this overreaching by the federal judiciary.

The premises from which my sweeping criticism of current First Amendment law proceeds will be viewed by some readers as idiosyncratic. That would not have been so in former times for my premises were shared by persons dominating American politics

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\* Chadwick Professor of Law, Duke University. This article is presented as part of the Allen Chair Symposium for 2000 at the University of Richmond School of Law. It is an expansion of a chapter of my book *STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION* (1999) and reflects the theme of that work. Numerous persons were exposed to earlier drafts; those who tried to save me from error by their helpful comments were Walter Dellinger, Dan Farber, Martin Golding, Leno Graglia, Anthony Lewis, Robert Nagel, Tom Phillips, and William Van Alstyne. Diane Descoteaux and Amy Van Middlesworth helped with the references.

for a century and a half. My premises were expressed in the second and third sentences of the Declaration of Independence.<sup>1</sup> They animated the eighteenth century anti-federalists who regarded the Constitution of the United States as originally drafted by Madison and others as a grave threat to their democratic aspirations, and who demanded not only the First Amendment as a restraint on Congress but also, and even more urgently, the right to jury trial in civil cases as a means of limiting the role and power of judges with life tenure.<sup>2</sup> My premises were shared as well by those Jeffersonians who cheered the French Revolution in its early years before the advent of the Jacobins and the erection of the guillotine,<sup>3</sup> and by Jacksonians who mistrusted the plutocratic aims of the Bank of the United States and who insisted on the right to hold judges exercising broad political powers accountable to the people at the ballot box.<sup>4</sup> The same premises underlie the most memorable rhetoric of Abraham Lincoln<sup>5</sup> and his counterpart in constitutional scholarship, Thomas Cooley.<sup>6</sup> Those premises were shared as well by many Progressives, most emphatically by my heroes, Louis Brandeis and his counterpart in constitutional scholarship, Ernst Freund.<sup>7</sup>

The first of those premises is that the communitarian right of citizens to self-government is the primary value that ought to dominate our politics and our law. The second, which follows from the first, is that the law belongs to Everyman, not to a special class of aristocrats and intellectuals professing a morality they deem superior to that of the citizens whom they presume to gov-

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1. CARL BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* 197-200 (1922); MORTON WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION* 73-76 (1978); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 234, 270 (1991).

2. See *THE ANTIFEDERALISTS* 45, 49-52 (Cecilia M. Kenyon ed., 1966); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 289-90 (1966); Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 644 (1973).

3. See PATRICE HIGONNET, *SISTER REPUBLICS: THE ORIGINS OF FRENCH AND AMERICAN REPUBLICANISM* 1-11 (1988).

4. See MARVIN MEYERS, *THE JACKSONIAN PERSUASION: POLITICS AND BELIEF* 6-9 (1957); HARRY L. WATSON, *LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA* 139 (1990).

5. See GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 90-120 (1992).

6. PAUL D. CARRINGTON, *STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION* 55-81 (1999).

7. For brief accounts of their careers and thought, see *id.* at 121-36.

ern. The third, which also follows from the first, is that the Constitution of the United States guarantees a republican, not an oligarchic, and certainly not a plutocratic, form of government. The Constitution was intended and ought to be read to authorize the Court to brake majoritarian impulses when there is a basis for doing so in a legal text as understood by the citizens who are subject to it, but not as a commission to the federal judiciary to displace broadly the moral and political judgments of democratic electorates with its own preferences.

While my acceptance of the need for a democratic political process is not now widely shared among the elite of the United States, I am not alone in observing that, beginning with the successful outcome of World War II, America has substantially forsaken moral-political-legal premises that had dominated its politics for about a hundred and fifty years. Among others noticing this event are Michael Sandel,<sup>8</sup> Robert Wiebe,<sup>9</sup> Benjamin Barber,<sup>10</sup> and the late Christopher Lasch,<sup>11</sup> all of them eminent social scientists and wise observers. Seemingly invisible to our courts is the difference between doing good and requiring others to do it.

There were always, it ought be acknowledged, Americans who rejected the Declaration of Independence as political humbug useful only as an "opiate of the people." Alexander Hamilton was eminent among those revolutionaries who were feudal lords at heart.<sup>12</sup> The slave-owning class always dissented from the Declaration, as did the barons of industry and the social Darwinists of the late nineteenth century. The banners borne by such Americans are now borne by many of our contemporaries including numerous intellectual movements spanning the political spectrum.

What caused the demise of democratic values that Sandel, Wiebe, Barber, Lasch, and I observe? Surely the causes are

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8. *See generally* MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996).

9. *See generally* ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* (1995).

10. *See generally* BENJAMIN BARBER, *THE CONQUEST OF POLITICS: LIBERAL PHILOSOPHY IN DEMOCRATIC TIMES* (1988).

11. *See generally* CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* (1995).

12. *See* STANLEY ELKINS & ERICK MCKITTRICK, *THE EARLY AMERICAN REPUBLIC* 103-04 (1993) (analyzing Alexander Hamilton's speech at the Philadelphia Convention on June 18, 1778); *see also* CLINTON ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* 14 (1964) (describing generally Alexander Hamilton's character).

largely external and not the result of rational planning or scheming.<sup>13</sup> So perhaps the change was inevitable. In the twentieth century, the chances of life and of geography called America to the role of empire. We are as a consequence, I fear, tracking the path marked by earlier republics such as Athens, Rome, and Venice and so elegantly depicted by Gibbon.<sup>14</sup>

We are told that the first step on those republics' path to decline and fall was military success bringing a false sense of invulnerability. The second was economic success bringing a deepening of class lines dividing those who prospered most from the imperial engagement from those who prospered least. The third was the attainment of moral arrogance among the former, centered in a community of leaders who assured one another that their collective wisdom and virtue was so vastly superior to that of the unwashed that imperial rule is justified.

When one looks for evidence of moral arrogance in a ruling class in America, the jurisprudence of the First Amendment presents itself as one striking exhibit.<sup>15</sup> The text of the Amendment, intended to express a right central to democratic self-government, has been transmogrified into the means by which life-tenured judges supported by an intellectual elite and the barons of the media suppress self-government and force on fellow citizens the moral and political precepts of a ruling class. These precepts strongly favor powerful individuals (such as those who profit from the "infotainment" industry) and their profit-seeking corporations over citizens' rights to make collective decisions about the communities in which they live and work. Those looking for a cause to enlist under a banner bearing the revered motto "Don't Tread on Me"<sup>16</sup> can find it in today's First Amendment.

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13. Another contributing cause may have been the movement of the Supreme Court into its highly pretentious quarters. Louis Brandeis refused to occupy chambers in that building and foretold that it would foster an atmosphere conducive to judicial arrogance. ALPHEUS T. MASON, *BRANDEIS: A FREE MAN'S LIFE* 628-29 (1946). A possible response to the problem depicted here would be to return the Court to the facilities in the basement of the Capitol that it occupied until 1929.

14. See generally EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* (J.B. Bury ed., The Heritage Press 1946) (1776).

15. For a comprehensive presentation of the case law, see generally WILLIAM W. VAN ALSTYNE, *THE FIRST AMENDMENT: CASES AND MATERIALS* (1995). The institutional arrogance of the Court is not limited to this subject. For another, see Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1997).

16. This was the motto on the flag of the first American naval vessels to engage in the Revolutionary War. I am told that it is reappearing on banners of "militia" units in some

## II. THE REPUBLICAN IDEA OF THE FIRST AMENDMENT

In 1925, Louis Brandeis joined in extending First Amendment restraints to state and local government by incorporating that provision into the Due Process Clause of the Fourteenth Amendment,<sup>17</sup> despite the fact that the textual and historical basis for that extension was, at best, inconclusive.<sup>18</sup> This was a rare departure for him from a stern self-discipline by which he aimed to keep the Supreme Court of the United States on the straight and narrow trail of deference to the role of those government officers who represent the people and who are accountable to them. That deference (like the deference expressed in this article) was not rooted in a romanticized vision of the wisdom of the people, but in the belief that social peace and stability are best assured by the opportunity of citizens to participate in their own governance and by a disbelief in the superior wisdom (especially with respect to moral issues) of those who put themselves forward as a ruling class.

The compass of the First Amendment that Brandeis voted to extend into the Fourteenth was narrow.<sup>19</sup> The idea was largely confined to a thought that John Milton expressed in 1644:

Give me the liberty to know, to utter, and to argue freely according to conscience above all liberties. . . .

....

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter? Her confuting is the best and surest suppressing.<sup>20</sup>

The Amendment's protection thus articulated extended to

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parts of the United States. I have seen one such flag in Kansas.

17. *Gitlow v. New York*, 268 U.S. 652, 672 (1925); see DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION 366-67* (1990) (stating that the Bill of Rights only applies to the states to the extent that it is incorporated into the Fourteenth Amendment).

18. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 138 (1949).

19. David M. Rabban, *Can Academic Freedom Survive Postmodernism?*, 86 CAL. L. REV. 1377, 1378 (1998) (reviewing *THE FUTURE OF ACADEMIC FREEDOM* (Louis Menand ed. 1996)) (discussing the history of constraints on academic freedom).

20. JOHN MILTON, *AEROPAGITICA: A SPEECH FOR LIBERTY OF UNLICENSED PRINTING* (1644), reprinted in 32 GREAT BOOKS OF THE WESTERN WORLD 381, 408-09 (1952).

speech related to religious observance and political expression motivated by conscience and a regard for truth, and even that protection was not expressed in absolute terms. It assumed that the marketplace of ideas would be a level space on which truth might grapple with falsehood in "a free and open encounter."<sup>21</sup> Even Jefferson, while opposing "every form of tyranny over the mind of man"<sup>22</sup> (as the entablature on his monument records) was willing to allow the citizens of a republic some room to distinguish for themselves what is tyranny over the mind of man from what is sound public policy.

No one in 1868, when the Fourteenth Amendment was ratified, or in 1925, when it was deployed to make the First Amendment applicable to state and local governments, reckoned that the Constitution of the United States had anything to say about laws forbidding deeds said by the actors to have symbolic meaning, pornography, obscenity, commercial speech, campaign finance, or defamation.<sup>23</sup> In recent decades, the Supreme Court has constitutionalized all of those subjects and thereby imposed its moral judgments and that of lower federal courts not only on the federal government, but also on state and local governments, effectively foreclosing further political debate on the wisdom of the principles it applied. A secondary effect of that unauthorized seizure of power is that our freedom of expression no longer is derived from the tolerance and civility of the communities in which we express ourselves and for which we share responsibility, but from what Brandeis would have denoted as "foreign aid"<sup>24</sup> imposed by a distant and imperial oligarchy sitting on the Supreme Court.

To some extent, the enlargement of First Amendment protection was prompted by the narrowest and most legitimate of Fourteenth Amendment concerns for the right of African-American citizens to express their indignation at racial segregation.<sup>25</sup> But

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21. *Id.* at 409.

22. Letter from Thomas Jefferson to Dr. Benjamin Rush (Sept. 23, 1800), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 173, 175 (Andrew A. Lipscomb & Albert Ellery Bergh, eds., 1905).

23. A contemporaneous account of the modest aims of the Fourteenth Amendment is set forth in 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 648-77 (Thomas M. Cooley ed., 4th ed. 1873). For a revisionist view, see generally AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

24. MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES 259 (1982).

25. *Cf.* N.Y. Times v. Sullivan, 376 U.S. 254, 266 (1964) (examining the protections that the First and Fourteenth Amendments provided to a newspaper advertisement con-

the Court has gone far beyond considerations of a vibrant political process that was not long ago cited as the sovereign legitimization of the unwritten Constitution crafted by the Court in the two decades after *Brown v. Board of Education*<sup>26</sup> was decided<sup>27</sup> and has seldom attempted to reconcile its reasons for doing so with the contrary politics expressed by the vote of the people.<sup>28</sup> What we have witnessed is a bloodless victory for the individual rights celebrated by John Locke<sup>29</sup> and chiefly enjoyed and exercised by members of a ruling class over the rights of community celebrated by Edmund Burke<sup>30</sup> and shared by all. This has also been a stunning triumph for the journalism profession and the entertainment industry and a bitter defeat for moralists, the clergy, and those who believe, as I do, in representative government.<sup>31</sup>

### III. PORNOGRAPHY, OBSCENITY AND GRAPHIC VIOLENCE

The Court's first major anti-democratic excursion to proceed under the banner of both the First and Fourteenth Amendments was the invalidation of local pornography laws. In 1957, the Court affirmed a conviction under a federal statute forbidding the use of the mails to convey obscene material.<sup>32</sup> Justice Brennan, writing for the Court, upheld the statute by interpreting it to be applicable only to matter altogether lacking redemptive social

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cerning the civil rights movement); *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (holding that the NAACP's activities are modes of expression and association that the First and Fourteenth Amendments protect). See generally HARRY KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* (1965) (detailing the general impact of the civil rights movement on First Amendment law).

26. 347 U.S. 483 (1954).

27. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

28. Lee C. Bollinger, *Elitism, the Masses and the Idea of Self-Government: Ambivalence about the Central Meaning of the First Amendment*, in *CONSTITUTIONAL GOVERNMENT IN AMERICA* 99 (Ronald K.L. Collins ed., 1980) (describing the Supreme Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), as a major step in defining the freedom of the press).

29. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 168-69 (Classics of Liberty Library 1992) (1690) (discussing the inherent liberties of man bestowed on him by nature).

30. See EDMUND BURKE, *EDMUND BURKE ON GOVERNMENT, POLITICS AND SOCIETY* 50-51 (B.W. Hill ed., 1976).

31. There is deep irony in the Court's recent willingness, indeed seeming eagerness, to invalidate acts of Congress that trench on the sovereignty of state government while the Court has imposed no analogous restraint on itself. For a brief account of the Court's newly revived federalism, and its irony, see Earl M. Maltz, *Justice Kennedy's Vision of Federalism*, 31 *RUTGERS L.J.* 761 (2000).

32. *Roth v. United States*, 354 U.S. 476, 492 (1957).



importance.<sup>33</sup> In 1973, the Court modified the standard to apply to "works taken as a whole."<sup>34</sup>

Insofar as those decisions affect only the federal government, I take no strong exception to them. The issue appears in a different light, however, when the standard is applied to prevent enforcement of laws enacted by representative state or local government. No doubt the application of a local standard by a jury or local censor evaluating artistic "works taken as a whole" can threaten the values articulated by Milton and embodied in the First Amendment. The arts, prized as instruments of social change, not infrequently offend and ought not be suppressed in a free society. There is also, however, a wide range of material offensive to the moralities prevailing in many communities for which the claim can be only colorably made that a work as a whole has *some* nominal intellectual content or literary value, but which falls far short of making a contribution to the enduring struggle between truth and falsehood. Moreover, the opportunities for enrichment from the making of "art" that most citizens regard as dangerous and malicious depravity have been greatly multiplied by the technological advances of recent years, a matter of apparent indifference to the Court.<sup>35</sup>

Finding the distinction between art and smut elusive, the second Justice Harlan repeatedly advocated,<sup>36</sup> with scant success,<sup>37</sup> that some accommodation ought to be made to allow for the discretion of state and local officials in drawing that line. As a consequence of the Court's failure to observe his caution, the power of the state or local government to restrain the circulation of "adult" materials was closely confined. States and communities were substantially disempowered to regulate a wide range of commercially motivated activity exploiting diverse sexual or violent urges that do not comport with the hopes of many communities to channel sexuality into a framework of conventional family life or some postmodern alternative social structure, or of civil and humane relations with fellow citizens.

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33. *Id.* at 485.

34. *Miller v. California*, 413 U.S. 15, 39 (1973).

35. *Cf. Reno v. ACLU*, 521 U.S. 844 (1997) (involving a federal law seeking to regulate electronic transmissions).

36. *See A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General*, 383 U.S. 413, 455 (1966); *Smith v. California*, 361 U.S. 147, 169 (1959) (Harlan, J., concurring); *Roth*, 354 U.S. at 503.

37. *See Miller*, 413 U.S. at 33.

For example, a current, questionable application of the First Amendment is its use to bar site-blocking software deployed by local public libraries to prevent Internet access to pornography or excessively graphic violence on their public access computers.<sup>38</sup> If, as seems not unlikely, that decision is upheld on the ground that the software might block access to protected speech, one result will be that fewer children will be seen in public libraries as parents strive to shield their children from exposure to such material. Even the most explicit child pornography or most brutal violence can be incorporated within some kind of drama that might be said to have a point, and thus, taken as a whole, not pornographic or obscene in the eyes of a federal judge and hence accessible in public libraries.

It must be granted that a library making the wrong choice in using its site-blocking software might prevent adults from having free access to lurid but inspiring art. Yet, given the consequences, a reasonable local library might make the decision to resolve doubts by blocking material sufficiently lurid that reasonable parents might prefer to keep their children out of the library rather than provide them with access to the lurid material. That would leave those desiring access to lurid material to find it without the aid of the public library, a wound to individual freedom that communities might reasonably choose to impose as the lesser evil in the belief that there will be a net gain in community access to information if the “adult” material is excluded and children thus encouraged to use the library.

It seems to be widely accepted that no community library board (or any other government entity)<sup>39</sup> can or should consider whether it ought refrain from supplying adults with material having redemptive artistic worth merely because its officers expect the “art” to increase the frequency with which adult library patrons express their sexual impulses in relationships with children or commit acts of violence on fellow citizens. In this respect, it appears to matter not at all that the governing board of a public library is accountable at least indirectly to the people it serves, for their views on such matters count for nothing. Nor does it matter whether a reasonable observer could perceive that the “art” could

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38. *E.g.*, *Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998).

39. *Cf. Reno v. ACLU*, 521 U.S. 844 (1997).

stand as well without as with the objectionable material. Nor does it appear to matter that the presentation of material in a public library is inescapably a suggestion by the institution (and thus the public) that the material has some possible merit making it worthy of the attention of library patrons.

Of course, wise citizens might share the view of many professional librarians that such moral judgments are not only beyond their competence, but unsuited as well to the judgment of a community, and therefore best left entirely to individual library patrons. Many public libraries would elect to provide their users with material that is sexually explicit, exploits children, or presents extreme graphic violence. The point I wish to make is not that adults should (or could) be barred from access to pornography or extreme graphic violence, but that the decision to provide access in a public library is not rightly seen as one of constitutional stature to be made by life-tenured judges.

Also worth noting in this context are the remarkable claims to First Amendment protection made by some members of the entertainment industry. What is to be said of the constitutional right to broadcast such events as a wrestling match in which the winner is entitled to have sexual intercourse with the loser's wife, or perhaps the loser's child, or one in which the loser is required to kill and eat his own dog?<sup>40</sup> Why stop with marrying a millionaire—would it not attract a bigger audience if the candidates performed sexual favors for the millionaire on camera, including perhaps a little sexual violence? One cannot be surprised that there is an audience for such events; we all are voyeurs. Indeed, if there were cameras in the death chamber, we can be sure that a sizeable audience would be attracted, just as Parisians would gather around the guillotine. Indeed, why do networks not have the right to broadcast such art and such newsworthy events? They would turn a nice profit. It may be that communities are even as a practical matter powerless to prevent such exploitative "art" and reportage, but it is galling to many to hear that those who broadcast such material are exercising a sacred right established in our revered Constitution.

The response of the industry to expressed concerns about the

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40. Such events are said to have been featured on WWF's *Smackdown*, a program appearing on UPN, a cable network. I have not witnessed them. If they have not yet occurred on network television, just wait.

graphic portrayal of violence is reluctantly to suggest techniques for shielding children from their most brutalizing presentations, as by such futile means as rating films. Members of the industry assume an absolute constitutional right to broadcast or exhibit anything that adults might pay to see. But even if such techniques for excluding young viewers were effective (and one must doubt that they could be), more is at stake than the protection of children from moral influences of which their parents do not approve. A stable democratic society depends on a level of civility derived from a shared respect for the human condition and for the moral sensibilities of other citizens. Perhaps in some sense the wrestling show described above is art, but it is also an invitation to indulge brutal sentiments that a democracy might wisely suppress, in adults as well as in children, to the extent possible.

Consider also the industry that manufactures computer games. There are now in all of our communities numerous persons of diverse ages who spend many hours a day engaging in spectacularly brutal violence against other humans as portrayed in highly realistic electronic graphics. Perhaps those among us who are prone to rape, mayhem, torture, and murder can, in this way, gratify and expend their urges on a computer screen, but a community might not unreasonably reckon that such recreations will have the opposite effect. It is contended by the industry that even they are constitutionally protected.<sup>41</sup>

Violent language is another offense that communities are disempowered to constrain. The Court has explained that the viewer of the words "Fuck the Draft" can simply avert his eyes and thus avoid any injury, and so his interest is trumped by the sacred right to use four-letter words.<sup>42</sup>

Very little is really known about the social consequences of pornography, obscenity, or graphic violence. The abundant empirical data is gathered in circumstances so rife with causes and effects that conclusions must be tentative. Nevertheless, the data tend to confirm the widely shared intuition that extreme graphic violence is a contributing cause of real violence.<sup>43</sup> Sexually ex-

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41. *E.g.*, *Am. Amusement Mach. Ass'n v. Cottey*, No. IP 00-1321-C H/G, 2000 U.S. Dist. LEXIS 15076 (S.D. Ind. Oct. 11, 2000). The association did not obtain the preliminary injunction it sought against an ordinance. *Id.* at \*4.

42. *Cohen v. California*, 403 U.S. 15, 21 (1971).

43. A very brief review is available at Kerby Anderson, *Television Violence*, Kerby An-

plicit "art" may be, as many in the entertainment industry profess to believe, harmless or even benign, but the contrary position cannot be disproved. It is at least possible that much sexual material is, as some contend, degrading to the status of women<sup>44</sup> as well as hostile to widely favored norms of sexual conduct or a provocation to violence and, therefore, a provocation to antisocial conduct.

As Justice Harlan observed, the federal interest in constraining state and local officials and courts with respect to the management of public libraries or other forms of distribution of material containing child pornography or extreme graphic violence is at best attenuated.<sup>45</sup> Those who vote for state and local officials are not demonstrably wrong to believe that artistic freedom ought to be compromised to protect "family values" and encourage civil deportment. That sort of compromise is what state and local political institutions were designed to achieve.<sup>46</sup> Perhaps that means that there will be marginally less artistic freedom available to citizens of a democracy than is available to artists who have the patronage of an absolute monarch. If a particular work of art is censored in a community, the primary forum in which to grieve should be a legislature, a city council, or a jury. The secondary forum should be a state supreme court enforcing the freedom of expression provisions of state constitutions; most such courts are in some way accountable to the people they represent. A judge holding tenure for life and invoking an unwritten and almost unamendable text ought to become involved only in matters of grave abuse of power by state government such as the systematic suppression of a specific idea or sentiment. Thus, if the city fathers of Atlanta are so unwise as to prevent the exhibition of so excellent a film as *Carnal Knowledge*,<sup>47</sup> the most appropriate response is for the voters to "throw the rascals out," or perhaps sue them in state court. That was the law until recent times.

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derson's Commentaries, at <http://www.probe.org/docs/c-tvviol.html> (Apr. 14, 2000). A full review is in WENDY L. JOSEPHSON, TELEVISION VIOLENCE: A REVIEW OF THE EFFECTS ON CHILDREN OF DIFFERENT AGES (1995).

44. See CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSE ON LIFE AND LAW 163 (1987).

45. See *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General*, 383 U.S. 413, 455 (1966); *Smith v. California*, 361 U.S. 147, 169 (1959); *Roth v. United States*, 354 U.S. 476, 503 (1957).

46. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990) (analyzing the theory behind the line of Supreme Court decisions in which First Amendment protections have been extended to outrageous or offensive speech).

47. See *Jenkins v. Georgia*, 418 U.S. 153 (1974).

## IV. CHURCH AND STATE

The Court has virtually forbidden state or local government to encourage religious faith. Religious freedom has at times been displaced by freedom from religion.

Many of the Founders, Washington and Jefferson not least among them, shared a loose deism bordering on unbelief, but they perceived religion to be a necessary element in democratic life.<sup>48</sup> In its decisions, the Court has gone far beyond the requirements of Jefferson's great testament to religious freedom emblazoned on the wall in Old Richmond.<sup>49</sup> Cooley and Brandeis, although not themselves committed to any religious faith, also shared the belief that the morality of citizenship was for many citizens dependent on faith and that the democratic state therefore had a self-interest in encouraging religious communities of belief.<sup>50</sup> I am not so sure, but they may be right.

Francis Lieber explained this belief more fully.<sup>51</sup> Anticipating a point frequently made today by multi-culturalists, he attributed the success of American democracy to the existence of numerous social organizations or networks establishing communities of interest in which self-governance was practiced in diverse forms. These institutions included fraternal orders such as the Rotary, the Masons, the Elk, and Lions, but also prominent among them were religious communities.

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48. *E.g.*, George Washington, Farewell Address to the People of the United States (Sept. 9, 1796), reprinted in S. Doc. No. 105-22, at 20 (1998).

49. See 12 STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 84-86 (William Waller Hening ed., Richmond, Virginia 1823). The Virginia Guarantee of Religious Liberty, drafted by Jefferson as Governor and later enacted by the legislature in 1781, provided:

That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his opinion or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion and that the same shall in no-wise diminish, enlarge, or affect their civil capacities.

*Id.* at 86.

50. See ALAN R. JONES, THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY: A STUDY IN THE HISTORY OF IDEAS 262-63 (1987); PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 9 (1994) ("The home in which Brandeis grew up was not one that adhered to formal religion or engaged in religious activities.").

51. See FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT (1853). Lieber coined the phrase "hamarchy" to describe this form of self-government, which he considered to be far more stable on account of its internal structures for much the same reasons that federalism has stabilizing effects.

American democracy, including the republican idea of the First Amendment expressed by Milton, found many of its roots in Protestantism. One of the ways in which communities of faith share their beliefs and values is to express them in political discourse.<sup>52</sup> In some sense, membership in subordinate communities, including those of faith, gives meaning in this way to the exercise of the franchise. Moreover, while there have been epochs of severe religious intolerance, most religions teach, in some form, the idea of the brotherhood of man as the essential truth on which democratic citizenship must rest. This is not to say that nonbelievers cannot be good citizens of a republic, but that their citizenship rests on a concern for and respect of their fellow citizens that is at least akin to core religious teaching. A society bereft of that idea of citizenship (as Rome, for example, was in its days of empire when citizenship became merely an emblem of membership in a ruling class) seems doomed to become the war of all against all in which democratic government is destined to be among the first casualties.

This belief in a linkage between religion and democracy was shared by thoughtful secular observers from Jefferson to Brandeis, and there is no evidence to falsify it. It ought also to be recognized that Justices and intellectuals who suppose that "the dissemination of science" is a "sufficient agent" of civic moral education to sustain a community capable of self-government<sup>53</sup> comprise a "culture of disbelief"<sup>54</sup> that competes with faith. If disbelief has become the dogma of the republic, those who nurture religious faith and whose conduct as citizens is in part informed by their faith are being made an embattled minority<sup>55</sup> not far different from those minorities the Court presumes to protect by its habits of "strict scrutiny."

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52. My colleague, Martin Golding, has explained this relationship for orthodox Jews. Martin Golding, *Tikkun Olam: Social Responsibility*, in *JEWISH THOUGHT AND LAW* 201, 209-14 (D. Schatz et al. eds., 1997) (explaining how general consensus reached in public debate cannot so easily be obtained by Orthodox Jews for both religious and cultural reasons).

53. Thomas K. Lindsay, *Defending Liberalism*, 82 *IOWA L. REV.* 943 (1997) (reviewing STEPHEN HOLMES, *PASSIONS AND CONSTRAINTS: ON THE THEORY OF LIBERAL DEMOCRACY* (1995)).

54. See generally STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

55. STANLEY HAUERWAS & WILLIAM WILLIMON, *WHERE RESIDENT ALIENS LIVE: EXERCISES FOR CHRISTIAN PRACTICE COLONY* 25 (1989) ("By being adopted to be part of a journey called discipleship, Christians are permanently ill at ease in the world.")

There is no principle of natural law by which the line between church and state can be judged.<sup>56</sup> Most controversial of the Court's decisions in this area is that restricting prayer in schools,<sup>57</sup> a stricture that often has been defied. There is no question that a requirement that public school children participate in faith-specific religious services is an offense against the core values of the First Amendment. But the Fourteenth Amendment is not a commission to the Court to stamp out every religious impulse manifested by public institutions. Providing textbooks to students in parochial schools<sup>58</sup> is probably bad policy, but the constitutional values at issue are at most minimal and, as the Court with manifest reluctance acknowledged, do not call for the application of the federal judiciary's heavy hand.<sup>59</sup> Likewise, the lighting of a Christmas tree on the courthouse lawn alongside a creche and Chanukah menorah<sup>60</sup> is in poor taste, but it hardly threatens the values of religious freedom and free public discourse.<sup>61</sup> Those who are offended are not without recourse to local politics and state law, including state amendable constitutions, and they have the option of "averting their eyes."<sup>62</sup>

A current issue is whether it violates the First Amendment for a local school board to post the Ten Commandments in a public school facility.<sup>63</sup> I was once an elected member of a school board and resisted the presentation of a prayer at the beginning of our public meetings. I would never have voted to post the Ten Commandments in a public school. However, the posting of such a message seems to me to be a far cry from conducting a sectarian prayer in the classroom, or even from uttering a benediction at a school board meeting.

Among my pro bono ACLU clients years ago was an Ypsilanti, Michigan schoolteacher who encouraged his students to use his

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56. See Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2332 (1997).

57. See *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

58. See *Lemon v. Kurtzman*, 403 U.S. 602, 603 (1971).

59. *But cf. id.* at 625 (holding that two state statutes authorizing state aid to church-related educational institutions violate the First Amendment).

60. See *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

61. *But cf. id.* at 579 (holding the public display of the creche unconstitutional).

62. *Cohen v. California*, 403 U.S. 15, 21 (1971).

63. See, e.g., *Doe v. Harlan County Sch. Dist.*, 96 F. Supp. 2d 667, 672-78 (E.D. Ky. 2000) (ruling that the Ten Commandments should be removed from display in county schools).



classroom bulletin board for expressing their political ideas. Among the ideas they chose to express was that the local police were pigs. He was fired for refusing to remove that message from his bulletin board in support of his students' right to express themselves. Suppose he allowed a student to post the Ten Commandments. Suppose he posted them himself. Could or should he be fired for doing so? Maybe he should be, or maybe he should not be subject to any constraint that is based on the content of his postings, but the question seems to be at least close enough that it ought to be resolved (as it was in *Ypsilanti*) by vote of persons who are politically accountable, or possibly in state court pursuant to state law, and not by persons appointed in Washington who have tenure for life and no explicit commission to decide such matters.

To be sure, for the school board to post the Ten Commandments on a classroom bulletin board gives them a sort of official imprimatur that does not exist when the person posting them is a teacher or a student. Still, it would seem that anyone offended by the posting could avert his or her eyes at least as easily as one could ignore the statement "Fuck the Draft" embroidered on a jacket.<sup>64</sup> And they have recourse to the ballot box and the state courts. They, too, do not need the foreign aid of the federal judiciary to protect themselves from so inconsequential an affront.

Similarly, it seems to me that anyone offended by the words "With God All Things Are Possible" on a granite plaza next to a state capitol can be asked to avert his or her eyes. A panel of the United States Court of Appeals for the Sixth Circuit recently has held that such an entablature of the state motto of Ohio violates the First Amendment.<sup>65</sup> In order to take offense, one would have to know the Bible well enough to know that Christ is said to have uttered those words,<sup>66</sup> but not well enough to recognize that the words are taken out of context by Ohio to communicate a non-sectarian optimism identical to that expressed in the more familiar expression, "In God We Trust," appearing on our dollar bills. Had the state of Ohio been so gauche as to engrave "Jesus

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64. See *Cohen*, 403 U.S. at 21 (stating that "[t]hose in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes" from the language on the jacket).

65. *ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d 703, 727 (6th Cir. 2000).

66. *Matthew* 19:26 (Good News Bible).

Saves” on a wall, the court might indeed reasonably conclude that Ohio had “cross[ed] the line from evenhandedness toward all religions to a preference for christianity.”<sup>67</sup> But it is simply perverse to derive a sectarian message from those six words standing alone as a motto, and life-tenured judges are not warranted in imposing their perverse interpretation on them. Were I a legislator voting on a state motto, I would vote against that one, not because it mentions God or is known to the devout student of the New Testament as a quotation of Christ, but because it strikes me as somewhat sappy. But then what is a state motto supposed to be? I am gratified that the case is being reheard by the Court of Appeals en banc.<sup>68</sup>

What I have said bears also on the more difficult issue involving prayers at high school graduations or football games. Recently, a Santa Fe, Texas high school (note the name of the community: Spanish for “holy faith!”) was forbidden to allow its students to elect by secret ballot classmates to present an invocation at its football games.<sup>69</sup> A person of faith attending such events might regard specific utterances (we do not know what the students might have said had they been allowed to speak because the Court imposed a prior restraint!) as sacrilegious; those who objected to them on that ground might possibly have a point worthy of scrutiny under the First Amendment. However, the school board’s proposed practice might also be a lesson in democracy. Those who take offense have the privilege of silently or boisterously sneering at the invocation. They can vote for different speakers or for a different school board. In doing so, they would be striving to create a community that celebrates the values expressed in the First Amendment. Or they could sue in state court. Instead, they sought and received the foreign aid of distant Justices who, as the dissenters observed, “bristle[] with hostility to all things religious in public life.”<sup>70</sup>

When a state seriously tries to establish a state religion, of the sort Connecticut imposed on its citizens until 1817,<sup>71</sup> it will be time for the Supreme Court to occupy itself with the relationship

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67. *Capitol Square Review*, 210 F.3d at 726.

68. *ACLU v. Capitol Square Review and Advisory Bd.*, No. 98-4106, 2000 U.S. App. LEXIS 16276, at \*1 (6th Cir. July 14, 2000).

69. *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2282-83 (2000).

70. *Id.* at 2283 (Rehnquist, C.J., dissenting).

71. See RICHARD J. PURCELL, *CONNECTICUT IN TRANSITION, 1775-1818* (1963).

of state and local government with religion. Requiring sectarian prayer seems close enough to such an event to warrant the Court's attention. But it trivializes that important restraint for the federal judiciary to involve itself in micromanagement of that relationship.

## V. SYMBOLIC SPEECH

The Court also has used the First Amendment to control actions of state and local governments deterring deeds denoted by the actors as symbolic speech. Much conduct signals thoughts or feelings and can therefore be identified as symbolizing speech; indeed, having abandoned the distinction between words and deeds, the Court has cloaked a wide range of wordless conduct with a claim to First Amendment protection from the efforts of state or local government to discourage deeds that many citizens regard as harmful. Responsibility for drawing the line between deeds having symbolic importance that a democratic society ought to tolerate from those that do not has been relocated from democratic government to the federal judiciary.

The obscurity of the issue is illustrated by the limited right to dance nude. The Court has allowed the states to require barroom dancers to wear G-strings and pasties.<sup>72</sup> It is a reasonable inference from these opinions that absolutely buck-naked dancing in a barroom is not a constitutionally protected right, although numerous Justices have thought that it is. It is also a reasonable inference from these decisions that the Court would not allow a state to require G-strings and pasties if the dancers were engaged in what the Court deemed to be serious art such as that performed by the New York City Ballet. Finally, it also appears that public nudity for some nonartistic purpose, whether to show off the superiority of one's "private parts" or to exhibit one's contempt for their viewers, may be punished under state laws prohibiting public nudity. These distinctions are not coherent.<sup>73</sup> Their administration requires determinations of fact regarding the purpose of the nudity and the setting in which it occurs, so

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72. *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1395-98 (2000); *Barnes v. Glen Theatre, Inc.* 501 U.S. 560, 571 (1991). *But see* *Schultz v. City of Cumberland*, Nos. 98-4126 & 98-4209, 2000 U.S. App. LEXIS 23773, at \*1 (7th Cir. Sept. 26, 2000).

73. *See Pap's A.M.*, 120 S. Ct. at 1406 (Stevens, J., dissenting).

that one can be said to have a right to practice as much nudity as the federal judiciary approves in a given case. One may perhaps wonder what the Court will decide when it is confronted with *The Naked Truth*, a program featuring announcers who strip while reading the evening news on network television.<sup>74</sup>

The right to be nude is not, all things considered, a very important individual right. A community might suspect that the nudity even of classical ballet dancers is less a means of expression than a means of attracting an audience of paying voyeurs whose human frailties are being exploited for lucre. A wise community would nevertheless tolerate most presentations of nudity whether or not the actions were intended to communicate an idea or a feeling, as long as the nudity did not occasion serious offense to others or otherwise cause public disorder. At the same time, a wise community might conclude, along with virtually every other human culture ever sustained on the planet, that maintaining a measure of privacy for one's genitals tends to promote desirable civil decorum and therefore should be encouraged by the law.

Many years ago, I represented eighteen actors who appeared nude on a public stage. I can say from personal knowledge that my clients stripped because, and only because, they had been unable to draw a sufficient audience when they performed clothed. Maybe their nudity enhanced their artistic expression, but I doubt it. I won all eighteen cases, making me one of the most successful nudity lawyers of all time. My argument, never answered by the prosecutor, was that the Michigan law did not apply to nude dancing in a theatre. I believe that the same result would, and should, accrue in most states.

However, I share the view expressed in Justice Scalia's concurrence in *Barnes v. Glen Theatre*<sup>75</sup> that laws generally constraining public nudity are not properly subject to any form of scrutiny under the First Amendment.<sup>76</sup> If the city fathers of Erie perceive pasties to be needed for the moral health of their city, it is no business of life-tenured federal judges to tell them that they are mistaken in that assessment. And if the City of New York were so

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74. This happens on Channel M1 in Moscow. See Michael Wines, *So the News Is Ho-Hum. The Show's Spectacular*, N.Y. TIMES, Oct. 5, 2000, at A4.

75. 501 U.S. 560 (1991) (Scalia, J., concurring).

76. See also *Pap's A.M.*, 120 S. Ct. at 1400-02 (citing Justice Scalia's concurrence in *Barnes*, 501 U.S. at 574 (Scalia, J., concurring)).

foolish as to prosecute a ballet company for performing in the buff, it would be sufficient to resolve the issue by democratic means or by the intervention of state courts. That last example is, of course, a merely imaginary horrible scenario. We do not need the federal judiciary to protect us from such impossibilities.

Constitutional protection for the burning of crosses<sup>77</sup> is another example of First Amendment hypertrophy. A state or city could reasonably perceive that such a gesture is an intimidation and a provocation to violence, with no visible redeeming value. If there are people who want to burn crosses, they can vote to throw out the rascals who would punish them for doing so.

And then there is flag burning.<sup>78</sup> Not only are citizens entitled to withhold their respect for national symbols, but the Court has proclaimed the individual's right to destroy our national icons.<sup>79</sup> Many believe that ceremonial honor to the symbols of the Republic is an important means of reinforcing civic virtue.<sup>80</sup> That belief, like the belief that religion is good for a democratic polity, cannot be falsified. It is often intensely felt by those who have risked their lives or lost loved ones to protect the Republic symbolized by the flag. The act of burning a symbol so cherished by persons expected to view the act is an unmistakably hostile act having tangible and potentially harmful consequences even if it also serves to express hostile sentiments. The competing interest of the flag burner is insubstantial. There are an almost infinite number of other methods of expressing his hostility to the commonwealth.

What is one person's benign symbolic expression is another's hostile deed. Is a community constitutionally forbidden to discourage the wearing of the Confederate flag as an intentional affront to African-American citizens, or of Swastikas worn to encourage anti-Semitism? Or might it be constitutionally entitled to

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77. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (holding that an ordinance prohibiting the display of symbols that, based on race, may alarm others is invalid under the First Amendment).

78. See generally Kenneth D. Ward, *Free Speech and the Development of Liberal Virtues: An Examination of the Controversies Involving Flag-Burning and Hate Speech*, 52 U. MIAMI L. REV. 733 (1998).

79. See *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (holding that burning the American flag is expressive conduct that the First Amendment protects).

80. *Proposing an Amendment to the Constitution of the U.S. Authorizing Congress to Prohibit the Physical Desecration of the Flag of the U.S.: Hearing on H.R. 54 Before the Subcomm. on the Constitution, 105th Cong.* (1997) (statement of Prof. Richard D. Parker, Harvard Univ.).

forbid the display of the Stars and Stripes as a local protest against national policy? Wisdom decrees tolerance in all such matters, but it is the tolerance of the community that matters, and little of that is gained by federal decrees.

The flag burning decision has evoked a vigorous effort to amend the Constitution, which has some chance of success. What a trivial amendment! But it would be a measured response to an intervention by the Court to forbid a trivial trespass on the individual's right to engage in symbolic anti-symbolism.

## VI. THE RIGHT TO DISSOCIATE

In the same vein, there is unseemliness in the Court's fashioning a constitutional right of the Boy Scouts to exclude homosexual scoutmasters.<sup>81</sup> No doubt this is an important issue for those committed to the scouting movement, an institution devoted to the moral development of youth.<sup>82</sup> The Scouts may be right to suppose that many parents would withdraw their children from the movement if it appeared to shelter leaders proselytizing for homosexual lifestyles.<sup>83</sup> Wise law might well leave those leading the scouting movement free to make the appropriate accommodations according to their own lights.

But is such wisdom constitutionally required? Might a state or community reasonably follow the course of protecting gay and lesbian citizens from discrimination by institutions such as the Scouts? Particularly at a time when sexual mores are changing, there is much to be said for allowing states to experiment with diverse policies in the manner long advocated by Justice Brandeis,<sup>84</sup> especially when an experiment has no significant extraterritorial effects. There is a genuine collision of moral values, and one might therefore think its resolution an appropriate matter for democratic self-government.

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81. See *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2457 (2000).

82. See *id.* at 2451-52.

83. Cf. *id.* at 2453 (stating that the Boy Scouts expressed, in a position statement, its current view that "[t]he Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization. We do not believe that homosexuals provide a role model consistent with these expectations.").

84. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) ("There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.") (Brandeis, J., dissenting).

However, the Court boldly disempowered the state of New Jersey from pursuing a policy of anti-discrimination on the ground that it offends the Scouts' right of association embedded in the First Amendment. To find this restraint in the text of the First Amendment is more than a stretch; the right of association is itself a strained inference from the text, but there has never before been a right to associate *for the purpose of achieving discrimination against embattled groups*.<sup>85</sup> The New Jersey law that the Court invalidated can hardly be viewed as an expression of majoritarian tyranny indifferent to the interest and welfare of a beleaguered minority represented by the Scouts. The Scouts have full recourse to the political process to correct the problem if indeed the people of New Jersey perceive that there is one. The Supreme Court of New Jersey concluded that there was none.

## VII. COMMERCIAL ADVERTISING

Another, and even more misguided, excursion is the Court's extension of the First Amendment to commercial advertising.<sup>86</sup> Until the advent of the Burger Court, it was assumed that commercial advertising was unprotected by constitutional entitlements.<sup>87</sup> Advertising, to resort to Milton, has nothing to do with conscience and very little to do with truth. Nevertheless, the Court's present doctrine is that advertising that is not demonstrably false or deceptive and that does not concern unlawful activities may be restricted only in the service of a substantial public interest.<sup>88</sup> This standard appears to disempower states and communities from dealing with a considerable range of highly debatable conduct by which some individuals seek to profit from the inattentiveness or lack of sophistication of consumers of goods and services.

A useful illustration of the difficulties with the Court's stan-

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85. *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (arguing that a state's "compelling interest in eradicating discrimination against its female citizens justifies the impact" on a private organization's "male members' associational freedoms").

86. *See Va. State Bd. of Pharmacy v. Va. Citizens Cmty. Council*, 425 U.S. 748 (1976) (holding that commercial speech deserved the protection of the First Amendment).

87. *See Valentine v. Chrestensen*, 316 U.S. 52, 55 (1941) (holding that an ordinance forbidding the use of handbills for advertising did not violate the handbiller's constitutional rights).

88. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980).

dard is the problem of lawyer advertising.<sup>89</sup> Even simple price advertising by lawyers often threatens to mislead because of the absence of any means to provide information about the relative quality or utility of the service that a lawyer seeks to sell. There is also a public interest of ancient dignity expressed in laws against champerty and barratry that accords with widely shared moral judgment in forestalling activities seeking to cause or perpetuate civil disputes. While it is fairly contended that much litigation is in the public interest and ought to be promoted, there are many claims that potential plaintiffs are ill-advised to assert, not only because they lack merit, but also because the transaction cost, in heartache as well as treasure, makes their assertion improvident even if successful. Any experienced lawyer is acquainted with instances in which considerable public and private expense was incurred in litigation, foreseeably to the benefit of no person except the lawyers; indeed, an Italian proverb has it that "a lawsuit is a fruit tree planted in a lawyer's garden."<sup>90</sup> Moreover, the public has a special claim to regulate lawyers to prevent the degradation of the profession by excessive commercialism.<sup>91</sup> This is so because trust in lawyers is a public resource affecting the trust in other institutions of the Republic.<sup>92</sup> In addition, lawyer advertising appears to have strengthened a tendency for remunerative law practice, like other commercial enterprises, to be concentrated in fewer hands so that considerations of economic policy also are entailed.

Whether, despite all these concerns, lawyer advertising is on balance useful and whether or to what extent its regulation is warranted are questions eminently suited to resolution by officers entrusted to decide them by the people through conventional democratic institutions. There is no reason to suppose that national uniformity is useful. Life-tenured judges, however educated and experienced, have no special qualifications to appraise the issues.

Yet, the Supreme Court has steadily enlarged the constitu-

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89. See *In re R.M.J.*, 455 U.S. 191 (1982); *Bates v. State Bar*, 433 U.S. 350 (1977).

90. *Illinois v. Harper & Row Publishers*, 55 F.R.D. 221, 224 (N.D. Ill. 1972).

91. But see Geoffrey C. Hazard, Russell G. Pearce & Jeffrey W. Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (1983); FTC, REPORT ON LAWYER ADVERTISING (1984).

92. Carl M. Selinger, *The Public's Interest in Preserving the Dignity and Unity of the Legal Profession*, 32 WAKE FOREST L. REV. 861, 872 (1997).



tional inhibition<sup>93</sup> to extend to direct, personal, uninvited solicitation of business by certified public accountants<sup>94</sup> and, presumably, by lawyers as well. These holdings have made it very difficult if not impossible for the state to protect citizens from invasive selling of expensive professional services that the consumer may not need. The Court's earlier concern that a hard-selling professional person might overbear a less sophisticated and vulnerable potential client<sup>95</sup> seems to have vanished.

This disregard for the public interest in protecting citizens from misleading salesmanship is even more evident when the advertising in question is employed by those who seek to profit from the gullibility of consumers of diverse health remedies, a large group of citizens that may be especially in need of protection from the mendacity of many vendors. Consistent with utterances of the Supreme Court,<sup>96</sup> lower federal courts have held that vendors of health foods and dietetic supplements have a constitutional right to present their wares as healthful as long as their labels disclose in the fine print that there is no scientific evidence to support their claims.<sup>97</sup> It also has been held that manufacturers of prescription drugs have a constitutional right to advise doctors of uses of their drugs that have not been evaluated by the Food and Drug Administration.<sup>98</sup> Indeed, as Margaret Gilhooley has observed, food and drug law is increasingly a subdivision of First Amendment law.<sup>99</sup> The effect is to turn the clock back a century to provide substantial freedom to the purveyors of useless and potentially harmful snake oil that progressive consumer protection law sought long ago to drive out of the marketplace.

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93. See *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990); *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).

94. *Edenfield v. Fane*, 507 U.S. 761 (1993).

95. *E.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

96. *Cf.* *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (holding that the state cannot prohibit liquor advertising). Of course, the state can eliminate all private sales of liquor, but cannot allow private sales without advertising. This result can seem sensible only to one who has become lost in the wilderness of First Amendment doctrine.

97. *E.g.*, *Pearson v. Shalala*, 164 F.3d 650, 655 (D.C. Cir. 1999). For background on this problem, see generally H.R. REP. No. 101-980 (1990) ("FDA's Continuing Failure to Prevent Deceptive Health Claims for Food").

98. *Wash. Legal Found. v. Friedman*, 13 F. Supp. 2d 51, 74-75 (D.D.C. 1999), *appeal dismissed and order vacated*, *Wash. Legal Found. v. Henney*, 202 F.3d 331 (D.C. Cir. 2000).

99. See Margaret Gilhooley, *Constitutionalizing Food and Drug Law*, 74 TUL. L. REV. 815, 823-24 (2000).

The problem with respect to lawyer, accountant, and health food advertising is that all are instruments for exploitation of citizens who do not have means or occasion for evaluating the information that vendors supply. Consumer protection law (and investor protection law) in virtually all its forms rests on an intuitively based assumption that many vendors of goods and services will stay up nights thinking of ways to catch consumers (or investors) in unguarded moments when they can be separated from their money by suggestions that they might gain happiness by unlikely means remunerative to the vendors. Overt and demonstrable fraud is only the most blatant form of exploitation. All of us at times, and some of us all of the time, are vulnerable to subtle and optimistic suggestion that a manufactured substance (or a service) might improve our health, wealth, appearance, or disposition.

Consumer and investor protection law cannot protect us from calculated exploitation of that common human weakness without imposing restraints on what vendors can say. As Kathleen Sullivan has observed, the Court has made all consumer protection law “much harder to defend.”<sup>100</sup> Of course, there are some utterances by vendors that have genuine value to consumers. But there is no reason to believe that federal judges are better able than legislators or administrators to distinguish good commercial advertising from bad. Nor is there reason to suppose that the value of the information we receive from good advertising outweighs the harm caused by advertising that “pushes the envelope” of truth to gain profit. For example, the harms caused by medical advertising include misplaced reliance on a useless remedy, failure to secure real help that might be available, and occasional unanticipated toxic effects of the snake oil bought and consumed.

Unlike other matters discussed here, this extension of the First Amendment to food and drug law is not an intrusion on state or local law. With respect to the advertising of health foods and medicines, primary reliance of consumers for protection has rested on the federal government because of the inability of state and local governments to regulate the distribution of goods mov-

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100. Kathleen M. Sullivan, *Cheap Spirits, Cigarettes and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 155; see also Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589 (1996).

ing in interstate and international commerce and because of the high cost of scientific investigation of claims made for products.<sup>101</sup> For similar reasons, many foreign governments and even the World Health Organization also rely on the United States Food and Drug Administration.<sup>102</sup> It is not merely American citizens who are exposed to exploitation when the United States Food and Drug Administration is restrained, but people in all corners of the world.

If lawyers and vendors of ineffective and possibly harmful remedies have a constitutionally protected right to advertise, a compelling argument can be made for a constitutionally protected right to beg.<sup>103</sup> Recognition of such a right would entail a Court-crafted law of vagrancy equally suitable for application to every community, neighborhood, and street in the United States. Humane consideration of the needs and interests of the most impoverished citizens is as important as any of the values enshrined in the Constitution, at least equal to those noted in the preceding pages, but it would be improvident of the Court to take upon itself the responsibility for controlling the means by which those needs and interests ought to be considered and recognized. However, if professional ethics law and food and drug law are branches of First Amendment law, why not vagrancy law? At least the federal courts enforcing such constitutional law would be protecting the powerless rather than those who have abundant resources by which to protect themselves in democratic political struggles.

## VIII. CAMPAIGN FINANCE

The most grave example (in this author's mind) of the Court's hubris in extending the First Amendment to matters that are not its business is the Court-created right to spend money to influence and sometimes to control the result of ostensibly democratic elections.<sup>104</sup> It is this that has led me to this reconsideration of the

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101. See generally FOOD AND DRUG LAW (Richard M. Cooper ed., 1991).

102. See generally JAVED SIDDIQI, WORLD HEALTH AND WORLD POLITICS: THE WORLD HEALTH ORGANIZATION AND THE UN SYSTEM (1995).

103. Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 900 (1990) (relating the right to commercial speech with the right to beg).

104. See generally ELIZABETH DREW, THE CORRUPTION OF AMERICAN POLITICS: WHAT WENT WRONG AND WHY (2000).

Court's other dogmatic extensions of the First Amendment. Indeed, a cynic could see in the Court's decisions on campaign finance a malicious purpose to so degrade democracy that the people have no choice but to rely on the Court to govern us as a tenured College of Cardinals.

While many of us are willing to supply small sums of money to support a political cause, the common understanding is that large political contributions are generally made in expectation of a quid pro quo from the recipient. There have been occasions when wealthy persons acting in what they perceived to be a public spirit have financed an expensive campaign because they believed in a cause or in the moral worth of an individual candidate. But many campaign contributions, we cannot know how many, are repaid out of public stock in the form of special consideration in lawmaking or enforcement.

For example, it is the frequent practice of many firms and persons of means to contribute substantial sums to rival candidates so that whichever candidate wins, the donor wins. On the face of it, such contributors are expressing no idea and favoring no policy other than preferential treatment for particular interests they favor. Perhaps the clearest example of the evil is the federal subsidy to sugar growers, which serves no imaginable public purpose, but lines the pockets of a few families who subsidize the political campaigns of many, many legislators on both sides of any aisle.<sup>105</sup> Other generous patrons of rival political campaigns include gambling casinos, tobacco companies, highway contractors, and real estate developers, none of whom can be suspected of spending to promote any policy other than their own financial self-interest.

A state or community is legitimately concerned with the availability of its political process for the open encounter of ideas praised by Milton. A process in which one side of a debate is given by far the largest share of exposure to the public is not a fair contest on a level playing field. It is at best a Lincoln-Douglas debate with little or no Lincoln. Manifestly, fairness in this context is not easily defined or achieved, but that is a reason to allow constraints that the people of a state or community might choose to impose on persons who seek to use money to dominate public dis-

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105. Cf. Richard K. Harper & John Aldrich, *The Political Economy of Sugar Legislation*, 70 PUB. CHOICE 299, 300-01 (1991) (contending that the federal subsidy to sugar growers is not economically feasible).

course with glitzy, glib, misleading sound bites crafted by professional deceivers.

The Court in its treatment of the issues in its widely disparaged opinion in *Buckley v. Valeo*<sup>106</sup> acknowledged the risk of bribery as a justification for the regulation of campaign funding.<sup>107</sup> What the Court and advocates such as the Wall Street Journal editorialists<sup>108</sup> have not acknowledged is the marginally more subtle form of corruption achieved by monied interests who buy not the officer but the office, assuring themselves that it will be occupied by a person reliably friendly to their interests. While vast expenditures of interest group money are not an absolute assurance of success, there are few elected offices in the United States government that a citizen who does not have access to very large sums might hope to occupy. That is also true of most state offices. This is a profoundly disaffecting reality.

The problem of campaign finance was a problem in earlier times, but it did not become acute until the advent of television. The electronic media are capable of providing a blitzkrieg of political advertising, but only for a high price paid not only to the media but to consultants who are expert in the relevant arts of misguidance. Political advertising on commercial television is much more effective, and much more pernicious, than any other form of campaigning because the disinformation, supplied through sonorous and artistic spot advertisements broadcast between innings or between soap opera conversations, "melts down" in the minds of viewers, even sophisticated viewers, who are prone to forget its unreliable source and attribute it to a reliable one.<sup>109</sup>

The result of such an insidious electronic blitzkrieg, or even the possible threat of a blitzkrieg, because of its effectiveness, is to impose a similar cost on rival candidates. Indeed, candidates face a prisoner's dilemma compelling them to resort to high-tech, high-cost, negative campaigning. To compete for many public offices, the serious office seeker therefore is compelled to do what-

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106. 424 U.S. 1 (1976).

107. *Id.* at 45.

108. *E.g.*, 'Loose Enterprise?' WALL ST. J., July 27, 2000, at A22.

109. The process is analyzed in KATHLEEN HALL JAMIESON, DIRTY POLITICS 43-63 (1992). See generally JOSEPH A. CAPPELLA & KATHLEEN HALL JAMIESON, SPIRAL OF CYNICISM: THE PRESS AND THE PUBLIC GOOD (1997).

ever is necessary to secure a large campaign fund. Not just money, but big money, has truly become the mother's milk of politics.<sup>110</sup>

Justice Stevens has recently expressed the correct premise of First Amendment doctrine applicable to campaign finance. "Money," he said, "is property; it is not speech."<sup>111</sup>

Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.<sup>112</sup>

Justice Byron White expressed a similar thought in his dissent in *Buckley*.<sup>113</sup> Alas, that his brethren did not heed his words; one may hope they may in time heed those of Justice Stevens.

They have been encouraged to do so by Burt Neuborne, who advocates a "democracy-centered" reading of the First Amendment.<sup>114</sup> Indeed, the problem of campaign finance lies at the center of the First Amendment's historic preoccupation with the protection of political utterances. As Milton understood, a republic requires debate for its very life. When incorporated into the Fourteenth Amendment, the First Amendment can be rightly viewed as having a direct connection to the constitutional guarantee of a republican form of government. It is then also linked to the Equal Protection Clause and the rightly celebrated doctrine of one man, one vote.

Thus seen, the right to express oneself by hiring others to speak must yield to the imperative need to level the playing field so that citizens of modest means can participate in self-government on reasonably equal terms with individuals or groups of abundant means. When large sums of money are used to hire

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110. CHARLES LEWIS, *THE BUYING OF THE CONGRESS: HOW SPECIAL INTERESTS HAVE STOLEN YOUR RIGHT TO LIFE, LIBERTY AND THE PURSUIT OF HAPPINESS* 1-12 (1998); Lars-Erik Nelson, *Democracy for Sale*, N.Y. REVIEW OF BOOKS, Dec. 3, 1998, at 8.

111. *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 910 (2000) (Stevens, J., concurring).

112. *Id.* (Stevens, J., concurring).

113. 424 U.S. at 257 (White, J., dissenting).

114. Burt Neuborne, *Soft Landings*, in *IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS* 169 (E. Joshua Rosenkranz ed., 1999).

others to express, publish, or broadcast in insidious form ideas that they may or may not share to audiences who do not choose to receive them, much more than debate is involved. The guarantee of a republican form of government is out the window, and in its place is a First Amendment guarantee of a plutocratic form of government subservient to the interests of wealth, which is the form of government now prevailing in America.

The problem of campaign finance is most acute with respect to the judicial elections that are my special concern. In such elections, voter interest is generally low, political content is limited, and the appearance, if not the risk, of quasi-bribery to secure preferred treatment is especially great. Nevertheless, since the 1980s, multimillion dollar campaign funds are required to secure election to some states' highest courts.<sup>115</sup> Citizens are not wrong to doubt the independence of the judiciary in such circumstances. The practice is a fulfillment of the cynical view expressed in public choice theory that elected judges are virtually indistinguishable from legislators in their vote-maximizing behavior.<sup>116</sup>

Any effort to regulate campaign finance must also confront another questionable application of the First Amendment: the Court's holdings that there is in at least some circumstances a constitutional right to engage in politics anonymously.<sup>117</sup> Often suggested by those who oppose more effective regulation of campaign finance is public disclosure of sources. There are numerous practical problems with this approach that seem likely to make it ineffective, but even that is subject to objection cloaked in the rhetoric of the First Amendment. Supreme Court cases affirming the right to anonymity are distinguishable on their facts, but given the manifest predisposition of the Court to favor the rights of wealthy citizens or groups to dominate political discourse with their money, the Court might perhaps be expected to hold that a billionaire citizen or group is constitutionally entitled to saturate

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115. See, e.g., Kurt M. Brauer, *The Role of Campaign Fundraising in Michigan's Supreme Court Elections: Should We Throw the Baby out with the Bathwater?*, 44 WAYNE L. REV. 367 (1998); Paul D. Carrington, *Big Money in Texas Judicial Elections: The Sickness and Its Remedies*, 53 SMU L. REV. 263 (2000); Nathan S. Heffernan, *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 MARQ. L. REV. 1031 (1997); Glenn C. Noe, *Alabama Judicial Selection Reform: A Skunk in Tort Hell*, 28 CUMB. L. REV. 215 (1998).

116. Richard L. Hasen, *"High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act*, 75 N.C. L. REV. 1305, 1313 (1997).

117. See, e.g., *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 357 (1995).

anonymously our airwaves with costly and misleading political advertising as one appears to have done in a recent presidential primary.

A reasonable citizen might well wonder: if people have the right to use money anonymously to buy influence with a legislature, why should they not be equally entitled to buy influence with a court, or even the Supreme Court, that claims the power to move the issue of campaign finance beyond the reach of democratic political discourse? Frederick Grimke noted long ago that all the arguments for life tenure for judges are nearly equally applicable to legislators and executives.<sup>118</sup> One response to the concerns I express would be to amend Article III to require the Justices to stand for re-election every six years or so in a free-for-all campaign requiring those wishing to remain on the bench to raise millions of dollars a year from interest groups, litigants, and lawyers appearing before the Court to enable themselves to calumniate their political adversaries. At least one could then be assured that those making decisions about the constitutionality of campaign finance laws really understood what was at stake.

#### IX. DEFAMATION AND THE FAIRNESS DOCTRINE IN BROADCAST REGULATION

The problem of campaign finance is further compounded by what the Court has done with the law of defamation.<sup>119</sup> The not-so-hypothetical anonymous billionaire may perhaps safely saturate our airwaves with material that stops just short of blatant defamation of a disfavored candidate.

The holding in *New York Times v. Sullivan*<sup>120</sup> that a public official must prove malice by clear and convincing evidence to recover for alleged defamation uttered in public debate<sup>121</sup> did not anticipate our vast postmodern abilities to publish derogatory material requiring a victimized candidate (if he or she is to survive the assault) promptly to refute it and to have on hand the large sums required for effective refutation when an election is

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118. See FREDERICK GRIMKE, *THE NATURE AND TENDENCY OF FREE INSTITUTIONS* 444 (John William Ward ed., 1963) (1856).

119. See generally RODNEY A. SMOLLA, *SUING THE PRESS* (1986).

120. 376 U.S. 274 (1964).

121. *Id.* at 279-80.



imminent.<sup>122</sup> Nor does it take account of the cumulative impact of decades of intensely negative campaigning on the feelings of citizens toward the governments for which they share nominal responsibility or on the willingness of able citizens to stand for election.

There now seem to be those spending vast sums not to persuade voters to support the candidate of the big spenders but to so despoil the process that many voters will stay home on election day, a choice that a growing number of citizens have been making. Civility in democratic politics is at best rare, but it is a priceless asset worth seeking. To many, and perhaps most, American voters, it is made to appear that most electoral choices are choices among scoundrels.

If civility in elections is not a constitutionally legitimate objective of legislation, then it would seem that civility in judicial proceedings is equally unsuited to legislative concern. If one can freely accuse a candidate for judicial office of moral transgressions, why may a lawyer or litigant not repeat those accusations in open court in the course of a jury trial?<sup>123</sup> Does a lawyer not have a First Amendment right to speak her mind and heart when she is making a closing argument to the jury? Can she not say that the legal instructions they are about to hear will be given by a judge whose campaign funds were provided by tobacco companies and other hateful enterprises?<sup>124</sup> Can she not use the same strong language on her adversary that is used on network television or perhaps drape the bench or adversary counsel's table with a Confederate flag or a Swastika?

Justice Byron White joined in Justice Brennan's sweeping opinion in *Sullivan*, but later concluded that it was his worst vote in thirty years on the Court.<sup>125</sup> For many years, he sought opportunities to restore (without punitive damages) the law of defamation in its application to political discourse.<sup>126</sup> He sensed, as many did not, that it was a mistake to strip our political discourse of ef-

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122. See generally ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).

123. Cf. *In re Green*, No. 995A150, 2000 Colo. LEXIS 1034 (Sept. 11, 2000).

124. Cf. MODEL CODE OF PROF'L RESPONSIBILITY EC 8-6 (1981).

125. See DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 352, 421 (1998).

126. See *id.* at 352.

fective restraint on false or misleading information about candidates for public office.<sup>127</sup> He repeatedly affirmed a public need for a forum in which candidates victimized by political disinformation could call their unjust assailants to account.<sup>128</sup> He did succeed in leading the Court to a holding that, notwithstanding *Sullivan*, a knowingly false attribution of a quotation is actionable defamation.<sup>129</sup>

There is no doubt that *Sullivan* is now deeply entrenched in our legal and political culture.<sup>130</sup> Indeed, at least two American courts have refused to enforce English judgments imposing liability on foreign publishers who in foreign lands defamed officers of foreign governments.<sup>131</sup> These decisions were radical departures from the recognition customarily given to English judgments in American courts.<sup>132</sup> It is not generally a reason to deny recognition of a foreign judgment (perhaps least of all that of an English court) that the law expressed in the judgment is different from American law, as the English law is on the *Sullivan* issue.<sup>133</sup> It was, however, held that judgments imposing liability on journalists for defaming public figures so shock the American judicial conscience that it would be contrary to national policy to enforce them.<sup>134</sup> Indeed, this acute sensitivity to the presumed virtues of the *Sullivan* rule is remarkable given that most, if not all, other democracies afford their politicians seeking to represent the people whatever protection from defamation is afforded other citizens.<sup>135</sup> By the standards of other civilized societies, the two

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127. *See id.* at 422.

128. *See id.*

129. *See* *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 518 (1991).

130. *See generally* DONALD M. GILLMOR, *POWER, PUBLICITY, AND THE ABUSE OF LIBEL LAWS* (1992); LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* (1991).

131. *See* *Telnikoff v. Matusevitch*, 702 A.2d 230, 236 (Md. Ct. Spec. App. 1997); *Bachchan v. India Abroad Pubs., Inc.*, 585 N.Y. Supp. 2d 661 (Sup. Ct. 1992).

132. *See, e.g.*, UNIF. FOREIGN-MONEY JUDGMENTS RECOGNITION ACT, 13 U.L.A. 261 (1968); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 (1987).

133. *See Sullivan*, 376 U.S. at 274-75.

134. *See* Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, *LAW & CONTEMP. PROBS.*, Summer 1998, at 124 ("The right of citizens to defame public officials is now so widely recognized that it has become ingrained in our legal culture.")

135. Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism*, in IF BUCKLEY FELL, *supra* note 114, at 103, 119. A proposal for a statutory modification of the *Sullivan* rule is set forth in Carrington, *supra* note 134, at 124.

judgments were correct on the merits even if their merits cannot be recognized in the United States.

So far have the federal courts come with this extraordinary doctrine that it is no longer possible to regard the law of defamation as a serious inhibition on the utterance of misleading or seriously overstated allegations not only against government officers, but against a host of other "public figures." It is even plausible that corporate executives are unprotected against false utterances about them that are intended to mislead the stock market.<sup>136</sup>

A regulation of the media intended to inhibit uncivil politics was the fairness doctrine, imposed on television broadcasters by the Federal Communications Commission.<sup>137</sup> To the great distress of the media, the Court upheld that doctrine over thirty years ago.<sup>138</sup> It has since been substantially neglected,<sup>139</sup> and the Court's holding seems likely to be narrowly confined. But a ray or two of hope has been opened by the opinions of the Justices in the cases involving the must-carry provisions of the Cable Act of 1992.<sup>140</sup> Those opinions have been analyzed with admirable care by Owen Fiss, who finds in them some evidence that the Court may be turning away from extreme libertarianism and might tolerate well-crafted regulation of the practices of television and cable operators to assure equalizing access for political expression that is presently being drowned out by the paid utterances of well-funded candidates and interest groups.<sup>141</sup> Perhaps such regulation might include some form of a right to reply to at least some forms of defamatory or seriously misleading political advertising such as most of those provided in sound bites inserted into commercial television.

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136. For a thoughtful analysis of this use of the Internet, see generally Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000).

137. See Communications Act of 1934, 47 U.S.C. § 315(a) (1994); 47 C.F.R. 73.1910 (1999) (requiring that broadcasters are obligated to give a reasonable opportunity for the discussion of conflicting views on public issues).

138. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369, 400-01 (1969).

139. The last vestige of the doctrine was suspended by the Commission on October 4, 2000. Stephen Labaton, *In Test, F.C.C. Lifts Requirement on Broadcasting Political Replies*, N.Y. TIMES, Oct. 5, 2000, at A1.

140. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

141. Owen Fiss, *The Censorship of Television*, 93 NW. U. L. REV. 1215, 1238 (1999).

On the other hand, the political prospects for such reforms seem dim. As Cass Sunstein has observed, the National Association of Broadcasters uses the First Amendment in the way that the National Rifle Association uses the Second Amendment: “as an all-purpose shield against any action adverse to their interests.”<sup>142</sup> Politicians (or Justices) daring to impose any form of accountability on the media must expect to be pilloried for doing so.

The nexus between campaign finance and the absence of the restraining influence of defamation law has become, in very recent years, an especially acute problem in the conduct of judicial elections. How indeed can one spend millions of dollars on a judicial campaign other than on false and misleading advertising? The most common ploy, almost always available for use against a sitting judge, is to accuse an adversary of being soft on crime. Since 1996, six states have “create[d] organizations to monitor judicial elections,<sup>143</sup> but it is not clear that they will be allowed to take action against judicial candidates who debase their offices and their professions by uttering calumnies against one another. Thus, a United States District Court has enjoined a proceeding of the Alabama Judicial Inquiry Commission against Justice Harold See,<sup>144</sup> who spent millions in a campaign for the Republican nomination for the Chief Justiceship of his court to buy expensively crafted television advertising depicting his adversary as a judge who was soft on drug dealers.<sup>145</sup> See, who had himself been falsely vilified in a previous campaign,<sup>146</sup> listed among his adversary’s drug dealer cases many in which the adversary had not participated, as See appeared to know. See also surely knew that his adversary could not explain his current rulings on sentencing without violating a standard rule of judicial ethics,<sup>147</sup> so that his

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142. Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 499 n.+ (2000).

143. William Glaberson, *States to Rein in Truth-Bending in Court Races: Judges Face Penalties for Deceiving Voters*, N.Y. TIMES, Aug. 23, 2000, at A1.

144. *Butler v. Ala. Judicial Inquiry Comm’n*, No. 00-D-976-N, 2000 U.S. Dist. LEXIS 13235, at \*1-2 (M.D. Ala. Aug. 3, 2000).

145. *Id.* at \*31 n.18.

146. See Noe, *supra* note 115, at 216. For Justice See’s comments on the law governing judicial elections, see Harold See, *Comment: Judicial Selection and Decisional Independence*, LAW & CONTEMP. PROBS., Summer 1998, at 141.

147. *Butler*, 2000 U.S. Dist. LEXIS 13235, at \*37 (providing that the defendants stated in a court document that “Justice See knew or should have known that Canon 3A(6) prohibited Judge Moore from explaining pending cases.”); see ALA. CANONS OF JUDICIAL ETHICS Canon 3A(6) (1976) (amended 1999) (constraining public comment by judges on

adversary was essentially defenseless against the charge. The District Court held that the Alabama rule prohibiting a judge from publishing such false information in a judicial campaign is substantially likely to be a violation of the First Amendment and enjoined the disciplinary action taken by the Alabama Judicial Inquiry Commission.<sup>148</sup>

The case of Justice See is, alas, one of many.<sup>149</sup> In 1998, a Georgia panel monitoring judicial elections published its finding that a spot advertisement broadcast by a candidate was highly misleading and unethical. The candidate lost, perhaps as a result of this corrective intervention, and has now brought an action against the commission charging it with a violation of his First Amendment rights. And there are other pending disputes of a like kind, arising in Michigan, Nevada, and Florida.<sup>150</sup>

One must at least give Justice See credit for appearing on screen and calumniating his adversary in the first person. Perhaps he could have avoided trouble by arranging to have the same advertising done at the expense and direction of an anonymous supporter, allowing the calumnies to be uttered by an actor bearing a suitable resemblance to Walter Cronkite. If one is to believe all one reads in the Supreme Court reports,<sup>151</sup> there is nothing that a state can do to prevent an anonymous source of wealth (say an organization calling itself War on Drugs) from calumniating judicial candidates. Such an anonymous source was single-handedly responsible for the defeat in 1996 of a member of the Supreme Court of Tennessee.<sup>152</sup> The identities and true mo-

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pending matters).

148. *Butler*, 2000 U.S. Dist. LEXIS 13235, at \*39-40 (finding that "Justice See ha[d] established a substantial likelihood of succeeding on the merits of his claim that Canon 2A is unconstitutional as applied to him").

149. *See* Glaberson, *supra* note 143, at A1 (describing Alabama's first disciplinary charge against a judge and a Florida trial judge's removal as examples of a changing trend in the attitude toward judges in our country).

150. The breadth of concern over the effect of the inflated First Amendment on the integrity of judicial elections was revealed by the call of an emergency meeting of fifteen Chief Justices to discuss the issue and possible remedies. William Glaberson, *Chief Justices to Meet on Abuses in Judicial Races*, N.Y. TIMES, Sept. 8, 2000, at A1.

151. *Cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (holding that a state cannot outlaw speech based on its potentially fraudulent content). That case involved an unsigned flyer circulated by the author at a public meeting; it could be readily distinguished from any case involving electronic advertising.

152. An account of the 1996 Tennessee election is provided in Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 310 (1997). *See also*

tives of her assailants may never be revealed, and it may be that the state is constitutionally disabled from investigating and publicizing them.

I have observed a tendency in some life-tenured judges and persons holding academic tenure to dismiss concern for any problems with judicial elections, many of them reckoning that there is an easy answer to the problem: just appoint state court judges, like federal judges, for life. This is not the place to debate the merits of judicial elections,<sup>153</sup> but the point needs to be made that judicial elections are here to stay in most states.<sup>154</sup> There are legitimate, if not universally convincing, arguments for holding such elections. It is therefore a matter of paramount importance to the law that those elections being held be free of fraud and other electoral abuses, including factual distortions to make a rival candidate appear to be a scoundrel. While the difference between judicial elections and other kinds of elections is perhaps a matter only of degree, there is a distinction to be made with respect to the relative importance of civility and personal integrity of those elected to judicial office and, indeed, of the appearance of integrity needed to sustain public confidence in law.

#### X. THE MEDIA AND THE RIGHT TO A FAIR TRIAL

The hyperinflation of the First Amendment that is ravaging our politics and our judicial institutions reflects the excessive power that barons of the media exercise over American politics and law. The barons long ago outgrew any resemblance to the homely village newspaper celebrated in the utterances of early champions of the right to freedom of expression. They are an industry and, like other industries, are engaged in competitive exploitation of consumers and workers for the purpose of rewarding shareholders and justifying mind-boggling compensation for themselves. In many fields, as economists are prone to urge, such

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Kirk Loggins & Duren Cheek, *Activists Target Tennessee Judge*, NASHVILLE TENNESSEAN, July 9, 1998, at A1.

153. For an attack on the institution, see generally Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995). Professor Croley suggests that the election of judges is a violation of the Fourteenth Amendment; such a holding could be regarded as the ultimate arrogation by the Court.

154. The history of the institution is recounted in Carrington, *supra* note 134, at 87-107.

competition may in the end benefit those whom the competitors seek to exploit. But there is scant evidence that the quality of our public institutions is well served by the electronic media who profit from political spot advertising and serve their viewers with political news comprised of sound bites.<sup>155</sup> The chronic failure of the market to serve the public interest in maintaining effective public institutions is dramatically exhibited in claims made by the media for the right to conduct their business without regard for the justice or injustice of the outcomes of judicial proceedings.

John Henry Wigmore stated a principle no less applicable to the media than to other citizens. The duty to assist a court by supplying it with evidence relevant to a matter it must decide is, he said:

a duty not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit. He is not a desirable member of society. He who will live by society must let society live by him, when it requires to.

. . . [The] inconvenience which he may suffer, in consequence of his testimony, by way of enmity or disgrace or ridicule or other disfavoring action of fellow-members of the community, is also a contribution which he makes in payment of his dues to society in its function of executing justice. If he cannot always obtain adequate solace from this reflection, he may at least recognize that it defines an unmistakable axiom. When the course of justice requires the investigation of truth, no man has any knowledge that is rightly private.<sup>156</sup>

The Supreme Court has often affirmed the wisdom of the principle stated by Wigmore and applied it to the media, denying contrary First Amendment claims. In *Branzburg v. Hayes*,<sup>157</sup> the Court denied the right of journalists to refuse to identify their sources when needed to pursue an investigation of facts by a Kentucky grand jury.<sup>158</sup> In *Zurcher v. Stanford Daily*,<sup>159</sup> it held that newsrooms are not sheltered from reasonable searches for evi-

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155. For a lively account of the contemporary role of the media in our public life, see generally DAVID L. PALETZ, *THE MEDIA IN AMERICAN POLITICS: CONTENTS AND CONSEQUENCES* (1999).

156. JOHN H. WIGMORE, *TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2192, at 2697 (1905).

157. 408 U.S. 665 (1972).

158. *Id.* at 708.

159. 436 U.S. 547 (1978).

dence conducted pursuant to warrants.<sup>160</sup> And, in *Herbert v. Lando*,<sup>161</sup> it upheld the right of civil litigants to compel the disclosure of unpublished material in the possession of journalists.<sup>162</sup> These decisions evoked a strong and hostile reaction from the media, whose members claimed immunity from the obligations of ordinary citizens to cooperate with courts seeking to do justice.

The media succeeded in elevating their self-interest over the rights of litigants in *Nebraska Press Ass'n v. Stuart*.<sup>163</sup> In that case, the Court upheld the right of the press to publish in advance of trial evidence of an accused person's guilt.<sup>164</sup> It was assumed that there are other available means to protect the accused's right from the inflammatory effects of premature publicity of select pieces of incriminating evidence.<sup>165</sup> That the assumption is always valid is doubtful. It is, in any case, ironic that the constitutional right to *due process of law* expressed in the Fourteenth Amendment favors the media over the rights of litigants.

Furthermore, notwithstanding the holding in *Branzburg*, the media have sometimes continued to insist on their right to refuse to disclose information in its possession to those responsible for law enforcement. They have succeeded in lobbying through many state legislatures so-called "shield laws," which confer an evidentiary privilege on journalists faintly resembling that which lawyers enjoy with respect to communications received in private from a client seeking legal advice. Such legislation exempts the media, in limited circumstances, from the duty of citizens to give evidence.<sup>166</sup>

The media contend that a healthy democracy requires investigative journalism, which in turn requires confidentiality for secret informers. Of course, there is something to be said for the media contention if the shield is narrowly limited to informers who engage in whistleblowing that bears on public matters or

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160. *Id.* at 567-68.

161. 441 U.S. 153 (1979).

162. *Id.* at 176-77.

163. 427 U.S. 539 (1976).

164. *Id.* at 570.

165. *Id.*

166. In 1993, Florida became the thirtieth state to enact a statute limiting the power of its courts to subpoena the information of professional journalists. *Agents of Discovery*, The Reporters Committee for Freedom of the Press, at <http://www/rcfp.org/agents> (last visited Oct. 10, 2000).



who otherwise supply information that would have important practical value to readers or viewers. Maybe the identity of the legendary "Deep Throat" should be protected even at the cost of rendering a false judgment depriving a litigant of his or her rights. But in many of their potential applications, such shields of secrecy intersect and conflict with other values of at least equal constitutional import, not least of which is the right to a fair trial guaranteed by the Fifth and Fourteenth Amendments. Nationwide, the media as a whole comply with about half the subpoenas served on them; about thirty percent of their challenges to subpoenas based on the shield laws are denied.<sup>167</sup>

Illustrating media indifference to the social and political obligation identified by Wigmore was the recent event involving the three young men convicted in Jasper, Texas of brutally torturing and murdering, apparently in a fit of racial hatred, an African-American man. For CBS, Dan Rather interviewed one of the accused men in prison and broadcast selected parts of the interview.<sup>168</sup> When the prosecutor sought access to the takeouts, CBS invoked the First Amendment, there being no shield law in Texas.<sup>169</sup>

I have been unable to imagine what the accused murderer sitting in his jail cell could have said to Dan Rather that has even the slightest resemblance to the utterances of Deep Throat with respect to any need for confidentiality. Whether he is guilty, innocent, or something in between, the matter is in the public domain and the media have no legitimate interest that differs from that of the state of Texas, i.e., to see that all relevant evidence is presented to the trier of fact. I am also unable to conceive a reason rooted in any public interest why accused murderers should be given the privilege of previewing their possible testimony with the media.

I am able, however, to imagine that other persons accused of the same crime might desperately seek access to the same takeouts as possible evidence of their innocence. The reader will easily

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167. The data was gathered by the Reporters Committee for Freedom of the Press. William Glaberson, *News Organizations See a Threat to Their Independence in an Avalanche of Subpoenas*, N.Y. TIMES, Mar. 27, 1995, at D8.

168. *Sixty Minutes: Killing Time* (CBS television broadcast, Sept. 28, 1999).

169. See *Metro News Briefs: Prosecutor Asks Court to Demand CBS Tapes*, N.Y. TIMES, Nov. 6, 1999, at B6.

imagine civil lawsuits in which access to the takeouts might be highly pertinent. Individual litigants are entitled to access to relevant proof, especially if they are accused of a crime and most especially in a capital case; it would seem to be a forthright denial of due process to prevent a co-defendant from having access to takeouts in the possession of a television network. Presumably, CBS would generously concede this point in some cases, but it appears to claim constitutional protection for its discretion in such matters. While the constitutional protection of the Due Process Clause does not extend to the state of Texas, the state's interest in securing fair trials is surely superior to the frail interest of the media in treating the takeouts as professional secrets that they are free to sell or not as they see fit.<sup>170</sup>

Despite the manifest vanity of the CBS position in resisting the request of the prosecutor, it was voiced with utmost pretense of virtue by Rather and by lawyers of favorable repute. Skeptics are invited to review the transcript of the discussion on the PBS News Hour.<sup>171</sup> What they will find is evidence of Sunstein's observation that the media deploys the First Amendment as a bar to any public action, however needful, that in any way discommodates or burdens themselves.<sup>172</sup> I doubt whether any other legal system on the planet would for a moment suffer the conduct of CBS.<sup>173</sup> As Wigmore would have it, CBS should become a hermit.

## XI. CONCLUDING OBSERVATIONS

In these matters, the federal judiciary, of course, has followed the leadership of the Supreme Court.

In part, what has happened is the erection by the Burger and Rehnquist Courts of broad constitutional doctrine derived from a

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170. It follows from this premise that reasonable constraints on lawyer use and misuse of the media are warranted when necessary to protect the accused and the public interest in a fair trial, such as the "gag order" enforced by Judge I. Leo Glasser in the recent case of John Gotti. See *United States v. Gotti*, 787 F. Supp. 319, 325-27 (E.D.N.Y. 1992). For an account, see Laura R. Handman & Adam Liptak, *Media Coverage of Trials of the Century*, LITIGATION, Fall 1999, at 35.

171. PBS, *Online News Hour: Free Press v. Fair Trial* (Nov. 12, 1999), available at [http://www.pbs.org/newshour/bb/media/july-dec99/cbs\\_11-12.html](http://www.pbs.org/newshour/bb/media/july-dec99/cbs_11-12.html).

172. See Sunstein, *supra* note 142, at 499 n.+.

173. For a comparative discussion, see Michael Chesterman, *OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt with in Australia and America*, 45 AM. J. COMP. L. 109 (1997).

few highly fact-centered decisions of the Warren Court that had been driven by civil rights concerns. Nevertheless, some of the most objectionable applications of the First Amendment may be the work of district and circuit judges, some of whom may not have fully appreciated the cautions sometimes found in the Court's utterances, or who at times have yielded to the impulse of vanity to create some new constitutional law.

Many of the federal courts' First Amendment decisions reviewed here had substantive outcomes of which I approve. I do not believe that pornography or obscenity is much of a threat to important social values. I am mildly offended by those who choose to burn a flag, but I would not consider punishing them. I am more offended by burning crosses or the display of the Confederate flag, but I would not punish those deeds, either. I can avert my eyes if I am offended by the words "Fuck the Draft" on a garment or by many other hateful utterances. As a parent and grandparent, I would prefer that my descendants' scoutmaster not be one making an issue of his or her homosexuality. I have resisted public prayer, and I would vote against posting the Ten Commandments in a public facility. I do not have a problem with nude dancing, even in a barroom, with or without pasties, and I have observed nude ballet dancers without feeling any urge to summon the police.

My problem with the federal judiciary on these issues rests on the recognition that none of my own opinions (anymore than those of judges and Justices) has special value making them more worthy of legal status than those of any randomly selected citizen. Those whose views are different from mine are entitled to vote on those issues. If some of us are deeply offended by the enforcement of local laws forbidding pornography, nudity, obscenity, flag burning, commencement prayers, or preventing discrimination against homosexuals, we can sue in state courts (whose judges have some democratic accountability for what they do), invoking state constitutional provisions that can be amended if the judge's decision is an offense against the moral judgments of the electorate.

About other outcomes discussed here, I am more doubtful of my own preferences. Somehow or other, I would eradicate, if empowered to do so, extreme graphic violence without regard to any claims to artistic freedom. I do not know what the law should be with respect to lawyer advertising, but I might restrain some of

its more aggressive forms. I am inclined to think that the Food and Drug Administration should protect consumers of products promoted as means to health and beauty without much regard for any right of vendors to puff their wares. I do not know what the law of political defamation ought to be, but I am not in doubt that the law we have as a result of *Sullivan* is a major source of incivility in our politics. Perhaps our democratic politics could be partly redeemed by some legislated utilization of the fairness doctrine applied to spot advertising on commercial television.

I have largely left to others the application of the Court's extended doctrine to communications in cyberspace, but to my observations should be added that of Daniel Farber, who observed that "an information economy governed by the First Amendment would not look much different from the laissez-faire world championed by economic libertarians."<sup>174</sup>

The observations of First Amendment law recited here raise the question of whether there is reason to confer on any corporation organized for profit a constitutional right to freedom of expression. Any resemblance of vast media empires such as Time-Warner, Disney, or General Electric or such drug manufacturers as Merck or Pfizer to the courageous, outspoken journalists of Thomas Jefferson's day is absent. Such institutions are created to pursue gain and are structurally incompetent to profess religious faith, act on conscience, or experience the sentiments of civic virtue or dissent. They are, in short, completely outside the range of impulses and activities that the First Amendment aims to protect. There are, of course, reasons of sound policy for conferring some such rights on such institutions, but those reasons should be addressed to legislatures that are accountable to the people and not to the federal judiciary.

In every respect mentioned here, the First Amendment has become an instrument of class warfare by which a self-anointed elite imposes its will on the unwashed electorate whose disregarded and disdained moral opinions are in a republic entitled to equal respect. America pompously promotes democracy as the solvent of all the world's political problems, but in regard to a wide range of matters is itself indifferent to the moral judgment

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174. *Symposium, Expressive Commerce in Cyberspace: Public Goods, Network Effects, and Free Speech*, 16 GA. ST. U. L. REV. 789, 790 (2000).

of its own people as it is expressed by their elected representatives. The people have very little say on the matters about which many care the most.

This moral imperialism is not merely bad politics; it is bad law. People cannot be expected to obey law that has lost its underpinnings in popular morality. People obey law not merely because they fear legal consequences, but because they fear the odium imposed on offenders by citizens regarding the law as their own. A legal system lacking moral footings lacks that force and must rely on the brutality of its sanctions to secure compliance, if indeed compliance can be achieved.

The Court has especially lost its way with respect to campaign finance. On this, too, I am not in doubt. It is urgent that the Court reverse or substantially qualify *Buckley*. It is intolerable that the First Amendment, long treasured as an essential feature of self-government, has been made by the Court into an instrument for the subordination of the democratic process to government controlled by the highest bidders. The combination of the rights said to derive from the First Amendment, including the right to anonymously spend vast sums to flood the media with sound bites defiling those seeking to perform public service, is dangerous to the health of the law and of the republic, if indeed they are not a deadly potion.

It is my clear impression that we now have the most degraded political system of any reasonably stable democracy. Of course I am not familiar with all of them. But I am assured that candidates for high office in Australia, Britain, Canada, France, Germany, Israel, Italy, Japan and Sweden do not spend vast sums on expensively crafted television advertising to disparage the moral character of their adversaries. Those countries, too, face difficulties in preventing their most powerful citizens and organizations from overrunning and corrupting the democratic process, but none of them have so totally forsaken the effort to do so.

Hendrik Hertzberg was precise in decrying our current presidential campaign for:

the baneful influence of money, which corrupts our most sacred institutions; the notion that it is somehow acceptable to force people to make serious choices on the basis of distorted information gleaned from concocted television spectacles; the promises made to be broken; and, finally, the dark revelations about personal behavior and finan-

cial chicanery that sooner or later emerge, giving rise to recriminations and bringing the entire enterprise into disrepute.<sup>175</sup>

Doubtless the Supreme Court of the United States is not alone responsible for this misfortune, but it is the direct product of the Court's indifference to democratic traditions and institutions and lack of regard for the common sense and moral judgment of fellow citizens.

No doubt any legislated solution to the perplexing problems of campaign finance and civility in elections will attract criticism, and some of it will have merit. Any solution that could be passed by a constitutionally unfettered legislature might be more objectionable than the system we have. However, it would have the virtue of being an election law enacted by persons accountable to the people and changeable by the simple and popular remedy of throwing the rascals out.

Effective correction of the hypertrophy of the First Amendment seems remote.<sup>176</sup> Meanwhile, the Court should require itself to reread the Declaration of Independence and the Gettysburg Address. Or perhaps the crucial words of those scriptures should be read aloud in court at each of its sittings in lieu of the constitutionally doubtful utterance, "God save this honorable Court." Somehow, the Court must regain a sense of its appropriately quite limited role in protecting us from ourselves, for it has done incalculable damage to our democratic institutions and has made a transparent fraud of our evangelical rhetoric about the virtues of democracy in other lands.

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175. Hendrik Hertzberg, *The Talk of the Town: Millions and Millions*, NEW YORKER, Mar. 6, 2000, at 29.

176. I have proposed elsewhere a limited structural remedy to the problem addressed here. See generally Paul D. Carrington, *Restoring Vitality to State and Local Politics: Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397 (1999).

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